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1948

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324	ILR (1948) N 393		ILR(1948)Nag 271		ILR (1948) N 50	408	ILR (1948) N 481
	1948 N L J 501	353	1948 N L J 391	385	ILR (1948) N 523		1948 N L J 549
327	1948 N L J 285		ILR (1948) N 470		1948 N L J 589		1948-16 ITR 430
	ILR (1948) N 449	355	1949 N L J 18	388	1948 N L J 77	409	1948 N L J 20
328	ILR (1948) N 824		ILR (1949) N 81		ILR (1948) N 174		ILR (1948) N 142
334	1947 N L J 417	357	1948 N L J 314	390	1948 N L J 6	411	ILR (1948) N 445
	ILR (1947) N 477		ILR (1948) N 281		ILR (1948) N 80		1948 N L J 539
341	1948 N L J 221	358	ILR (1948) N 747	392	ILR (1948) N 530	413	ILR (1948) N 451
	1948 AWRSup 78	362	ILR (1948) N 252	395	1947 N L J 552		49 Cr L J 758
	1948 O A Sup 78		1949 N L J 83		ILR (1948) N 167	414	ILR (1948) N 365
	49 Cr L J 519	365	...	397	ILR (1948) N 401		1948 N L J 439
	ILR (1948) N 483	367	1948 N L J 264		1948 N L J 551		49 Cr L J 623
342	1949 N L J 92		ILR (1948) N 506	398	1948 N L J 117		1948 AWRSup 158
	1949 AWRSup 40	369	ILR (1948) N 584		ILR (1948) N 98	416	1948 N L J 228
	49 Cr L J 529	373	ILR (1948) N 418	401	ILR (1948) N 454		1948 AWRSup 77
	ILR(1948)Nag 276	374	1948 N L J 421		1948 N L J 463		1948 O A Sup 77
344	ILR(1948)Nag 147		ILR (1948) N 486				ILR (1948) N 387
	49 Cr L J 561						49 Cr L J 592

CASES OVERRULED OR REVERSED IN A. I. R. (35) 1948 NAGPUR

('40) A. I. R. (27) 1940 Nag. 278=I. L. R. (1941) Nag. 632 = 1940 N. L. J. 275 = 193 I. C. 598, Bhim Singh Kishore v. Gangaram Ramaji	Reversed in A. I. R. (35) 1948 P. C. 1.
('42) A. I. R. (29) 1942 Nag 3 = I. L. R. (1941) Nag. 732 = 1941 N L J 220 = 198 I C 262, Nanhoo v. Zillimul	Overruled in A. I. R. (35) 1948 Nag. 211 (F. B.).

ILR (1947) Nag.

ILR	AIR		
1	1947	N	61
25	"	"	101
39	"	"	73
43	"	"	83
45	"	"	157
51	"	"	159
56	1946	"	372
60	1947	"	193
80	"	"	79
85	"	"	161
124	"	"	229
127	"	"	208
131	"	"	201
141	"	"	154
144	"	"	113
150	"	"	177
154	"	"	84
159	"	"	86
162	"	"	205
169	"	"	128
172	"	"	115
176	"	"	239
190	"	"	236
197	1948	"	35
205	1947	"	121
211	"	"	231
218	"	"	192
220	"	"	243
226	1948	"	20
235	1947	"	176
237	1948	"	28
245	"	"	41
254	1947	"	175
256	1948	"	24
267	1947	"	180
286	1948	"	20
288	"	"	32
299	1947	"	178
302	1948	"	31
305	"	"	38
314	1947	"	124
323	1948	"	50
328	1947	"	254
335	1948	"	65
341	"	"	19
344	"	"	52
351	"	"	85
369	"	"	17
375	"	"	15
378	"	"	80
381	"	"	44
393	"	"	49
397	"	"	92
402	"	"	60
409	1947	"	247
412	1948	"	56
422	1947	"	187
425	1948	"	228
445	1947	"	246
449	1948	"	67
455	"	"	100
470	"	"	180
474	"	"	55
477	"	"	334
494	"	"	63
497	"	"	189
510	"	"	110
538	"	"	183
553	"	"	279
572	"	"	197
576	"	"	70
579	"	"	199

ILR (1947) Nag.

ILR	AIR		
599	1948	N	134
604	"	"	131
611	"	"	82
616	"	"	194
623	"	"	181
627	"	"	83
631	"	"	162
643	"	"	123
649	"	"	155
668	"	"	256
674	"	"	94
683	"	"	308
688	"	"	126
691	1947	"	248
706	1948	"	76
710	"	"	293
719	"	"	97
726	1947	"	224
740	"	"	210
776	1948	"	145
781	"	"	287
788	"	"	71
794	"	"	177
802	"	"	127
812	"	"	299
815	"	"	14
819	1947	"	233
827	1948	"	118
830	"	PC	1
838	"	N	136
844	"	"	276
848	"	"	1
881	"	"	292
885	"	"	141
889	"	"	304
899	"	"	243
902	"	"	219
912	"	"	316
933	"	"	223
939	"	"	142
947	"	"	225
955	1949	"	60
970	1948	"	106
979	"	"	69
982	"	"	168
985	"	"	150

ILR (1948) Nag.

ILR	AIR		
1	1948	N	211
12	"	"	274
16	"	"	258
50	"	"	382
57	"	"	78
63	"	"	147
71	"	"	138
73	"	"	404
80	"	"	390
85	"	"	215
95	"	"	210
98	"	"	398
105	"	"	406
110	"	"	74
117	1949	"	97
142	1948	"	409
147	"	"	344
167	"	"	395
174	"	"	388
179	"	PC	66
200	"	N	286
203	1949	"	31

ILR (1948) Nag.

ILR	AIR		
210	1949	N	37
216	"	"	25
230	1948	"	272
237	1949	"	120
252	1948	"	362
259	"	"	314
264	"	"	300
271	"	"	351
276	"	"	342
281	"	"	357
284	1949	"	39
290	"	"	81
296	1948	"	250
299	1949	"	21
308	1948	"	209
310	"	"	290
316	1949	"	88
320	1948	"	284
324	"	"	283
327	1949	"	34
334	1948	"	251
340	"	"	377
350	1949	"	48
357	"	"	85
365	1948	"	414
370	1949	"	103
373	"	"	18
376	"	"	106
381	1948	"	244
384	1949	"	42
387	1948	"	416
389	1949	"	90
393	1948	"	324
401	"	"	397
403	"	"	297
409	"	"	173
418	"	"	373
422	1949	"	126
425	"	"	96
427	1948	"	277
431	1949	"	113
435	"	"	19
441	"	"	111
445	1948	"	411
449	"	"	327
451	"	"	413
454	"	"	401
462	"	"	310
465	1949	"	108
470	1948	"	353
474	1949	"	171
481	1948	"	408
483	"	"	341
486	"	"	374
488	1949	"	50
506	1948	"	367
509	1949	"	91
523	1948	"	385
530	"	"	392
535	1949	"	110
538	"	"	154
540	"	"	134
543	"	"	178
555	1948	"	312
559	1949	"	104
565	"	"	1
573	"	"	114
576	"	"	118
581	"	"	148
584	1948	"	369
595	1949	"	155

ILR (1948) Nag.

ILR	AIR		
606	1949	N	8
610	"	"	127
612	"	"	141
620	"	"	117
621	"	"	149
628	"	"	144
631	"	"	160
639	"	"	229
653	"	"	159
657	"	"	132
662	1948	"	236
678	1949	"	43
690	"	"	188
695	1948	"	303
698	1949	"	166
711	"	"	66
745	1948	"	249
747	"	"	358
757	"	"	375
766	1949	"	270
775	"	"	128
780	"	"	193
785	"	"	16
789	"	"	227
794	"	"	235
815	"	"	83
820	"	"	116
824	1948	"	328
838	1949	"	58
843	"	"	186
846	"	"	183
851	"	"	14
853	"	"	195
864	"	"	131
867	"	"	199
873	"	"	182
874	1948	"	253
882	1949	"	245
887	"	"	249
900	"	"	15
903	"	"	163
910	"	"	3
913	"	"	5
920	"	"	130
932	"	"	263
936	"	"	206
948	"	"	17
950	"	"	214
953	"	"	201
966	"	"	10
971	"	"	215
978	"	"	265
989	"	"	256
999	"	"	4

1947 Nag. L J

NLJ	AIR		
1	1947	N	17
15	"	"	157
18	"	"	175
25	1948	"	20
31	1947	"	154
33	"	"	101
41	"	"	86
43	1946	"	428
49	1947	"	177
51	"	"	159
55	"	"	61
71	"	"	176
73	"	"	121
81	1948	"	31

1947 N L J

NLJ	AIR		
83	1947	"	243
86	1947	N	129
106	"	PC	15
115	"	N	246
118	"	"	178
120	"	"	229
122	"	"	193
133	"	"	143
139	"	"	192
141	1948	"	28
151	1947	"	180
163	"	"	124
172	"	"	161
197	"	"	239
206	1948	"	50
209	"	"	15
212	"	"	65
216	"	"	38
221	1947	"	236
225	1948	"	35
230	"	"	19
232	"	"	70
234	1947	"	208
237	1948	"	92
240	"	"	52
245	"	"	67
249	"	"	32
253	1947	"	254
257	"	"	187
258	1948	"	56
265	1947	"	247
267	1948	"	17
270	"	"	55
274	"	"	41
279	"	"	63
281	"	"	24
287	"	"	49
289	"	"	20
295	1947	"	231
299	1948	"	183
310	"	"	245
319	"	"	44
326	"	"	199
342	"	"	136
346	"	"	228
360	"	"	76
363	"	"	80
365	"	"	85
376	"	"	189
385	1947	"	201
391	1948	"	180
393	"	"	82
396	"	"	83
399	"	"	197
405	"	"	293
411	"	"	60
417	"	"	334
429	1949	"	178
436	1948	"	292
438	"	"	106
444	"	"	299
446	"	"	118
447	"	"	97
452	"	"	134
455	1947	"	210
478	1948	"	287
483	"	"	14
486	"	"	145
489	"	"	123
494	"	"	126
497	"	"	181
500	"	"	122

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1947 N L J				1948 N L J				1948 N L J				1948 N L J				1948 N L J			
NLJ	A I R			NLJ	A I R			NLJ	A I R			NLJ	A I R			NLJ	A I R		
502	1948	N	308	24	1948	N	147	195	1949	N	34	316	1949	N	21	450	1949	N	166
506	"	"	127	28	"	"	162	203	"	"	97	323	"	"	3	458	1948	"	404
512	"	"	131	36	"	"	78	212	"	"	25	325	"	"	10	463	"	"	401
517	"	"	194	44	"	"	74	221	1948	"	341	328	"	"	15	467	"	"	286
521	1949	"	171	54	"	"	94	223	1949	"	31	337	"	"	126	471	1949	"	19
526	"	"	154	65	"	"	150	228	1948	"	416	340	"	"	132	477	1948	"	258
527	1947	"	233	72	"	"	168	229	"	"	250	346	"	"	12	489	"	"	344
531	1948	"	69	74	"	"	141	231	"	"	316	349	"	"	91	501	"	"	324
540	1947	"	224	77	"	"	388	244	"	"	251	359	"	"	17	507	"	"	249
549	1948	"	276	82	"	"	215	248	1949	"	111	360	"	"	193	509	"	"	209
552	"	"	395	89	"	PC	66	250	1948	"	297	365	"	"	118	513	"	"	377
556	"	"	304	103	"	N	244	254	1949	"	85	378	"	"	243	523	1949	"	176
563	"	"	71	105	1949	"	18	259	"	"	113	389	"	"	117	530	"	"	246
567	"	"	274	107	1948	"	210	262	1948	"	284	391	1948	"	353	533	"	"	190
569	"	"	243	112	1949	"	39	264	"	"	367	394	1949	"	136	539	1948	"	411
571	"	"	138	117	1948	"	398	267	1949	"	108	399	"	"	116	541	1949	"	215
572	"	"	279	121	1949	"	37	270	1948	"	303	404	"	"	148	546	"	"	103
581	"	"	1	125	"	"	42	272	1949	"	106	406	"	"	188	549	1948	"	408
602	1949	"	152	127	"	"	120	275	1948	"	283	416	"	"	159	551	"	"	397
607	1948	"	177	136	1948	PC	1	277	1949	"	195	421	1948	"	374	554	1949	"	206
				140	1949	N	104	285	1948	"	327	424	1949	"	83	561	"	"	199
1948 Nag. L J				143	"	"	131	293	1949	"	60	428	"	"	130	565	"	"	163
NLJ	A I R			146	1948	"	406	304	"	"	96	430	"	"	114	573	"	"	223
1	1947	PC	189	149	"	"	290	305	1948	"	351	432	"	"	186	578	"	"	187
6	1948	N	390	155	1947	"	248	309	1949	"	110	434	"	"	183	580	1948	"	314
10	"	"	382	164	1948	"	173	311	"	"	14	437	"	"	4	583	1949	"	90
15	"	"	142	170	"	"	256	312	"	"	127	439	1948	"	414	589	1948	"	385
20	"	"	409	181	"	"	211	314	1948	"	357	443	"	"	310	594	1949	"	48
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ALL INDIA REPORTER
1948
Nagpur High Court

***A. I. R. (35) 1948 Nagpur 1** *[C. N. 1.]*

BOSE AND SEN JJ.

Mandli Prasad Ramcharanlal — Plaintiff — Appellant v. *Ramcharanlal and others — Defendants — Respondents.*

Second Appeal No. 373 of 1941, Decided on 3-2-1947, from decree of Extra Addl. Dist. Judge, Bilaspur, D/- 1-4 1941.

*(a) Hindu law — Partition — Suit for partition by minor — Share allotted to his father — Another son begotten after suit for partition cannot reopen partition.

Where a father has, at a partition with his sons, reserved a share for himself, a son begotten after partition is not entitled to have the partition reopened, but is exclusively entitled both to the father's share and to his separate or self-acquired property. A son who was in his mother's womb at the time of partition but was born subsequent to it, is however entitled to reopen the partition and to receive a share equal to that of his brothers. [Para 25]

Even in a suit for partition filed by a minor the severance of status takes place from the date of the suit and not from the date of the decree. [Paras 35 and 66]

Hence where in a suit for partition by a minor son, a share is allotted to his father, the critical date when the severance takes place is the date of suit and another son begotten subsequent to it but before the final decree for partition is not entitled to reopen the partition. *Case law referred.* [Para 66].

(b) Hindu law — Joint family — Son in utero — Rights of.

Under the Hindu law a son begotten but not born is equal in all respects to a son actually in existence except for the purposes of adoption. His membership with the family is considered as commencing from the date of conception. A son in *utero* becomes (if he is born alive) a coparcener with all his rights as from the date of his conception as if he were in actual existence. He has, therefore, the right to take the joint family property by survivorship *Case law referred.* [Para 23]

(c) Hindu law — Partition — Right of member of joint family to require partition — What amounts to separation — Division of title and division of property.

According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with can be enforced by legal process. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed. Partition is used in two different senses, division of title or severance of status and division of property. By division of title the coparcenary property ceases to be joint property and it is converted from a joint into a separate ownership. Severance of the joint status so far as the separating member is concerned, with all its legal consequences resulting therefrom is quite distinct from the *de facto* division into specific shares of the property held until then jointly: *Case law referred.* [Para 27]

(d) Hindu law — Partition — Suit for partition by adult coparcener — Date of severance.

Where an adult coparcener clearly and unequivocally gives a notice of his intention to separate from the joint Hindu family he becomes separate in status from the date of the notice and if no previous notice is given, the filing of a suit for partition amounts to an expression of an intention to separate and if the claim is decreed the date of severance relates back to the date of the institution of the suit and not the date of the decree. [Para 34]

(e) Hindu law — Partition — Valid partition may be made during minority of one or more coparceners. [Para 41]

(f) Hindu law — Partition — Suit for partition by minor when can be decreed.

It has been the settled practice not to decree a suit for partition filed on behalf of a minor plaintiff unless the Court is satisfied that the partition is for his benefit. This does not in any way affect the right which a minor has to separate from the joint Hindu family if it is for his benefit and that power can be exercised on his behalf by a person purporting to act as his guardian. Any person can file a suit for partition on behalf of a minor and a change in his legal status which affects his right to property in various ways should not be permitted unless the Court is satisfied that the partition is for his benefit. In deciding whether partition is in

the interest and for the benefit of the minor, a Court is not restricted to considerations purely personal to the minor but may take into consideration matters concerning his mother, or his wife or his daughter in whom he may be interested. The power which the Court exercises in decreeing or refusing partition at the instance of a minor plaintiff is not in denial but in protection of his right which he undoubtedly has to separate from the joint Hindu family if it is in his interest and for his benefit: *Case law referred.* [Paras 48 and 49]

(g) Civil P. C. (1908), O. 22, R. 1—Partition—Suit for partition by minor does not abate on his death.

The right to partition is a right relating to property. It is not a case of a personal action which dies with the *personactio personalis moritur cum persona.* A suit for partition on behalf of a minor, if properly instituted, should not abate on his death but his legal representative should be in a position to carry on the litigation. There is no justification for the assumption that the cause of action does not survive on the death of a minor plaintiff after the suit for partition has been filed on his behalf. [Paras 50 and 52]

Annotation: ('44-Com.) C. P. C., O. 22, R. 1, N. 9a.

(h) Civil P. C. (1908), O. 7, R. 7 — Suit to be tried on cause of action existing at date of its commencement —Court when can take notice of subsequent events.

A suit must be tried in all its stages on the cause of action as it existed at the date of its commencement. The Court, however, may in suitable cases take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions. This doctrine is of an exceptional character and is applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or, that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties: 2 A. I. R. 1915 Cal. 103, *Rel. on.* [Para 51]

Annotation: ('44-Com.) C. P. C., O. 7, R. 7, N. 4.

Cases referred:—

1. ('69) 4 Mad. H. C. R. 307, Yekemian v. Agniswarian.
2. ('82) 4 All. 427, Nawal Singh v. Bhagwan Singh.
3. ('99) 23 Bom. 636, Ganpat Venkatesh v. Gopalrao Venkatesh.
4. ('86) 9 Mad. 64 (F. B.), Krishna v. Sami.
5. ('15) 37 All. 162 : 2 A. I. R. 1915 All. 65 : 26 I. C. 871, Deo Narain Singh v. Ganga Prasad.
6. ('93) 16 Mad. 76, Sabapathi v. Somasundaram.
7. ('37) 24 A. I. R. 1937 Mad. 274 : 173 I. C. 347, Ramarao v. Venkata Subbayya.
8. ('69) 2 Beng. L. R. 103 (F. B.), Kalidas Das v. Krishnan Chandra.
9. ('88) 12 Bom. 105, Hanmant Ramchandra v. Bhimacharya.
10. ('21) 8 A. I. R. 1921 Cal. 487 : 67 I. C. 210, Kusum Kumari v. Dasarathi Sinha.
11. ('66-67) 11 M. I. A. 75 : 1 Suther 657 : 2 Sar. 218 (P. C.), Appovier v. Rama Subba Aiyan.
12. ('91) 17 I. A. 194 : 18 Cal. 157 (P. C.), Madho Prasad v. Mehrban Singh.
13. ('13) 40 I. A. 40 : 35 All. 80 : 16 O. C. 129 : 18 I. C. 30 (P. C.), Suraj Narain v. Iqbal Narain.
14. ('16) 43 I. A. 151 : 3 A. I. R. 1916 P. C. 104 : 43 Cal. 1031 : 12 N. L. R. 113 : 37 I. C. 321 (P. C.), Mt. Girja Bai v. Sadashio Dhundiraj.
15. ('16) 39 Mad. 159 : 3 A. I. R. 1916 Mad. 1170 : 33 I. C. 858 (F. B.), Soundararajan v. Arunachalam Chetti.
16. ('30) 17 A. I. R. 1930 Mad. 486 : 123 I. C. 806, Akanna v. Rangaraja.
17. F. A. Nos. 16 and 25 of 1911, D/- 25-7-1912, ashiv Dhundiraj v. Mt. Girjabai.
18. ('17) 44 I. A. 159 : 39 All. 496 : 4 A. I. R. 1917 P. C. 39 : 40 I. C. 286 (P. C.), Kawal Nain v. Budh Singh.
19. ('25) 52 I. A. 83 : 48 Mad. 254 : 12 A. I. R. 1925 P. C. 49 : 87 I. C. 333 (P. C.), Palani Ammal v. Muthuvenkatachala Moniagar.
20. ('31) 58 I. A. 220 : 53 All. 300 : 18 A. I. R. 1931 P. C. 154 : 132 I. C. 733 (P. C.), Bal Krishna v. Ram Krishna.
21. ('39) I. L. R. (1939) All. 680: 26 A.I.R. 1939 P. C. 174 : I.L.R. (1939) Kar. P.C. 279 : 181 I. C. 929 (P.C.), Ram Narain Sahu v. Mt. Makhna.
22. ('41) I. L. R. (1941) Nag. 652 : 27 A.I.R. 1940 Nag. 185 : 186 I. C. 688, Nathusingh v. Anandrao.
23. ('35) 22 A. I. R. 1935 Bom. 54 : 152 I. C. 715, Chhotabhai v. Dadabhai.
24. ('20) 42 All. 461 : 7 A. I. R. 1920 All. 116 : 58 I. C. 667 (F. B.), Lalta Prasad v. Shiam Singh.
25. ('25) 48 Mad. 465 : 12 A. I. R. 1925 Mad. 717 : 88 I. C. 421, Krishnaswami Thevan v. Pulukaruppa.
26. ('27) 50 Mad 866 : 14 A. I. R. 1927 Mad. 801 : 104 I. C. 472, Ranga Thathachariar v. Srinivasa Thathachariar.
27. ('34) 57 Mad 95 : 20 A. I. R. 1933 Mad. 890 : 146 I. C. 269 (F. B.), Rangasayi v. Nagarathanamma.
28. ('39) I. L. R. (1939) Bom. 256 : 26 A. I. R. 1939 Bom. 169 : 182 I. C. 172, Ramsingh v. Fakira.
29. ('43) I. L. R. (1943) Nag. 390 : 30 A. I. R. 1943 Nag. 101 : 205 I. C. 279 Laxminarayan v. Dinkar.
30. ('45) I. L. R. (1945) Nag. 444 : 32 A. I. R. 1945 Nag. 138, Shanker Singh v. Gulabchand.
31. ('68) 10 W. R. 273 : 8 Beng. L. R. 363*n*, Mt. Deowanti Kunwar v. Dwarkanath.
32. ('03) 30 I. A. 139 : 30 Cal. 738 : 8 Sar. 489 (P.C.), Balkisan Das v. Ram Narain Sahu.
33. ('09) 36 I. A. 71 : 31 All. 412 : 3 I. C. 195 (P. C.), Parbati v. Naunihal Singh.
34. ('13) 9 N. L. R. 111 : 20 I. C. 563, Bali v. Mt. Girji.
35. ('36) 60 Bom. 736 : 23 A. I. R. 1936 Bom. 290 : 164 I. C. 632, Dnyaneshwar Vishnu v. Anant Vasudeo.
36. ('35) 22 A. I. R. 1935 All. 875 : 156 I. C. 736, Ram Narain v. Mt. Makhna.
37. ('89) 13 Bom. 137, Karmali Rahimbhoy v. Rahimbhoy Habibbhoy.
38. ('04) 27 Mad. 377, Doraswami Pillai v. Thungaswamy Pillai.
39. ('66) 3 Mad. H. C. R. 94, Kamakshi Ammal v. Chidambara Reddi.
40. ('05) 29 Bom. 51, Bachoo v. Man Korebai.
41. ('07) 34 I. A. 107 : 31 Bom. 373 (P. C.), Bachoo Hurkisondas v. Mankore Bai.
42. ('14) 20 C. L. J. 107 : 2 A. I. R. 1915 Cal. 103 : 26 I. C. 410, Raicharan Mandal v. Biswa Nath.
43. ('18) 41 Mad. 442 : 5 A. I. R. 1918 Mad. 379 : 42 I. C. 860, Chelimi Chetty v. Subbamma.
44. ('41) 28 A. I. R. 1941 Mad. 838 : 200 I. C. 483, Official Receiver, East Godavari v. Veerareddi.
45. ('45) I. L. R. (1945) Mad. 710 : 32 A. I. R. 1945 Mad. 290, Kotayya v. Krishna Rao.
46. ('19) 4 Pat. L. J. 38 : 5 A. I. R. 1918 Pat. 91 : 44 I. C. 146, Krishna Lal v. Nandeswar Jha.
47. ('35) 14 Pat. 732 : 22 A. I. R. 1935 Pat. 275 : 157 I. C. 53 (F. B.), Atul Krishna Roy v. Nandanji.
48. ('44) 31 A. I. R. 1944 Bom. 67 : 212 I. C. 151, Bammangouda Shankargouda v. Shankargouda Rangangouda.
49. ('26) 13 A. I. R. 1926 Sind. 216 : 20 S. L. R. 295 : 97 I. C. 505, Jethanand v. Kewalram.
50. ('36) 23 A. I. R. 1936 Lah. 504 : 168 I. C. 216, Hari Singh v. Pritamsingh.

R. Kaushalendra Rao —for Appellant.

A. R. Kulkarni —for Respondent No. 3.

Judgment.—This appeal arises out of a suit for partition. For a proper understanding of the case it is necessary to set out the genealogical tree given below.

GOKULPRASAD

(1st wife dead) = Ramcharanlal (defendant 1) = Chandramukhi (defendant 4)

Deviprasad (defendant 3). Dineshchandra (defendant 2) Mandliprasad (plaintiff).

[2] Respondent 3, Deviprasad is the son of respondent 1, Ramcharanlal by his first wife who is dead. Respondent 4, Chandramukhi is the second wife of Ramcharanlal. Respondent 2, Dineshchandra and appellant Mandliprasad are their sons who are minors. Ramcharanlal has three daughters from Chandramukhi but we are not concerned with them in the present appeal.

[3] Chandramukhi filed Civil Suit No. 6-A of 1937 on 27-9-1937 in the Court of the Subordinate Judge, 1st Class, Bilaspur, for partition of movable and immovable property on behalf of herself and as a next friend of her son Dineshchandra, who was described as a child of 7 years, against her husband Ramcharanlal and her step-son Deviprasad. She claimed that each of the parties was entitled to 1/4th share in the property and prayed for partition. The property sought to be partitioned consisted of 16 share of Baghamunda which was ancestral property in the hands of Ramcharanlal, tenancy land at *mauza* Fandwani, houses at Mungeli and Baghamunda, grain, cattle, pots and pans. The family had also to pay debts to the extent of Rs. 2250/- to creditors whose names were mentioned in the schedule filed along with the plaint. The reason alleged for seeking partition was that the property was being mismanaged and wasted on account of the frequent quarrels of Ramcharanlal with his son Deviprasad and that partition was necessary to protect the interest of her minor son Dineshchandra.

[4] Deviprasad contested the right of Chandramukhi to a share and stated that she was merely entitled to maintenance. He stated that he had no objection to the partition being effected and a share allotted to Dineshchandra.

[5] The trial Court found that Chandramukhi was also entitled to a quarter share and passed a preliminary decree for partition on 7-12-1937 and specified that each of the parties was entitled to a quarter share and directed that partition of land revenue paying estate be effected by the Collector and of the rest of the property by a commissioner. Commissioners were appointed successively to make a partition but no partition was actually effected. On 8-3-1938 the trial Court granted time to the parties as they stated that they were going to compromise and effect a partition out of Court.

[6] Further time was granted on 24-3-1938 and the case was fixed for 31-3-1938. In the mean time, the parties effected a division of property through arbitrators who delivered their award on 28-3-1938. Under that award Dineshchandra (plaintiff) and Ramcharanlal (his father) and Deviprasad (his half brother) were each given 1/3rd share. On the application of the plaintiffs, the Court granted permission to Chandramukhi to compromise the case but directed that the terms of the compromise be intimated to the Court in order to enable it to find out if the compromise was for the benefit of the minor. The case was fixed for 2-4-1938. On that date the parties filed an application under O. 23, R. 3, Civil P. C. for drawing up a decree in accordance with the terms of the award. The application was signed by Chandramukhi for herself and as a guardian of her minor son Dineshchandra and by the defendants. The defendants filed in Court the award dated 28-3-1938 delivered by the arbitrators. In the order sheet of that date the Court recorded that an application had been made for sanctioning the compromise and that it would persue the terms of the compromise and pass orders. On 22-4-1938 the Court recorded the statements of the parties regarding the compromise and passed an order that the compromise was for the benefit of the minor as he was getting a quarter share and accordingly sanctioned it. A final decree for partition was passed as per terms of the compromise on that date.

[7] The property was divided by metes and bounds into three shares and Ramcharanlal was to discharge the entire debt and he was to remain in possession of the 1/3rd share of Deviprasad in the property for six years from 31-5-1938 to 31-5-1944. Under the terms of the decree, Ramcharanlal was to deliver certain quantities of grain and Rs. 120/- in cash annually on 15th May each year from 1939 to 1944 with a condition that in case of default Deviprasad was entitled to resume possession of his share and realise the balance by a suit.

[8] One of the terms of the decree based on the terms of the compromise and the award was to this effect :

" In case of any sons being born to Ramcharanlal in future their share be carved out of the share of plaintiff 2 and defendant 2 and they shall have no right in the 0-5-4 share of defendant 1 and the burden of debts will also be on their shoulders."

Ramcharanlal was defendant 2 and his son Dineshchandra was plaintiff 2 in the suit. The

effect of the decree was that a son born to Ramcharanlal after the partition was entitled to a share out of the 2/3rd share of the property allotted to them and had no right to claim anything out of the 1/3rd share allotted to Deviprasad.

[9] The appellant Mandliprasad was not born when Civil Suit No. 6 A of 1937 was filed on the 27-9-1937, or on 7-12-1937 or on 22-4-1938 when the preliminary and the final decree for partition were made. Mandliprasad was born on 16-8-1938 on the 323rd day after the institution of Civil Suit No. 6 A of 1937, 252nd day after the preliminary decree and 116th day after the final decree.

[10] On 17-11-1939 Shyamprasad as next friend of his brother-in-law, Mandliprasad, filed Civil Suit No. 93-A of 1938 on his behalf in the Court of 1st Subordinate Judge 2nd Class, Bilaspur, against his father Ramcharanlal and mother Chandramukhi, brother Dineshchandra and half brother Deviprasad for re-opening the partition made in Civil Suit No. 6-A of 1937 and for a fresh partition of the family property. In the plaint the age of Mandliprasad was stated to be 1 year The plaintiff stated that as no share had been reserved for him at the partition made in the previous suit though the parties must have known that Chandramukhi was then *enceinte*, he was not bound by that partition and was entitled to have a re-partition of the property. He stated that each of the parties was entitled to 1/5th share and claimed a decree for partition and separate possession of his 1/5th share. He also claimed a decree for Rs. 160/- against Deviprasad on the allegation that he had removed grain worth Rs. 800/- and he was entitled to 1/5th share of the amount.

[11] Shyamprasad, the next friend of the plaintiff, is his sister's husband and is a resident of Bodla in Kawardha State which is outside British India. On the application of Deviprasad the trial Court ordered the plaintiff on 6-1-1940 to furnish security for Rs. 50/- for the costs of Dineshchandra and Deviprasad (defendants 2 and 3). On 15-1-1940 the plaintiff agreed to furnish security for costs and Ramcharanlal agreed to be his surety. In compliance with the directions of the Court Ramcharanlal executed the security bond.

[12] Ramcharanlal (defendant 1) admitted the claim of the plaintiff and stated that the condition in the award that any issue of Ramcharanlal born after the award was to get his share out of the property in the hands of Ramcharanlal and Dineshchandra, was not legal and not binding on him. Chandramukhi also admitted the claim of the plaintiff and stated that she was entitled to a share equal to that of the sons of Ramcharanlal and that the award could not take away her share which she got under the preliminary decree dated 7-12-1937.

[13] There can be no doubt that the suit has been filed at the instance of the parents of Mandliprasad in order that the 1/3rd share which Deviprasad obtained at the previous partition may be reduced to the 1/5th share which he would obtain in case the previous partition is set aside and a fresh partition effected.

[14] Deviprasad contested the claim of the plaintiff and stated that he was separate from Ramcharanlal and Dineshchandra as he had expressed his intention in clear and unequivocal terms to separate from them about 6 years before the institution of Civil Suit No. 6-A of 1937. He pleaded that Mandliprasad was bound by the partition which took place before he was born and begotten and was not entitled to reopen it and that on the death of Ramcharanlal Mandliprasad would be entitled to inherit the share allotted to Ramcharanlal and any separate property which he might possess. Deviprasad denied the removal of the grain or his liability for the payment of Rs. 160/.

[15] Dineshchandra was represented by the Court reader as his guardian. He denied the claim of the plaintiff and his defence was the same as of Deviprasad.

[16] The trial Court framed a preliminary issue on 6-1-1940 and decided it against the plaintiff by the order dated 31-1-1940. The trial Court held that the plaintiff was not entitled to re-open the partition and accordingly dismissed the suit on that date. The claim for Rs. 160/- was also not decreed and the plaintiff did not make that a ground of appeal either in the first appeal or in second appeal.

[17] The decree of the trial Court was affirmed by the Court of the Extra Additional District Judge, Bilaspur, by the decree dated 1-4-1941 in Civil Appeal No. 68-A of 1940. It is against this decree that the plaintiff has filed the present appeal

[18] Ramcharanlal, Chandramukhi and their son Dineshchandra were not represented before us. As already stated there can be no doubt that the present suit for partition by Mandliprasad has been filed at the instance of his father Ramcharanlal through his son-in-law as the next friend of the minor. Ramcharanlal admitted the claim of the plaintiff and furnished security on his behalf for the costs of Deviprasad incurred in the suit. Ramcharanlal paid fee of the counsel of the appellant: see the certificate of fees dated 28-8-1946 which recites that Rs. 25/- had been remitted by Ramcharanlal by money order on 5-7-1945 towards payment

of fee. Ramcharanlal is interested in the litigation and is taking keen interest in it although he is not represented in appeal.

[19] Deviprasad filed copies of the order sheets dated 27-9-1937 and the 10-11 1937 in Civil Suit No. 6 A of 1937 (Ex D. 1) and of his written statement dated 10-11-1937 (Ex. D. 2) in that suit. Reference was made by the parties in their pleadings to the award dated 18-3-1938, the preliminary decree dated 7-12-1937 and the final decree dated 22-4-1938 passed in that suit but their copies were not filed in the trial Court by either of the parties. The trial Court as well as the lower appellate Court have referred in their judgments to the pleadings and the decrees in the previous case.

[20] On 18-2-1942, the appellant Mandliprasad and the respondent Deviprasad made a joint application in this Court asking that the record of Civil Suit No. 6-A of 1937 be sent for and admitted in evidence and the preliminary and the final decree for partition and a copy of the endorsement dated 27-9 1937 made at the time of the presentation of the plaint in that suit be included in the supplementary paper book. This has been done and counsel have referred to them without any objection. Reference has accordingly been made to the pleadings and the decrees for partition in the previous suit in giving a resume of the case.

[21] The question for decision in this appeal is whether the appellant, Mandliprasad is entitled to re-open the partition made in the previous suit (Civil Suit No. 6-A of 1937). The decision of this question turns on the determination of the point when did the partition take place in the previous suit, whether on 27-9-1937 when the suit was filed by Dineshchandra for partition or on 7-12 1937 or on 22-4-1938 when the preliminary and the final decrees for partition were respectively made.

[22] Mandliprasad was born on 16-8-1938 more than three months after the final decree for partition had been made on 22 4-1938. The normal period of gestation is 280 days. Conception must have taken place sometime in November 1937 long after 27-9-1937 when the Civil Suit No. 6-A of 1937 for partition was filed. The trial Court was doubtful whether the plaintiff was conceived even on 10-11-1937 when the written statement of Deviprasad was filed. The plaintiff's case as stated in para. 6 of the plaint was that he was in his mother's womb on 28-8-1938 when the award was made and also on 22-4-1938 when the final decree for partition was passed in that suit but did not allege that he was in the womb on 27-9-1937 when the previous suit for partition was filed. The Courts below have decided the case on the basis that Mandliprasad was not in his morther's womb at the time when the previous suit for partition was filed. This assumption was not disputed by the appellant before the District Court and has also not been contested before us. Mandliprasad was thus not *en ventre sa mere* on 27-9-1937 when the previous suit for partition (Civil Suit No. 6-A of 1937) was filed.

[23] Under the Hindu law, a son begotten but not born is equal in all respects to a son actually in existence except for the purposes of adoption. His membership with the family is considered as commencing from the date of conception: 4 M. H. C. R. 307.[1] A son in utero becomes (if he is born alive) a coparcener with all his rights as from the date of his conception as if he were in actual existence. He has, therefore, the right to take the joint family property by survivorship: 4 ALL. 427[2], 23 Bom. 636[3] and 9 Mad. 64[4] to impeach alienations prior to his birth: 37 ALL. 162[5], 16 Mad. 76,[6] at p. 79 and A. I. R. 1937 Mad. 274[7] and to re-open a partition to have a share allotted to him: 2 Beng. L. R. 103,[8] 4 M. H. C. R. 307[1] and 12 Bom. 105,[9] at pp. 108, 109. The only exception to the rule is in regard to adoption: 12 Bom. 105.[9] (see Dr. Jolly, Tagore Law Lectures, page 132; Mayne's Hindu Law, Edn. 10, para. 419 at pages 532, 533; Mulla's Hindu Law, Edn. 9, para. 28 at pages 20 and 21, para. 270 at page 318 and para. 309 at page 380; and Gupte's Hindu Law, Article 14 pages 46-47.)

[24] In an elaborate and comprehensive judgment in A. I. R. 1921 Cal. 487[10] Mookerjee J. has reviewed the law regarding the position of a son in utero under the Hindu and other systems of law. He has referred to ancient Hindu law texts and their commentaries in discussing the rights of a son born after partition In that case the question was whether a posthumous son could challenge the settement made by his mother with her step-daughter during the time he was in the womb. The decision was that he had a right to do so.

[25] In para. 419 of Mayne's Hindu Law, Edn. 10, reference has been made to the ancient Hindu law texts and their commentaries in notes (t) (u) and (v). The law regardnig the rights of a son born after partition has been accurately and concisely summarised in these terms:

"*419.* .....Where a father has, at a partition with his sons, reserved a share for himself, a son begotten after partition is not entitled to have the partition reopened, but is exclusively entitled both to the father's share and to his separate or self-a quired property.

A son who was in his mother's womb at the time of partition but was born subsequent to it, is however entitled to reopen the partition and to receive a share equal to that of his brothers. For, a son in the womb is in point of law in existence.

"*420.* If the father had divided the whole property among his sons, retaining no share for himself, then the

sons, with whom partition was made, must allot from their shares a portion equal to their own to an after-born son. This proceeds on the principle that the unborn son cannot be deprived of his share in the paternal estate by a prior partition."

[26] In the privious suit for partition (Civil Suit No. 6-A of 1937) Ramcharanlal was allotted a share. Mandliprasad was not conceived on 27-9-1937 when the suit was filed. He was born on 16-8-1938 after the final decree for partition was made on 22-4-1938. He was, however, in utero on 7-12-1937 or on 22-4-1938 when the preliminary and the final decree for partition were respectively made. According to the law stated above, Mandliprasad would be entitled to reopen the partition in case the severance of status took place on 7-12-1937 or on 22-4-1938 as he was then in his mother's womb. If, however, the severanco took place on 27-9-1937, the date when the previous suit for partition was filed, he was not entitled to reopen the partition because his father was allotted a share. The question for decision, therefore, is what is the critical date, the 27-9-1937 when the suit was filed for partition or the 7-12-1937 or the 22-4-1938 when the preliminary and the final decree for partition were respectively made.

[27] In order to decide this question, it is necessary to set out briefly a few propositions of Hindu law which are well settled.

(1) According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definte share: 11 M. I. A. 75[11] at pp. 89, 90

(2) Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process: 17 I. A. 194, 196 : 18 Cal. 157[12]

(3) A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed: 40 I. A. 40, 43; 35 ALL. 80.[13]

(4) Partition is used in two different senses : division of title or severance of status and division of property. By division of title, the coparcenary property ceases to be joint property and it is converted from a joint into a separate ownership. Severance of the joint status so far as the separating member is concerned, with all its legal consequences resulting therefrom is quite distinct from the de facto division into specific shares of the property held until then jointly : 11 M. I. A. 75,[11] at p. 92 and 43 I. A. 151[14] at pp. 160, 161.

[28] In 39 Mad. 159[15] a minor illegitimate son of a Sudra filed a suit for partition against a legitimate son. The trial Court held that the paternity was not established and dismissed the suit. On appeal the High Court held that the paternity of the plaintiff was established and on reference to a Full Bench it was decided that he was entitled to the share of an illegitimate son in his father's property. The decision of the Full Bench is reported in 39 Mad. 159[15] while the appeal was pending in the High Court the legitimate son died unmarried and in his place his mother was brought on the record as his legal representative. This order was contested by the appellant who contended that he was entited to the entire property by survivorship on the death of his brother who died joint. The contention of the respondent was that by the presentation of the plaint for partition the plaintiff became a divided member and that consequently he was not entitled to succeed to his legitimate brother by survivorship. The question for decision was whether the plaintiff became separated from the other members by the fact of suing them for partition. It was held that the plaintiff became a separated member when he filed the suit for partition and that he was not entitled to succeed to his brother by survivorship. The decision is reported in 39 Mad. 159.[15] The case was argued by distinguished counsel and decided by eminent Judges and it is curious that there is no reference in that case to the question whether the fact that the plaintiff was a minor made any difference as regards the date of separation of status, whether from the date of the suit or from the date of the decree. As Jockson J. stated in A.I.R. 1930 Mad. 486[16] the learned Judges of the Full Bench in 39 Mad. 159[15] could not have overlooked the fact that the plaintiff was a minor and if the minority of the plaintiff affected the date of severance of status they would have distinghished the case in 40 I. A. 40[13] especially as the majority of the Judges of the Full Bench stated that they would have decided otherwise if the matter had not been concluded by the decision of the Privy Council.

[29] In F. A. Nos. 16 and 25 of 1911,[17] the Court of the Judicial Commissioner, Nagpur, held that severance of status could only be effected with the consent of all the ceparceners or by decree of the Court, There the plaintiff Harihar Bapuji Talatule gave a notice to the other members of the family in which he expressed his intention to separate from the joint Hindu family and claimed partition of his share. As this was not done, he filed a suit for partition. The other defendants admitted that he had 1/3rd share in the property and that he was entitled to have that share partitioned. The case was fixed for settlement by the parties as regards the best

mode of the division of the property. Before that question could be settled, Haribar died and in his place his widow Girja Bai was brought on the record as his legal representative and untimately a decree for partition was passed in her favour. The defendants filed appeals in the Court of the Judicial Commissioner against the order bringing Girja Bai on the record as a legal representative of the deceased plaintiff and against the decree for partition. The Court of the Judicial Commissioner held that partition could only be made by agreement of parties or by decree of the Court and as before that could be done Harihar died he must be deemed to have died as a member of joint Hindu family and as such the other brothers were entitled to the entire property by survivorship and the widow was not entitled to a decree for partition and accordingly reversed the decree of the trial Court and dismissed the suit. On appeal the Privy Council reversed the decree of the Court of the Judicial Commissioner and restored the decree of the trial Court. The judgment of the Judicial Committee is reported in 43 I. A. 151 : 12 N. L. R. 113.[14]

[30] The statement of law contained in their previous decision, 40 I. A. 40: 35 ALL. 80[13] was re-affirmed and their Lordships discussed the principle more fully than was in 40 I. A. 40 : 35 ALL. 80.[13]

[31] After a discussion of the relevant Hindu texts on the question of partition their Lordships of the Judicial Committee at page 160 held:-

"Separation from the joint family involving the severance of the joint status so far as the separating member is concerned. with all the legal consequences resulting therefrom, is quite distinct from the de facto division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilist the other is the natural resultant from his decision, the division and separation of his share, which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unquivocally expressed and clearly intimated to his co-shares. his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient;, the Court has simply to give effect to his right to have his share allocated separately from the others."

Their Lordships pointed out at page 161 that the District Court had confused the two considerations, namely, the serverance of status, which is a matter of individual volition, with the allotment of shares, which may be effected by different methods: by private agreements, by arbitrators appointed by the parties, or, in the last resort by the Court. This is now the leading case and has been followed in numerous cases: 44 I. A. 159: 39 ALL. 496,[18] 52 I. A. 83 : 48 Mad 254[19] (258), 58 I.A. 220, (224) : 53 ALL. 300[20] and I. L. R. (1939) ALL. 680[21], (685).

[32] In 44 I. A. 159 : 39 ALL. 496[18] the question was whether a morgage executed by Prabhu Lal was enforceable. If was joint at the time he executed the mortgage he had no power to execute it and the mortgage was void and unenforcable. If, however, he was separate the mortgage of his 1/5th share was valid and enforceable. The decision of the question turned on determination of the point whether he was joint or separate. In order to arrive at a decision the legal effect of a previous suit for partition filed by him had to be construed, Their Lordships held that notwithstanding the dismissal of.the suit for partition the claim in the plaint amounted to an intimation to the defendants, his co-sharers, of the unequivocal desire of the plaintiff for separation from the joint family and they held that the commencement of the suit for partition effected a separation from the joint family and that it was immaterial in such case, whether the co-sharers assent. Their Lordships observed at page 161:

"A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not."

As the mortgage was executed by Prabhulal after separation it was binding on him.

[33] In 52 I. A. 83 : 48 Mad. 254,[19] their Lordships of the Judicial Committee stated at p. 86 that the fact that any member of a joint family has separated himself from his coparceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted.

[34] In each of the Privy Council cases referred to above, with the exception of I. L. R. (1939) ALL. 680,[21] their Lordships of the Judicial Committee had to consider the effect of a suit for partition filed by an adult male coparcener. It may be taken as settled that where an adult coparcener clearly and unequivocally gives a notice of his intention to separate from the joint Hindu family he becomes separate in status from the date of the notice and if no previous notice is given, the filing of a suit for partition amounts to an expression of an intention to separate and if the claim is decreed the date of severance relates back to the date of the institution of the suit and not the date of the decree.

[35] The learned counsel for the appellant contended that these principles are not applicable to the case of a minor plaintiff suing for partition and in his case the severance of the joint status takes place not from the date the suit for partition is filed on his behalf but on the date when the decree for partition is made in his favour. On that point there was a divergence of judicial opinion but the weight of authority is in favour of the view that even in the case of minor, if his claim for partition is decreed the date of severance is the date of suit and not the date of decree.

[36] There are three cases of this Court which are, however, inconclusive as in none of these cases the point was decided. In I. L. R. (1941) Nag. 652[22] at p 655 the conflict of views was noted but it was not decided as it was not necessary. In that case, the question was whether the mortgage executed by Ratan Singh on 23 7-1930 was binding on his wife and minor son who claimed that they had separated before the date of the mortgage and that the mortgage was not binding on them. Prior to the execution of the mortgage the minor had filed a suit for partition through his next friend but that was filed in a wrong Court and the plaint was returned for presentation to the proper Court on 4-10-1930 and it was re presented in the proper Court in 1931. On those facts, it was held that the suit for partition must be deemed to have been instituted in 1931 when the plaint was filed in the proper Court and as the mortgage was effected before that date the mortgage was binding. The question whether the severance took place on the date when the suit for partition was filed or on the date when the preliminary decree for partition was made, was not material in that case because the mortgage was executed before either of the dates. Reference in that case was made to A. I. R. 1935 Bom. 54[23] and 42 ALL. 461[24] but no reference was made to the later cases 48 Mad. 465,[25] 50 Mad. 866,[26] 57 Mad. 95[27] and I. L. R. (1939) Bom. 256[28] where it was decided that the mere filing of a suit by a minor does not *ipso facto* cause severance of the joint status but that if the Court considers that the partition is for the benefit of the minor and decrees the claim, the partition relates back to the date of the institution of the suit and not to the date of the decree.

[37] In I. L. R. (1943) Nag. 390[29] at p. 407 the cases in I. L. R. (1939) Bom. 256,[28] 50 Mad. 866[26] and I. L. R. (1941) Nag. 652[22] at p. 655 were incidentally noted but the point was not decided as the plea had not been raised in the Courts below. There was no reference to 48 Mad. 465,[25] 50 Mad. 866[26] and 57 Mad. 95.[27]

[38] In I. L. R. (1945) Nag. 444[30] at p. 450 it was held that the mere commencement of a suit for partition is sufficient to effect a severance in interest before the decree No minors were involved in the case and it was not necessary to consider the effect of a suit filed by a minor plaintiff for partition, whether severance of status takes place from the date of the suit or the date of the decree. The statement at p. 450 is a part of the argument of counsel and not a part of the decision. This was pointed out by one of us (Bose J.) who had delivered the judgment in that case. The learned counsel for the appellant did not stress the matter further and did not contend that the decision is an authority in support of the proposition he contended, So far as this Court is concerned, the matter is *res integra* and can be decided on first principles.

[39] In 10 W. R. 273[31] Mitter J stated:

"Now it is settled doctrine of the Hindu Law that every member of a joint undivided family has an indefeasible right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not."

This statement was cited with approval by their Lordships of the Judicial Committee in 43 I. A. 151[14] at p. 161. At p. 160 their Lordships of the Judicial Committee observed:

"Once the decision has been unequivocally expressed and clearly intimated to his co sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co sharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others."

[40] In 30 I. A. 139[32] the Privy Council had to consider the effect of an Ikrarnama executed on 21 6-1883 by adult coparceners. Under that agreement the parties agreed to divide the coparcenery property in certain defined shares. The question was whether the agreement to separate executed by the guardians on behalf of the minor coparceners was effective to cause a severance of status. The decision was that it did. Their Lordships of the Judicial Committee observed at p. 150:

"There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition, and (as has been said) if an agreement for partition could not be made binding on minors a partition could hardly ever take place. No doubt, if the partition were unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings set it aside so far as regards himself."

[41] This was applied in 36 I. A. 71[33] and an agreement entered into during the minority of some of the coparceners was upheld and it was held that there was a severance of status. The mere fact that one of the coparceners is a minor does not affect the right of an adult coparcener

to separate if he chooses: 9 N. L. R. 111[34] and 60 Bom. 736.[35] It is now settled that a valid partition may be made during the minority of one or more coparceners: Mayne's Hindu Law paras. 426, 539. If a guardian can represent a minor in effecting a partition, there is no reason why he should not have the right to separate the minor from the family by giving a notice and if that right is denied, to enforce the claim by a suit for partition.

[42] In I. L. R. (1939) ALL. 680[21] the question was whether the claim by the guardian of a lunatic for separation of his share effected a severance of his status. The decision was that it did. The question arose in this way. Two of the coparceners Ram Das and Parsotam filed a suit for partition and claimed half share. The defendants were the other two coparceners Ram Narain and Deo Narain. Deo Narain was a lunatic and he was represented in the suit by his wife as his guardian. Deo Narain filed a written statement but there was no demand for separation from Ram Narain, the other defendant. On 23-4-1924 the trial Judge ordered partition and directed the amin to divide the properties into two lots. On 10-5-1924, the guardian of Deo Narain filed an application that his share be separated by the amin and stated that there was an apprehension of loss in future if the said share was allowed to remain joint. The trial Court passed a final decree for partition in which 1/4th share was allotted in severalty to Deo Narain. Ramnarain and his son filed an appeal in the High Court on 27-7-1925. During the pendency of the appeal, Deo Narain died on 5-8-1927 leaving behind him a widow and a daughter. The widow was brought on the record in his place as his legal representative. The High Court held that after the preliminary decree the trial Court was not competent to entertain an application that Deo Narain's share should be separated, and accordingly reversed the decree granting a share to Deo Narain but left the question open as regards the legal effect of the application of the guardian upon the status of the family property or the constitution of the family *qua* Ram Narain and Deo Narain which was left to be determined in a properly framed suit.

[43] Ram Narain and his son filed a suit for declaration that Deo Narain died joint and that they were entitled to the entire property by survivorship. The trial Court dismissed the suit which was affirmed by the High Court in A.I.R. 1935 ALL. 875.[36] The High Court held that the guardian *ad litem* of Deo Narain did clearly express an intention by means of an application to have the share of Deo Narain separated from the share of Ram Narain and the application had the approval both of the trial Court and of the High Court and had the legal effect of bringing about separation between Ram Narain and Deo Narain even if they were joint up to the time that the petition was filed in Court. At p. 882 their Lordships observed:

"A member of a joint family who is a minor or of unsound mind is incapable of giving expression to an effective intention to separate, but such intention can be expressed by his guardian and has the legal effect of bringing about disruption of the joint family, provided the Court is of the opinion that it is to the benefit of the minor or the person of unsound mind to separate. Once the Court has recorded a finding to that effect the separation follows as a matter of law."

[44] The decision of the High Court was affirmed by the Privy Council in I. L. R. (1939) ALL. 680.[21] At p. 687 their Lordships of the Judicial Committee observed that the ordinary right of a coparcener to effect a separation of his estate, interest or title as distinct from a partition by metes and bounds by proper declaration of his desire to sever, is not abrogated by the mere fact that he has not claimed to exercise it prior to the preliminary decree. As the demand by the guardian for separation of the estate and interest of the lunatic had the approval of the trial Judge and apparently of the High Court, and as it was not shown to have been in any way contrary to the interests of the lunatic, it was held that the application of the guardian amounted to severance of status. The principle underlying this decision is equally applicable to the case of a notice given by a guardian on behalf of a minor to separate from the joint family or by his filing a suit for partition on his behalf.

[45] In the case of a minor the right to separate has to be exercised on his behalf by a person acting as his guardian. There are special considerations why a Court must scrutinise the reasons given by the guardian for separation of the minor to find out whether they were well founded or sufficient and if the Court is satisfied that the partition is for the benefit of the minor, to give effect to his right to have his share allocated separately from the others. The Court exercises this power because it has supervisory jurisdiction over the property of the minor and to control the action of a person who purports to act on his behalf.

[46] Story in para. 1769 of Vol. 3 of his Equity Jurisprudence, 14th Edition, states the law regarding infants thus:

"Properly speaking, a ward of chancery is a person who is under a guardian appointed by the Court of Chancery. But wherever a suit is instituted in the Court of Chancery relative to the person or property of an infant, although he is not under any general guardian appointed by the Court, he is treated as a ward of the Court and as being under its especial cognizance and protection."

In para. 1771 it is stated that in all cases where an infant is a ward of chancery no act can be

done affecting the person or property or state of the minor, unless under the express or implied direction of the Court itself. The principle stated by Story has been applied in several Indian cases : 13 Bom. 137,[37] at pp. 145, 146, 27 Mad. 377,[38] 57 Mad. 95,[27] at pp. 140, 148 and it has been held that a suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of Court and that being so, no act can be done affecting the property of the minor unless under the express or implied direction of the Court itself.

[47] Under Order 32, Civil P. C. a Court has ample power to remove the next friend of a minor if he acts to his prejudice and to make him liable for costs of the suit in case the suit filed by him on behalf of the minor for partition was frivolous, or vexatious or not for the benefit of the minor. In suitable cases, a suit may be stayed in order to enable the minor to decide on his attaining majority whether he elects to proceed with the suit or to abandon it. The guardian purporting to act on behalf of a minor may do so out of hostility to the family of which the minor is a member and may be actuated by considerations other than the benefit of the minor and he need not necessarily be a person who is interested in the welfare of the minor. That is the reason why the Court has to determine whether a suit for partition filed on behalf of a minor is for his benefit and if satisfied to decree his claim.

[48] As stated in 3 M. H. C. R. 94,[39] at p. 96 an action will not indeed lie, unless there is something clearly indicating that the interests of the infant will be advanced by partition, because, ordinarily speaking the family estate is better managed and yields a greater ratio of profit in union than when split up and distributed among the several parceners, and as a general rule, therefore it is more profitable for an infant parcener, that his share should continue an integral portion of the whole estate in the hands of kinsmen. At page 98, Innes J. observed :

"that it often may not be for the benefit of a minor that he should have a partition; if his rights are not denied or the property not mismanaged, it might not be so, he would lose for instance the possible benefit of survivorship, and generally so great a change in the condition of a minor as a partition operates, ought not to be allowed to take place, unless it is clearly for his benefit that it should be so."

Accordingly, it has been the settled practice not to decree a suit for partition filed on behalf of a minor plaintiff unless the Court is satisfied that the partition is for his benefit. This does not in any way affect the right which a minor has to separate from the joint Hindu family if it is for his benefit and that power can be exercised on his behalf by a person purporting to act as his guardian. Any person can file a suit for partition on behalf of a minor and a change in his legal status which affects his right to property in various ways should not be permitted unless the Court is satisfied that the partition is for his benefit. That was laid down in 3 M. H. C. R. 94[39] at p. 96 and has been followed in numerous cases. In 29 Bom. 51[40] at p. 60 Tyabji J. refused to decree partition because it was not for the benefit of the minor and that decree was affirmed in appeal by the High Court and also by the Privy Council in 34 I. A. 107 : 31 Bom. 373[41]

[49] In deciding whether partition is in the interest and for the benefit of the minor a Court is not restricted to considerations purely personal to the minor but may take into consideration matters concerning his mother, or his wife or his daughter in whom he may be interested. The power which the Court exercises in decreeing or refusing partition at the instance of a minor plaintiff is not in denial but in protection of his right which he undoubtedly has to separate from the joint Hindu family if it is in his interest and for his benefit. This aspect of the case has been considered in some Madras cases to which reference will be made later. When, however, the Court decrees a suit for partition filed on behalf of a minor, there is no reason why the separation or severance of status should not be from the date of the plaint as in the case of an adult coparcener.

[50] The right of action for partition rests upon the right to separate by a Hindu coparcener. The cause of action for a minor's suit is not essentially different from the one by an adult. The only difference is that in the case of a minor the right to separate is asserted on his behalf by his guardian. The Court grants relief on the cause of action stated in the plaint if it is satisfied that the assertion by the guardian was properly made and that partition was in the interest of and for the benefit of the minor. The right to partition is a right relating to property. It is not a case of a personal action which dies with the person — *actio personalis moritur cum persona.* A suit, if properly instituted, should not abate, but on plaintiff's death his legal representatives should be in a position to carry on the litigation. The cause of action survives on the death of a minor plaintiff and it cannot be said that if a minor dies before a decree for partition is passed that he dies joint.

[51] Two principles are well recognised in the matter of grant of relief to suitors and have been stated with precision by Mookherjee J. in 20 C. L. J. 107[42] in these terms. A suit must be tried in all its stages on the cause of action as it existed at the date of its commencement. The

Court, however, may in suitable cases take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions. This doctrine is of an exceptional character and is applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or, that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. If these two principles are borne in mind many of the difficulties raised by Reilly J. in his order of reference in 57 Mad. 95,[27] and on which great stress was laid by the learned counsel for the appellant, can be resolved.

[52] In 41 Mad. 442[43] two propositions were stated. The first proposition was that the rule that the institution of a suit for partition of joint family property effects a severance of the joint status is not applicable to a suit instituted on behalf of a minor; for, in such suit, it is for the Court to determine whether a decree for partition will be beneficial to the minor. The second proposition was that where a minor plaintiff dies during the pendency of the suit before a decree for partition is passed his legal representatives are not entitled to continue the suit. The first proposition was followed in latter cases but the question whether the second proposition was correct was not decided in those cases. The contention of the appellant in that case, that the mere filing of a suit for partition on behalf of a minor effects a severance of joint status, was negatived and it was held that the mere fact of the filing of a suit does not cause a severance of a status and that it is for the Court to determine whether in the special circumstances of the case partition was for the benefit of the minor and in case it was so, the Court is to decree the claim for partition. As the minor plaintiff died before a decree for partition was passed it was not necessary to decide when the severance of status takes places, whether from the date the suit for partition is filed or from the date of the decree. A suit for partition on behalf of a minor, if properly instituted, should not abate on his death but his legal representative should be in a position to carry on the litigation. There is no jusitfication for the assumption that the cause of action does not survive on the death of a minor plaintiff after the suit for partition has been filed on his behalf. The decision in 41 Mad. 442[43] was in conflict with the earlier Full Bench decision in 39 Mad. 159[15] and has been overruled by the Full Bench decision in 57 Mad. 95.[27]

[53] In 48 Mad. 465[25] it was held that the suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of status from the date of the plaint. In that case after the institution of a suit for partition on 31-1-1919, another son was born in May or June 1920 before the preliminary decree for partition was passed. It was held that the birth of a son subsequent to the filing of the suit for partition did not affect the share of the plaintiff which had to be determined on the state of affairs as existed on the date of the suit and not on the date of the decree. Spencer J. at p. 468 stated that it is a sound principle to regard the prayer in the minor's plaint for division as a conditional request that, provided that the Court sees fit, it may declare the status of the minor divided as from the date of the plaint and though there can be no division unless the Court sees fit to decree it, there is no reason why the Court should not make its decree take effect from the date of the institution of the suit. In the case of a suit by an adult coparcener for partition his share is not liable to be altered by the birth of a coparcener after filing of the suit for partition. There is no reason why a distinction should be made between adults and minors so far as their shares are subject to alteration in consequence of events that occur between the commencement and the end of a partition suit.

[54] In 50 Mad. 866[26] a minor plaintiff sued for partition on 14-8-1918 and a preliminary decree for partition was passed on 7-4-1921. The question for decision was when did the severance of status take place whether on 14-8-1918 when the suit was filed or on 7-4-1921 when the preliminary decree for partition was passed. That was necessary in order to determine the extent and share of the liability of the manager to render account. It was held that when a suit for partition is instituted on behalf of a Hindu minor and if the Court holds that a division is necessary in the interests of the minor and passes a preliminary decree for partition, it must be deemed that the divided status of the plaintiff dates from the date of the plaint and not from that of the preliminary decree.

[55] In A. I. R. 1930 Mad. 486[16] it was held that where in a suit for partition a minor defendant claimed a share and subsequently died his mother was entitled to continue the suit as his legal representative. The principle underlying the decision was that a guardian can on behalf of a minor exercise the discretion to separate from the joint Hindu family and if the Court approves, a decree for partition can be made at the instance of a guardian. Jackson J. pointed out that the Court acts as a super guardian in this matter and when once it is assumed that the Court may act for the minor and vicariously

exercise his volition, there is nothing in logic to prevent the guardian doing the same.

[56] In 57 Mad 95[27] the question for decision was whether on the death of a minor plaintiff in a suit for partition the suit abated or whether it could be continued by his legal representative. The case came on for hearing before Venkatasubba Rao and Reilly JJ. They made separate orders for reference to a Full Bench. Venkatasubba Rao J. was of opinion that the suit did not abate and that the mother of the plaintiff was entitled to proceed with the trial of the suit. Reilly J. took a contrary view. The Full Bench case was decided by three Judges and it was held that it was open to his legal representative to proceed with the trial and obtain a decree on her showing that when the partition suit was instituted it was for the benefit of the minor and that a suit by a minor for partition does not abate if he dies before the Court has found that the partition is for his benefit. The Full Bench case in 57 Mad. 95[27] was followed in A. I. R. 1937 Mad. 274,[7] A. I. R. 1941 Mad. 828[44] and in I. L. R. (1945) Mad 710[45] In the last case the doctrine was further extended and it was held that the severance takes place on the date the guardian communicates his intention on behalf of the minor to separate and that if the Court holds that the partition is for the benefit of the minor the severance relates back to the date of the notice given on behalf of the minor.

[57] In 4 Pat. L. J. 38: A. I. R. 1918 Pat. 91[46] Nandeshwar, a minor, filed a suit for partition on 11-8-1913 against his parents, step-mother Aina and grandmother for partition. During the pendency of the suit, the plaintiff attained majority. The trial Court held on 4-8-1915 that each of the parties was entitled to 1/5th share and accordingly decreed the claim for partition. Against this decree, his father Krishna Lal Jha filed an appeal in the High Court. During the pendency of the appeal, a son was born to him on 21-11-1915 by his 2nd wife Aina. The question for decision was whether the birth of a half-brother after the suit was filed affected the share of the plaintiff. The half-brother had not been conceived when the suit for partition had been filed on 11-8-1913 but was in *utero* on 4-8-1915 when the decree was made. If severance of status of the plaintiff took place on 11-8-1913 when the suit was filed, he was entitled to 1/5th share and the subsequent birth of a half-brother who was not conceived at the date of the suit would not have affected the share of the plaintiff. If, on the other hand, the severance took place on 4-8-1915 when the decree for partition was made the plaintiff was entitled only to 1/6th share as the half-brother who was in the womb was also entitled to a share. The date of severance was thus material as that would have determined the share of the plaintiff. It was held that the severance of status took place on 11-8-1913 when the suit for partition was filed, that the plaintiff was entitled to 1/5th share and that his share was not diminished by the subsequent birth of a half-brother during the pendency of the litigation.

[58] The cases in 4 Pat. L. J. 38 : A. I. R. 1918 Pat 921[46] and 48 Mad. 465[25] were followed by Agarwala J. in 14 Pat. 732[47] at p. 777 who held that when a partition suit, instituted by a minor, is decreed, the partition is effective from the date when the suit was instituted.

[59] In I. L. R. (1939) Bom. 256[28] a Hindu minor through his next friend filed a suit for partition against his father and grand-mother. The mother and the step-mother were not impleaded as defendants. Notwithstanding the defect the trial Court passed a decree for partition. On appeal the case was remanded for a *de novo* trial after impleading the mother and the step-mother. A half-brother who was born after the institution of the suit was also added as a defendant after remand. The question was whether the after-born son was entitled to a share and whether the share of the plaintiff was affected. The High Court approved of the decisions in 48 Mad. 465[25] 50 Mad. 866[26] and 57 Mad. 95[27] and held that although the institution of a suit for partition by a Hindu minor through his next friend does not *ipso facto* effect a severance of the joint status, if a decree were passed in that suit, the severance in estate must take effect from the date of the suit. Consequently the share of the plaintiff was not diminished by the birth of a son after the institution of the suit.

[60] In A. I. R. 1944 Bom. 67[48] it was held that a partition cannot be claimed by a minor as a matter of right and it is to be decreed in the minor's favour only if the Court is of opinion that in the circumstances of the case partition is in his interest and for his benefit. Divatia J. pointed out that this rule was one of prudence and expediency and did not affect the fundamental rule of Hindu law that a coparcener can sever his status merely by expressing a clear intention to do so. The decisions of the Madras High Court in 48 Mad. 465,[25] 50 Mad. 866.[26] and 57 Mad. 95,[27] and the decision in I. L. R. (1939) Bom. 256,[28] were followed and it was held that where a notice to separate is given by a guardian on behalf of a minor and the Court finds that the separation was for the benefit of the minor, the severance of status dates back from the date when the notice was given. The decision was the same as was taken in I. L. R. (1945) Mad. 710.[45]

[61] The learned counsel for the appellant relied on a few cases in support of his contention that the severance of status in the case of a minor takes places when a decree for partition is made and not when a suit is filed. In 42 ALL 461,[24] the plaintiff, a minor, through his mother as his next friend, filed a suit for partition against his grandfather on 18-11-1914. The grandfather made a will on 22-11-1914 and died on 25-11-1914. There was nothing to show that the grand-father knew of this suit. The question involved was as regards the validity of the will. The decision was that the grand-father died joint with the plaintiff and that the will made by him was inoperative in law. The decision was based on 41 Mad. 442,[43] which has been distinguished in later cases and subsequently overruled in 57 Mad. 95.[27] In the Allahabad case a decree had not been passed and it was in the interest of the minor that there should be no decree for partition as he got the property by survivorship on the death of his grand-father. Banerji J. at p. 470 stated that the rule laid down by the Privy Council in 43 I. A. 151,[14] to the effect that the institution of a suit for partition of joint family property has the effect of creating a separation of the joint family, cannot be applicable to a suit brought on behalf of a minor which has not matured into a decree. This aspect of the case has been elaborated in the Madras cases where it has been laid down that once a decree is passed, the severance of status takes place from the date of suit and not from the date of the decree.

[62] In A. I. R. 1926 Sind 216,[49] the minor plaintiffs through their mother filed a suit for partition and claimed 1/4th share against their uncle and other members of the family. During the pendency of the suit, their uncle died bequeathing certain legacies to his daughter-in-law and the residuary estate to the defendants. The question was about the validity of the will. If the defendant died joint he had no power to bequeath the property and the plaintiffs were entitled to half share. The decision of that point depended on the date of severance of status. It was held following the decision in 41 Mad. 442,[43] and 42 ALL. 461,[24] that the mere institution of a suit by a minor does not effect a partition of the family but separation takes place only when the suit is decreed. We have already given reasons why this view is not sound and we respectfully dissent from the decision.

[63] In A. I. R. 1935 Bom. 54,[23] observations at p. 61 of Divatia J. based on 41 Mad. 442,[43] were obiter and not necessary for the decision of the case. No reference was made by him to later cases : 48 Mad. 465,[25] 50 Mad. 866,[26] and 57 Mad. 95.[27] Murphy J. who delivered a concurring judgment did not refer to 41 Mad. 442,[43] or base his decision on it. This was pointed out by Wassoodew J. in I. L. R. (1939) Bom. 256,[28] at p. 261 and by Divatia J. himself in A. I. R. 1944 Bom. 67,[48] A. I. R. 1935 Bom. 54,[23] cannot be quoted as an authority in support of the proposition contended by the learned counsel for the appellant, especially as a contrary view was taken in later cases in the same Court

[64] In A. I R. 1936 Lah. 504,[50] it was held that the mere institution of a suit does not effect a separation of the family but separation only takes places when the suit is decreed and that consequently the liability to render account to the plaintiff is from the date of the preliminary decree. No reference was made to the Full Bench case in 57 Mad. 95.[27] In the judgment the conflict between the Allahabad view and the Madras view is noted but no reasons have been given for accepting the Allahabad view.

[65] The learned counsel for the appellant commended the opinion of Reilly J. in his order of reference in 57 Mad. 95[27] for our acceptance. The opinion of Reilly J. apparently did not meet with the approval of the learned Judges of the Full Bench. No useful purpose will be served in discussing his opinion because the Judges of the Full Bench dealt with every aspect of the case and have given reasons both on principle as well as on authority why the severance of status, even in the case of a minor, takes place from the date on which the suit for partition is filed and not from the date of the decree. We respectfully agree with the Full Bench decision and do not, therefore, cover the same ground over again.

[66] The view taken by the Madras High Court in 48 Mad. 465,[25] 50 Mad. 866[26] and 57 Mad. 95[27] and followed by the Bombay High Court in A. I. R. 1939 Bom. 256[28] is not only the more logical view but is also the better one from the point of view of convenience : it safeguards the interests of the minor, avoids anomalies and makes for consistency. We approve these decisions and hold that even in a suit filed by a minor the severance of status takes place from the date of the suit and not from the date of the decree. Accordingly, the critical date was 27-9-1937 when Civil Suit NO. 6-A of 1937 for partition was filed by Dineshchandra As on that date Mandliprasad was not in utero, he was not entitled to reopen the partition made in that suit. Ramcharanlal was given a share and the plaintiff was entitled under law to claim a portion out of his share and not out of the share given to Deviprasad.

(67) The plaintiff did not claim in the alternative that if he was not entitled to reopen partition, he may be given a share out of the

1/3rd share allotted to his father or out of the 2/3rd share allotted to him and Dineshchandra as stated in the final decree. This case was not set up or tried in the Courts below. This has not been made a ground in the memorandum of appeal in this Court. If partition is allowed now Chandramukhi will be entitled to a share and the plaintiff will lose the right to claim by survivorship, and he will need somebody to look after his share during his minority. He was of 1 year when he filed the suit for partition and may be now about 8 years of age. He is living with his father. Nothing has been alleged against him. The object of the suit was to reduce the share of Deviprasad from 1/3rd to 1/5th. That has failed. Partition in the circumstances of the case will not be in the interest and for the benefit of the plaintiff and is accordingly refused. The appeal fails and is dismissed with costs.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 14 *[C. N. 2.]*

BOSE AND MANGALMURTI JJ.

Thansing Tikaram Powar — Plaintiff — Appellant v. *Bhaulal Shriram Lodhi and another—Defendants—Respondents.*

Second Appeal No. 426 of 1942, Decided on 4-3-1947, against Appellate decree of Dist. Judge, Chhindwara, D/-13-7-1942.

Civil P. C. (1908), S. 70 (1) (c)—C.P. Rules under, — R. 15 — Orders of Financial Commissioner in revision are final.

By Rules 12 to 15 framed by C. P. Government under S. 70 (1) (c) a precise and self-contained Code of appeal is provided in regard to the orders passed in proceedings before the Collector and the jurisdiction of the civil Courts is excluded by implication. An order of the Financial Commissioner passed in revision under R. 15, when he is seized with the jurisdiction, is final and cannot be questioned in civil Court even though the order is wrong: 27 A. I. R. 1940 P. C. 105, *Ref.*

[Paras 6 and 8]

Annotation: ('44 Com.) Civil P. C., S. 70 Note. 7.

Case referred:

1. ('40) I. L. R. (1940) Mad. 599 : 27 A. I. R. 1940 P. C. 105 : I. L. R. (1940) Kar. (P. C.) 194 : 67 I. A. 222 : 188 I. C. 231 (P. C.), Secretary of State v. Mask & Co.

V. V. Kelkar and M. R. Bobde—for Appellant.

P. R. Padhye—for Respondents.

Judgment.—This is a second appeal by the plaintiff whose suit for declaration was decreed by the trial Court but dismissed by the Court of First Appeal. The plaintiff purchased 3 annas, malguzari share in patti No. 3 of mouza Lalpur belonging to the defendants in the sale held by the Sub-Divisional Officer, Waraseoni, on 20th April in execution of the decree in Civil Suit No. 2 of 1939 of the Court of the Sub-Judge, First Class, Balaghat, which was transferred by that Court for execution to the Collector in pursuance of the notification issued by the Provincial Government under S. 68, Civil P. C. This sale was confirmed on 10-6-1940. Before this sale was held the defendants had filed an application on 13-1-1940 before the Debt Relief Court for determination of their debts and framing a scheme for repayment. On that very day, the presiding officer of the Debt Relief Court passed an order directing that notice be issued to the Sub-Divisional Officer, Waraseoni, for staying the proceedings in execution pending before him. On 17-1-1940, another order was passed directing the issue of notices to the Court of the Subordinate Judge First Class and Junior Small Cause Court, Balaghat. On 4 5-1940 a notice in form No. 3 as prescribed by R. 15 of the rules framed under the Relief of Indebtedness Act was issued to the Sub-Divisional Officer Waraseoni before whom the proceedings for confirmation of the sale of that village share were pending. In spite of that notice the sale was confirmed. An appeal was filed before the Deputy Commissioner by the defendants against the order dated 10-6-1940 confirming the sale, but it was dismissed. The defendants then made an application to the Financial Commissioner for revision of that order, and it was allowed; the order of sale was set aside, and the case was remanded for disposal according to law.

[2] The plaintiff therefore brought the suit out of which this second appeal has arisen for a declaration that the order passed by the Financial Commissioner was invalid and without jurisdiction and did not affect his right, title, and interest to the 3 annas village share purchased by him at the auction sale. Though the trial Court granted to the plaintiff the declaration prayed for the District Judge, Chhindwara, has set aside that decree in appeal and dismissed the plaintiff's suit holding that the order passed by the Financial Commissioner is final and that the civil Courts have no jurisdiction to interfere with it; and that is the question for decision in this second appeal.

[3] The Financial Commissioner passed the order under R. 15 of the rules made by the Provincial Government under S. 70(1), Civil P. C. 1908. This rule which is to be found at p. 175 of the Revenue Manual Vol. 2, is to the following effect:

'In regard to any order passed in appeal under the preceding rule, the Governor in Council shall have the same powers of revision as are vested in the Judicial Commissioner by S. 115, Civil P. C. in respect of cases in which no appeal lies to the Judicial Commissioner.'

The Provincial Government had the power to make such a rule under S. 70(1)(c), Civil P. C. and it empowers the Financial Commissioner to go into the question whether in passing the

order the Deputy Commissioner or Collector (a) exercised jurisdiction not vested in him by law or (b) failed to exercise jurisdiction so vested or (c) acted in the exercise of his jurisdiction illegally or with material irregularity, and if it appears that he has done so to pass such order in the case as the Financial Commissioner thinks fit. That is exactly what the Financial Commissioner has done in this case. In his order dated 20-3-1941 (Ex. P. 6) the Financial Commissioner says:

'It must be held that in the peculiar circumstances of this case the orders of the Relief Court deprived the Collector of jurisdiction. I, therefore, set aside the order of sale and remand the case for disposal according to law.'

[4] The learned counsel for the appellant contends that the Financial Commissioner was wrong in saying that the Collector was deprived of jurisdiction by the orders of the Relief Court. It may be so; the Financial Commissioner may have come to an erroneous decision on a question of fact or even of law, but that does not mean that he had no jurisdiction to give that decision.

[5] The Financial Commissioner having jurisdiction no suit lies to set aside his order according to the opinion expressed at p. 278 of Mulla's Civil Procedure Code, Edn. 11 (1941), on which the learned counsel for the appellant relies, and which is to the following effect:

'A suit will lie to set aside an order made by the Collector, if the order is *ultra vires*.'

[6] Their Lordships of the Privy Council in I. L. R. (1940) Mad. 599,[1] made the following remarks at p. 614:

"It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

By rule 12 of the rules framed under S. 70 (1), Civil P. C., the Deputy Commissioner to whom decrees are sent under S. 68, Civil P. C. for execution is invested with all the powers which the Court might exercise in execution of such decrees if the execution thereof had not been transferred to the Deputy Commissioner including the powers of the Court under rules 72 and 92 in O. 21, Sch. 1. Civil P. C. Rule 13 invests Assistant Commissioners of the First Class and Extra Assistant Commissioners invested with the powers of an Assistant Commissioner of the First Class with all the powers of a Deputy Commissioner under those rules. Rule 14 provides for an appeal to the Deputy Commissioner if an order is passed by an Assistant or Extra Assistant Commissioner who is a Sub-Divisional Officer. Then comes rule 15, which deals with the powers of revision given to the Financial Commissioner. By these rules a precise and self-contained code of appeal is provided in regard to the orders passed in the proceedings before the Collector and the jurisdiction of the civil Courts seems to have been excluded by implication.

[7] It may be contended that in I. L. R. (1940) Mad. 599[1] their Lordships were dealing with a provision which said that every order passed in appeal shall be final, whereas there are no such words in the rules made under S. 70 (1), Civil P. C. But this only means that in that case the exclusion of the jurisdiction of the civil Courts was explicitly expressed, while in this case it is implied.

[8] We may mention here that in this case it is only the order of the Financial Commissioner which is challenged as *ultra vires* and not the order of the Collector. Our decision therefore does not cover the case where not only the order of the Financial Commissioner but even the order of the Collector, i. e. the Sub-Divisional Officer, is challenged as *ultra vires*. We are of the opinion that the order of the Financial Commissioner in this case is final and civil Courts have no jurisdiction to interfere with it. The decision of the learned District Judge is quite correct, and this appeal is hereby dismissed with costs.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 15 *[C. N. 3.]*

GRILLE C. J. AND HIDAYATULLAH J.

Chudamansao Bishramasao — Appellant v. *Ramkuwar Birajlal & others—Respondents.*

Second Appeal No. 346 of 1942, Decided on 11-10-1946, from appellate decree of Dist. Judge, Chhindwara, D/- 23-2-1942.

Limitation Act (1908), Ss. 4 and 14—S. 4 can be tacked on to S. 14.

Section 4 which by itself excludes no time can be tacked on to S. 14. Hence where after deducting the time which the plaintiff is entitled to exclude under S. 14 (viz., that spent in prosecuting bona fide and with due diligence a suit in a wrong Court) the limitation for the suit expires on a day when the Court is closed, and the suit is filed in the proper Court on the first day on which the Court reopens the suit will be within time: 22 A. I. R. 1935 P. C. 85 and 16 A. I. R. 1929 Cal. 315, *Rel. on*; 24 A. I. R. 1937 Nag. 215, *Disting.* [Para 4]

Annotation: ('42 Com.) Lim. Act, S. 4 N. 7, Pt. 3.

Cases referred:—

1. ('37) I. L. R. (1937) Nag. 217: 24 A. I. R. 1937 Nag. 215: 170 I. C. 798, Wamanrao Anandrao v. Umrao Tulsbiramji.
2. ('35) 22 A, I. R. 1935 P. C. 85: 57 All. 242: 62 I. A. 80: 155 I. C. 205 (P. C.), Maqbul Ahmad v. Onkar Pratap Narain Singh.
3. ('29) 16 A. I. R. 1929 Cal. 315: 123 I. C. 246, Bejoy Kumar v. Kusum Kumari.

A. L. Halve—for Appellant.

D. B. Padhye—for Respondents 1 to 3.

Judgment.—This is an appeal by defendant 2 and the only point for consideration is whether the suit itself was time-barred. The cause of action on a promissory note arose on 5.11.1936, and on 3.11.1939 the plaintiffs brought a suit in the Court of the First Sub-Judge Second Class, Jubbulpore. On 3.5 1940, that Court held that it had no jurisdiction to try the suit as no part of the cause of action arose at Jubbulpore and returned the plaint to be filed in the proper Court, which in this case was the Court of the First Sub-Judge, Second Class, Chhindwara. The 4th of May was a working day, the 5th of May was a Sunday, and the Courts closed for the summer vacation on the next day, the 6th of May. The plaint was presented on the day on which the Courts re-opened.

[2] In the Chhindwara Court, the defendants took the stand in their written statement without elaborating their reasons, that the suit was time-barred. That the argument turned on the right to exclude the time taken in the Court of Jubbulpore is evident from the finding of the trial Court that the suit at Jubbulpore was prosecuted *bona fide* and that the time there taken could be excluded under the provisions of S. 14, Limitation Act. The Court also found that the delay in not filing a suit on the 4th of May in Chhindwara was excusable in view of the distance of Chhindwara from Jubbulpore and the fact that preparation would have to be made before the plaint could be presented in Chhindwara.

[3] On appeal by the defendants, the lower appellate Court on a full consideration of the litigation held that there had been no want of diligence in prosecuting the case in the Jubbulpore Court which ultimately found that it had no jurisdiction, and that the suit was instituted there *bona fide*, and the Court pointed out conflicting rulings in the Judicial Commissioner's Court which misled the plaintiffs' counsel. The learned appellate Judge, however, did not agree that the delay after the 4th of May could be condoned He held that it was prefectly possible for the plaintiff to reach Chhindwara on the 4th of May. He found, however, that his decision was immaterial inasmuch as he had allowed the time taken in the Jubbulpore Court to be excluded, that limitation expired on a day when the Court was closed, and that the plaint was presented in the proper Court on the first day that the Courts re-opened.

[4] In appeal, it was contended that S. 4, Limitation Act cannot be tacked on to the time excluded under S. 14, and the case in I. L. R. (1937) Nag. 217[1] was cited in support of the contention. This case, however, has no application since it was decided on the point that when limitation had expired during the vacation the plaint was not presented in the appropriate Court on the day on which the Courts reopened but on the second day. That S. 4, which by itself excludes no time, can be tacked on to S. 14, Limitation Act is apparent from the decision of their Lordships of the Privy Council in A. I R. 1935 P. C. 85[2]. It is there stated that what S. 4 of the Act provides is that where the period of limitation prescribed expires on a day when the Court is closed the application may be made on the day when the Court re-opens and that 'the Court' means the proper Court in which the application ought to have been made. To the same effect is a judgment by a Divisional Bench of the Calcutta High Court in A. I. R. 1929 Cal. 315.[3] In the case we are now considering, the plaint was laid in the proper Court and was presented on the first day after the Courts reopened, they having been closed on the date when limitation expired. It is also clear that limitation had not expired until the 5th of May and there was no need for the trial Court to condone the delay in not presenting the plaint on the 4th May. Deducting the time taken in the Jubbulpore Court the plaintiff had 2 days in hand which carried him safely up to the time when the Courts were closed.

[5] It was also contended on behalf of the appellant that the plaint when presented contained no averment or statement of the facts under which the plaintiffs claimed that their suit was within time. This point was raised in the lower appellate Court, but it was raised by the plaintiffs respondents who asked permission to be allowed formally to amend the plaint by including it. The defendant-appellant objected, but the objection was overruled. In our opinion, the objection was rightly over-ruled inasmuch as it was obvious from the very beginning that the provisions of S. 14 were to be invoked and indeed, on the issue raised on the defendants' pleading that the suit was time-barred the trial Court found that proceedings had been carried on bona fide in the Jubbulpore Court and allowed time to be excluded under the provisions of S. 14. Both parties then were well aware as to the nature of the argument which was to be afforded on this issue despite the fact that the prayer had inadvertently been omitted when the plaint was re-presented, and since the issue was there the defendant-appellant has not, as he contends, really been deprived of the opportunity of leading evidence to show *mala fides* in the Jubbulpore Court.

[6] The result is that the appeal fails and is dismissed with costs.

N.S.D. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 17 *[C. N. 4.]*

NIYOGI J.

Govindlal Nityanand Agarwal—Plaintiff — Applicant v. *Governor-General in Council — Defendant — Non-Applicant.*

Civil Revn. No. 258 of 1944, Decided on 11-3-1946, from decree of 3rd Sub-Judge, First Class, Nagpur, D/- 24-4-1944.

(a) Railways Act (1890), S. 77—Notice of claim to Superintendent General of Claims—Superintendent General subsequently authorised to receive notices under S. 77—Effect.

The question whether a particular officer is authorised by the Agent to receive notices on his behalf is a question of fact to be determined in each case. Agency may be proved by direct evidence of authority or by a course of conduct justifying the interence of authorisation : 9 A. I. R. 1922 Mad. 362 (F. B.), *Rel. on.* [Para 6]

A bale of cloth belonging to the plaintiff having been lost in transit, the plaintiff on 19-10 1942 sent a notice to the Superintendent General, B. N. Railway, demanding settlement of his claim. On 20-5-1943 that officer was invested with power of disposing of all claims and in November 1943 he was authorised to receive notices under S. 77 and to dispose of claims. The claim of the plaintiff was pending before him on that date for disposal.

Held that whether the notice meant for the Railway Administration is to be given to one Railway Officer or another is merely a matter of procedure and as enactments affecting procedure are deemed to be retrospective in operation, the order of the Agent delegating his power to the Superintendent General in November 1943 was retrospective in its operation in respect of all claims which were awaiting disposal on that date. Hence the notice given to the Superintendent General was sufficient to bind the Railway Company in terms of S. 77 even though the Superintendent General had not then been technically authorised to receive notices under that section and the failure to give notice to the Agent did not disentitle the plaintiff from claiming compensation which was justly due to him. [Paras 6 & 7]

(b) Railways Act (1890), S. 77—Object—Validity of notice—Question as to.

Section 77 is only intended to give an opportunity to the Railway Company to make satisfactory investigation. Where, therefore, the Railway Company has admitted that loss of goods belonging to the plaintiff had occurred in transit, that admission itself dispenses with the inquiry into the validity or invalidity of the notice of the claim made by the plaintiff. 17 A. I. R. 1930 Cal. 332, *Rel. on.* [Para 7]

Cases referred:—

1. ('12) 8 N. L. R. 34: 14 I. C. 684, Deorao v. G. I. P. Ry. Co
2. ('28) 24 N. L. R. 1: 14 A. I. R. 1927 Nag. 276:103 I. C. 213, Mannalal v. Secy. of State.
3. ('22) 45 Mad 135 : 9 A.I.R. 1922 Mad 362 : 69 I. C. 59 (F B), Mahadeva Ayyar v. S. I. Ry. Co.
4. ('30) 57 Cal. 1286:17 A. I. R. 1930 Cal. 332: 128 I.C. 248, Shamsul Huq v. Secy. of State.
5. ('33) 12 Pat. 67: 20 A. I. R 1933 Pat. 45: 141 I. C. 813, B. & N. W. Ry. Co v. Kameshwar Singh.
6. ('44) 1 L.R. (1944) Nag. 612 31 A. I. R. 1944 Nag. 362, Bhayyalal v. Agent, B. N. Ry. Co.

N. M. Dharaskar and V. Raje—for Applicant.

P. N. Rudra—for Non-Applicant.

Order.—This is an application to revise the judgment of the Third Subordinate Judge, 1st Class Nagpur, empowered under S. 18, C. P. Courts Act, in Civil Suit No. 89 of 1943 dismissing the plaintiff's suit on 24-4-1944.

[2] On 7-7-1942 the management of the Delhi Cloth and General Mills Company Limited sent 4 bales of towels from Delhi to Itwari in the name of the self and endorsed the same in favour of the plaintiff Govindlal, a minor. The plaintiff received only 3 bales at the Itwari station. One bale that was missing contained 40 dozen towels and then market rate being Rs.11- per dozen. The plaintiff made a complaint to the Station Master as well as to the Superintendent General of the Bengal Nagpur Railway Company and on 19-10-1942 sent a notice to the Superintendent General B. N. R. by registered post through his pleader demanding settlement of his claim as early as possible. That was acknowledged by the Superintendent General on 29-10-1942. As the plaintiff received no further response, he on 9-5-1943 served notices purporting to be under S. 80, Civil P. C. as well as under S. 77, Indian Railways Act, on the Secretary to the Central Government, New Delhi and the Manager G. I. P. Railway Victoria Terminus Bombay and the Agent B. N. R, Calcuttta. The Deputy Director, Railway Board, Simla, on 24-5-1943 intimated to the plaintiff that his notice had been forwarded for disposal to the Agent and General Manager, B. N. R., Calcutta, who was the competent authority to deal with the matter and to whom all further references on the subject should be made. Since the decision of the suit, the Bengal Nagpur Railway has come under the direct control of the Governor-General in Council as the G. I. P. Railway already was before the institution of the suit.

[3] In the lower Court both the Governor-General in Council representing the G. I. P. Railway and the Agent B. N. Railway conceded that there was the loss of one bale in transit and they did not contest the amount of damages claimed. They, however, contended that as no notice as contemplated in S. 77, Railways Act was properly served on the Manager of the G. I. P. Railway or the Agent of the B. N. Railway the plaintiff was not entitled to claim any damages. That contention prevailed in the lower Court with the result that the plaintiff's claim was dismissed.

[4] The main dispute turns on the question whether the notice that was given to the Superintendent General on 19-10 1942 (Ex. P-15) fulfilled the requirements of S. 77, Railways Act. In a number of cases it was held that the notice contemplated in S. 77, Railways Act must

be served on the Agent or the Manager of the Company in one of the modes prescribed in S. 140, Railways Act. It was also held that notice served on an officer appointed to investigate the claim is not notice which could properly answer the requirements of S. 77, Indian Railways Act. These cases are referred to in 8 N. L. R. 34[1] and 24 N. L. R. 1.[2] But as there was divergence of the judicial opinion on the point the question came to be considered by a Full Bench in 45 Mad 135[3] in which it was held that the notice of claim under S. 77, Indian Railways Act must be served upon the Agent or Manager of the Railway or upon any officer deputed by the Company or its Agent or Manager to receive such notice and that it would be sufficient if the Agent or Manager had somehow knowledge of the claim within the specified time. Kumaraswami Sastri J. was of opinion that S. 140 was an enabling provision and that the word 'may' did not mean 'must' so as to make other modes of service ineffectual even in cases in which the notice was actually given. The learned Judges however concurred in the conclusion that the suit had been rightly thrown out because the notice had not been sent to the Agent and there was no evidence that the Agent had notice within the prescribed period, that is of six months. Since the decision of this case, the judicial opinion has turned against the too literal interpretation that used to be put in the past on the terms of Ss. 77 and 140, Railways Act, so as to save just claims from being throttled by purely technical considerations based on the letter of the law. In 57 Cal. 1286,[4] Lort-Williams J. pointed out that the object of S. 77 is to prevent dishonest claim for loss when owing to delay it might be impossible to trace the transaction and that it was intended as a weapon of defence against fraud, not as a means to enable the railway authorities to deprive their customers of their just dues. In 12 Pat. 67[5] it was held by Courtney-Terrell C. J, that if the company in the course of its business allowed their District Traffic Superintendent to deal with the claim of compensation that officer must be deemed to be the duly authorised agent of the Railway Company for the purposes of notice under S. 77 read with S. 140, Railways Act. These decisions may call for reconsideration of 8 N. L. R. 34[1] and 24 N.L.R. 1[2] in some proper case that may arise in this Court hereafter. The view taken in I. L. R (1944) Nag. 612[6] gives an indication of the trend towards a more judicial approach to the problem.

[5] So far as this case is concerned, it can be decided on the special facts which have been brought to light in this Court. Rule 4 printed on the back of the consignment note whice was current in July 1942 directed that the claims against the Railway Company for loss should be made to the Superintendent, Claims, B. N. Railway. From the affidavit filed on behalf of the B. N. Railway in this Court it appears that in 1922 (?) and upto 19-5-1943 the Superintendent General was receiving written statements of all claims. On 20-5 1943 that officer was invested with the power of receiving and disposing of all claims. In November 1943, the Superintendent General was authorised to receive notices under S. 77, Railways Act and dispose of all claims not exceeding Rs. 2000 without the sanction of the General Manager. After November 1943 any notice such as the one given by the plaintiff to the Superintendent General would be as good as one given to the Agent.

[6] It is to be seen what is the legal effect of the delegation of authority in November 1943. Whether the notice meant for the Railway Administration is to be given to one Railway officer or another is merely a matter of procedure. As pointed out by Kumaraswami Sastri J., in 45 Mad. 135[3] at pp. 154, 155 the question whether a particular officer is authorised by the Agent to receive notices on his behalf is a question of fact to be determined in each case. Agency may be proved by direct evidence of authority or by a course of conduct justifying the inference of authorisation. In the present case, the Superintendent General was in the course of the business, always held out as the person competent to receive claims and inquire into them so as to lead the public to believe that he was the officer appinted to receive notices under S. 77, Railways Act. The fact that he was expressly authorised in November 1943 was perfectly in conformity with the course of previous practice. It only made explicit what was implicit before. It is a well recognised rule of construction of statutes that enactments affecting procedure are deemed to be retrospective in their operation. Applying that principle to the order of the Agent delegating his power to the Superintendent General in November 1943 to receive notices under S. 77, Railways Act, that order would be deemed to be retrospective in its operation in respect of all the claims which were awaiting disposal on that day.

[7] Both the Railway Companies have admitted that the loss of one bale had occurred in transit. That admission itself dispenses with the enquiry into the validity or invalidity of the notice of the claim made by the plaintiff, since as pointed out in 57 Cal 1286[4] section 77, Railways Act is only intended to give an opportunity to the Railway Company to make satisfactory investigation. In view of the special facts of this case, I hold that the notice given to the

Superintendent General within 6 months was sufficient to bind the Railway Company in terms of S. 77, Railways Act even though the Superintendent General had not then been technically authorised to receive notices under that section and that the failure to give notice to the Agent does not disentitle the plaintiff from claiming compensation which is justly due to him.

[8] I set aside the lower Court's decree and send back the case to the lower Court for trial on its merits. Costs will abide the result. Counsel's fees Rs. 15.

D.S. *Case remanded.*

A. I. R. (35) 1948 Nagpur 19 *[C. N. 5.]*

POLLOCK J.

Karimuddin — Plaintiff — Appellant v. *Mt. Meherunnisa Begum and others—Defendants—Respondents.*

Second Appeal No. 284 of 1942, Decided on 12-9-1946, from appellate decree of Addl. Dist. Judge, Yeotmal, D/- 24-1-1942.

(a) Evidence Act (1872), S. 115—Who can raise plea of estoppel—Stranger.

It is not open to a person to raise a plea of estoppel where he is a stranger to the estoppel and there is no privity between him and the person to be estopped. [Para 2]

(b) Pre-emption—Right of—Waiver—Presumption.

Even if the property is sold in order to raise money for the maintenance of the pre-emptor and the money is subsequently so spent, this cannot raise a presumption of waiver of the pre-emptor's right of pre-emption. [Para 3]

Cases referred :—

1. ('38) I. L. R. (1938) 1 Cal. 66 : 24 A.I.R. 1937 P.C. 256 : 31 S. L. R. 637 : 64 I. A. 302 : 169 I. C. 547 (P.C.), Pradyumna Kumar Mallik v. Dinendra Mallik.
2. ('35) 13 Rang. 256 : 22 A. I. R. 1935 P. C. 79 : 62 I. A. 100 : 155 I. C. 1 (P. C.), Dawsons Bank, Ltd. v. Nippon Menkwa Kabushiki Krisha, Ltd.

P. R. Padhye—for Appellant.

R. Kaushalendra Rao and W. K. Sheoray—for Respondent (No. 3).

Judgment. — The defendant Wahidunnisa Begum sold certain fields to the defendant Meherunnisa Begum, and as a result of this sale two suits for pre-emption were instituted, one by Zaheda Begum, who is the daughter of Wahidunnisa and the sister-in-law of Meherunnisa, and the other by Kazi Karimuddin. It is admitted that Zaheda Begum has a prior claim to pre-empt, and that, if for any reason her claim fails, then Kazi Karimuddin is entitled to pre-empt. In each suit Kazi Karimuddin took the plea that Zehada Begum was estopped from claiming pre-emption. The lower Courts have decided the point in favour of Zehada Begum. This judgment will dispose of the appeals in both cases.

[2] As stated above, Zehada Begum is closely related to both the vendor and the vendee. Kazi Karimuddin alleged that she took part in bringing about the sale, that the property was sold partly in order to provide for the maintenance of Zaheda Begum and her husband, and that she and her husband having taken an active part in bringing about the sale and having full knowledge of the transaction had waived their right of pre-emption, if any, by their conduct and acquiescence and were estopped from challenging the sale as it was brought about by them for their own benefit. As the Privy Council explained in I.L.R. (1938) 1 Cal. 66[1] at p. 73:

"The doctrine of estoppel rests upon the principle that the person invoking it has relied upon a declaration, act, or omission of another person, and has thereby been induced to change his position to his detriment."

And again in 13 Rang. 256[2] at p. 266 'estoppel' has been explained as follows :

"It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant or an authorized agent of his to the plaintiff or some one on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action ; it is an agreement to release or not to assert a right."

Kazi Karimuddin relies upon a representation said to have been made by Zaheda Begum to Meherunnisa There is no suggestion that Kazi Karimuddin has been led by any such representation to change his position in any way, and it does not appear to me to be open to him to raise the plea of estoppel, for he is a stranger to the estoppel, and there was no privity between him and Zaheda Begum: *see* Caspersz on Estoppel, Edn. 4, at p. 72.

[3] Even assuming that the property was sold in order to raise money for the maintenance of Zaheda Begum and her husband and the money was subsequently spent on them, that cannot, in my opinion, raise a presumption of waiver of the right of pre-emption, and it has not been specifically pleaded that the money was so spent.

[4] Even if Zaheda Begum had agreed in writing to the transfer before it was made, her right of pre-emption would not have been extinguished if Kazi Karimuddin refused his consent to the sale, as is clear from the proviso to sub-s. (3) of S. 174, Berar Land Revenue Code. There appears therefore to be no reason why an implied consent not in writing should be more effective than a consent in writing.

[5] The lower Courts were correct, in my opinion, in holding that Zaheda Begum and not Kazi Karimuddin in entitled to pre-empt. The appeals are dismissed with costs. No counsel's fee as certificates have not been filed.

N.S.D. *Appeals dismissed.*

A. I. R. (35) 1948 Nagpur 20 (1) *[C. N. 6.]*

POLLOCK J.

Gulabsingh Nokesingh—Plaintiff—Appellant v. *Devendra Kumar—Defendant—Respondent.*

Second Appeal No. 478 of 1942, Decided on 18-7-1946, from appellate decree of Dist. Judge, Chhindwara, D/- 30-6-1942.

Limitation Act (1908), Art. 32 — Applicability — Suit for ejectment.

Where a tenant diverts the land to non-agricultural purposes by erecting a substantial structure on a portion of the land, a suit to eject him from that portion of the land and for removal of the structure is governed by Art. 32: *Case law relied on.* [Paras 1 and 3]

Annotation ('42-Com.) Lim. Act, Art. 32 N 1 Pt 2.

Cases referred :—

1. ('33) 14 Lah. 267 : 20 A. I. R. 1933 Lah. 705 : 145 I. C. 553 (F.B.), Mastan Singh v. Santa Singh.
2. ('97) 24 Cal. 160, Soman Gope v. Raghubir Ojha.
3. ('99) 26 Cal. 564 (F.B.), Sharoop Dass Mondal v. Joggessur Roy.
4. ('03) 30 Cal. 1063, Boidya Nath Panday v. Ghisu Mandal.
5. ('37) I. L. R. (1937) All. 623 : 24 A. I. R. 1937 All. 472 : 170 I. C. 121, Lachhman v. Ratnakar Singh.

B. R. Mandlekar—for Appellant.

D. B. Najbile—for Respondent.

Judgment. — The defendant erected a substantial *Dharmashala* on a portion of his occupancy field, and the plaintiff has brought this suit claiming that the defendant should be ejected from the portion of his holding diverted to non-agricultural purposes, and should also be directed to remove the building or pay Rs. 2000 as compensation. Both the lower Courts have held that the plaintiff's suit must fail, as he acquiesced in the building of the *Dharmashala*. The learned District Judge, has also held that the suit is barred by limitation under Art. 32, Limitation Act. The trial Court applied Art. 143.

[2] The learned Counsel for the appellant in this Court contends that Art. 143 should be applied. That article applies to suits for possession of immovable property when the plaintiff has become entitled by reason of any forfeiture or breach of condition. Article 32 applies to suits against one who having a right to use property for specific purposes perverts it to other purposes. Article 143 is obviously the more general article and cannot apply if Art. 32 can be applied. The appellant relies on the decision in 14 Lah. 267[1] but that decision seems clearly against him, for, it is said that with regard to suits in which the dispute is between the person who has given the use of his property to another for a specific purpose and this other has perverted it to an unauthorised purpose, there appears no difficulty, all the Courts being agreed that the suit falls within Art. 32. In 24 Cal. 160[2] where a landlord sued to eject his tenant on the ground that he has used the land in a manner which rendered it unfit for agricultural purposes, Art. 32 was applied and Art. 143 was not apparently suggested. That decision was approved in 26 Cal. 564.[3] Again in 30 Cal. 1063[4] where the landlord sued to eject the tenant who had rendered his land unfit for agricultural purposes, Art. 32 was apparently applied.

[3] Rustomji in his Law of Limitation remarked, at p. 652 of Edn. 5, that Art. 32 applies irrespective of the question whether the suit is based on tort or contract, that the article is quite general in its terms and is not limited to suits for compensation, and that a suit for ejectment or for injunction may come within the article. The wording of the article seems clear, and there is nothing to indicate that it does not apply to suits for ejectment. No case has been cited in which Art. 32 was not applied to such cases. In I. L. R. (1937) ALL. 623[5] where Art. 32 was not applied, the defendant had not a legal right to remain in possession for a specific purpose. There is an *obiter* remark that Art. 32 would not apply to cases where in substance the plaintiff seeks a greater relief than to have the perversion removed, but I do not think that this can be taken as a considered expression of opinion that Art. 32 would not apply to a suit for ejectment of a tenant who has perverted the property to non-agricultural purposes. I think it is clear that Art. 32 applies; it is admitted that if it does apply, the suit is thus barred by limitation. The appeal is dismissed with costs. Counsel's fee Rs. 75.

N.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 20 (2) *[C. N. 7.]*

HEMEON AND PADHYE JJ.

Kalicharan — Appellant v. *Emperor.*

Criminal Appeal Nos. 184 and 185 of 1946, Decided on 22-8-1946, from judgment of Sessions Judge, Raipur, D/- 22-7-1946.

(a) Penal Code (1860), S. 84 — Exemption under — Essentials to be proved.

A person is presumed to be responsible for his action and the natural consequences thereof unless he affirmatively proves that he is entitled to exemption from criminal liability. To bring the case within the exemption under S. 84 the accused must prove that at the time of committing the offence he was labouring under a defect of reason which had been caused by unsoundness of mind with the result that he was rendered incapable of knowing the nature of the act and that he was doing what was either wrong or contrary to law: 14 A. I. R. 1927 Lah. 674, *Rel. on.* [Para 11]

(b) Penal Code (1860), S. 84 — Insanity — Evidence — Atrocious crime without motive.

A crime is not excused by its own atrocity. From the fact that the accused killed four persons in succession without any motive no inference can be drawn that his reason must have been affected by insanity temporarily. One must look outside the act itself for the evidence as

to how much the accused knew about it : 24 A. I. R. 1937 Pat. 363, *Rel. on.* [Para 12]

(c) Penal Code (1860), S. 84 — Legal insanity — What is — Insanity affecting mind and that affecting emotions.

There is a clear distinction between 'medical insanity' and 'legal insanity.' Insanity affects not only the cognitive faculties of the mind which guide one's actions, but also his emotions which prompt his actions, and the will by which his actions are performed. It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law. It is this rule which is the basis of S. 84 : 23 Cal. 604 and (1843) 10 Cl. & Fin. 200, *Rel. on.* [Para 13]

(d) Penal Code (1860), S. 84 — Applicability.

Section 84 must be construed strictly and governs only those cases where the cognitive faculties of the accused are completely impaired. It cannot be extended to cases where the accused acts without any motive and under sudden and overpowering impulse : 10 Bom. 512; 12 Mad. 459; 22 Cal. 817 and (1859) 175 E. R. 898, *Rel. on.* [Paras 14 and 15]

(e) Penal Code (1860), S. 302 — Sentence — Extenuating circumstances.

Where the accused who was not cruel or quarrelsome by nature committed four murders in quick succession without any motive under a sudden and strong impulse the sentence of death was reduced to one of transportation for life : 24 A. I. R. 1937 Pat. 363; 14 A. I. R. 1927 Lah. 674 and 19 A. I. R. 1932 Oudh 18, *Rel. on.* [Para 17]

Cases referred :—

1. ('27) 8 Lah. 684 : 14 A. I. R. 1927 Lah. 674 : 102 I. C 774, Tola Ram v. Emperor.
2. ('37) 16 Pat. 333 : 24 A. I. R. 1937 Pat. 363 : 170 I. C. 74, Emperor v. Gedka Goala.
3. ('96) 23 Cal. 604, Queen Empress v. Kader Nasyer.
4. (1843) 10 Cl. & Fin. 200 : 8 E. R. 718, Daniel Mcnaughten's case.
5. ('86) 10 Bom. 512, Queen Empress v. Lakshman Dagdu.
6. ('89) 12 Mad. 459, Queen Empress v. Venkataswami.
7. ('95) 22 Cal. 817, Queen Empress v. Razai Mia.
8. (1859) 175 E. R. 898 : 1 F. & F. 665, Regina v. Haynes.
9. ('32) 7 Luck. 341 : 19 A. I. R. 1932 Oudh 18 : 135 I. C. 84, Ramadhin v. Emperor.

G. J. Ghate — for Appellant.

W. B. Pendharkar, Addl. Government Pleader — for the Crown.

Judgment. — This judgment governs two criminal appeals i. e. Criminal Appeal No. 184 of 1946 and No. 185 of 1946 against the judgments in Sessions Trials Nos. 21 of 1946 and 22 of 1946 respectively in both of which the accused (now appellant) has been convicted of murder and sentenced to be hanged in addition to a sentence of imprisonment passed against him for an offence under S. 324, Penal Code. The relevant facts are as stated below.

[2] The accused, Kalicharan was working as raj-mistri (mason) at Calcutta where he met Mt. Dukalbin and married her. After some time she left Calcutta as the climate of that place did not suit her and came to reside at Jora (her original village) along with Ramdanuwa, the son of the accused from his former wife. The accused continued to live at Calcutta for some time and sent letters and money-orders to his wife at Jora but finding that she did not like to return to Calcutta he himself came to reside at Jora and even purchased some land there. The accused with his wife and son was living in a house belonging to Bahorik, brother of Mt. Dukalbin, who was himself living in the adjoining house with his wife Thanwarin, his son Khorbahara and two daughters, Khorbahrin and Kachra. The children were all below 6 or 7 years of age and the youngest Kachra was only 2 months old.

[3] Mt. Dukalbin was not pulling on well with her step son, Ramdanuwa and she often complained against him to the accused. This was the cause of some disagreement between the accused and his wife and the latter threatened to leave the accused and go to live with her relations; as a fact on a day previous to the incident, i. e., on 7-4-1946, she actually went to a village Lawandi to stay with her sister. The accused requested her brother Bahorik to persuade her to return but in spite of Bahorik's persuasion she did not return that night i. e., on the night of 7-4-1946. The conduct of the wife in leaving the house and not returning that night was naturally disliked by the accused and it can be safely assumed that he was enraged against her.

[4] The next morning that is on the 8th, Mt. Dukalbin (the wife) returned only, as it appears, to ask the accused to give her As. 8 as she wanted to go to some village to attend the marriage of her relative. This added fuel to the fire and the accused threw the keys on her. At this time, Khorbahara, the minor son of Bahorik, came to the house of the accused.

[5] Mt. Dukalbin picked up the keys and went to the first floor of the house where the box containing money was kept. The accused, it appears, felt further enraged as he anticipated that his wife would take out money from the box and then leave as she proposed to attend her relative's marriage. The accused with a view to prevent and punish his wife, who was then on the first floor, proceeded to go to the first floor and unfortunate Khorbahara who happened to be there was the first subject of his wrath. The accused made a murderous attack on this boy, causing him not less than 13 injuries with a sharp-edged knife to which the boy subsequently succumbed in hospital where he was removed for treatment. He then went to the first floor, attacked his wife and caused her injuries, but before any fatal injury

could be inflicted, Baborik reached there and after some struggle snatched away the knife (ART. C) from the accused.

[6] The accused continued beating his wife with fists and blows until both of them, it appears, jumped from the first floor into the court-yard. Mt. Thanwarin, wife of Baborik with her dauther Khorbahrin in her lap came to the scene to rescue Mt. Dukalbin, her husband's sister. The accused assaulted her and also the daughter in her lap causing them several injuries which resulted in their instantaneous deaths. The accused also injured and killed Kachra, the young daughter of Baborik. One Mt. Turkabin, wife of Mehtar, a neighbour who came to the spot to intercede, was also attacked by the accused, but she escaped only with one injury on her shoulder. Thus the accused struck four persons to death and injured two persons in addition. The injures on the persons of all six were caused by the three instruments i. e., the two knives and the *adze* which were subsequently seized by the police.

[7] After snatching the knife (ART. C) from the hand of the accused, Baborik went to report the incident to kotwar and to mukaddam of the village and handed over the knife (ART. C) to the kotwar. Mt. Dukalbin also came to kotwar and reported to him the assault by the accused on her and on Khorbahara. The mukaddam, kotwar and others reached the spot immediately. Baborik also returned and found that his wife and his son were badly injured and were lying in precarious condition in court-yard and his two daughters were found in the house, the elder seriously injured and the younger dead.

[8] The tragic incident was reported to the police; usual investigation followed and as a result thereof two challans were put up against the accused. The accused was committed to sessions in both the cases and was tried and punished as stated above. The charges in Sessions Trial No. 21 of 1946 were under S. 302, Penal Code for the murders of Mt. Thanwarin wife of Baborik and of Mt. Khorbahrin and Kachra the two daughters of Baborik; the charges in Sessions Trial No. 22 of 1946 were for the murder of Khorbahara and for voluntarily causing hurt to Mt. Turkabin and to Mt. Dukalbin under Ss. 302 and 324, Penal Code.

[9] Both trials arise out of the same incident and oral and documentary evidence in both the trials is almost common. We shall, for convenience, give references from the paper book of Criminal Appeal No. 184 of 1946. The police seized three articles which are of importance in this case one knife under seizure memo EX. 5, one Basuli (adze) with hair sticking to the sharp edge and one small knife under seizure memo. EX P-19. The report of the Imperial Serologist (EX. P-36) shows that bloodstains on adze and knives were disintergrated and their origin could not be determined. The prosecution evidence consists of witnesses whom the learned Sessions Judge has rightly believed and on the strength of which he found the accused guilty of charges framed against him in both the trials. It is needless for us to refer to that evidence in detail as we agree with the conclusions and findings reached by the learned Sessions Judge and moreover no attempt was made before us to impeach the same except as to the state of mind of the accused at the time of the occurrence.

[10] The learned counsel for the appellant urged that the accused at the time of the occurrence was by unsoundness of mind incapable of knowing the nature of the act or acts which he was doing and those acts did not, therefore, constitute criminal offences. He relied on S. 84, Penal Code. He further urged that even if the appellant be not entitled to the exemption described in S. 84, Penal Code, he should in the circumstances of the case be awarded a lesser sentence i. e., of transportation for life.

[11] A person is presumed to be responsible for his action and the natural consequences thereof unless he affirmatively proves that he is entitled to exemption from criminal liability. In order to bring the case within the exemption under S. 84, Penal Code the accused must prove that at the time of committing the offence he was labouring under a defect of reason which had been caused by unsoundness of mind with the result that he was rendered incapable of knowing the nature of the act and that he was doing what was either wrong or contrary to law: *vide* 8 Lah. 684[1] at p. 690.

[12] The learned counsel for the appellant urged that the appellant had no motive to kill four persons in quick succession and that the very nature of the act of the accused shows that his reason must have been affected by insanity, howsoever temporary it may be. It may be noted that the appellant did not plead insanity in the lower Court. In his examination before the Committing Magistrate he admits having struck Khorbahara and having given a blow to Mt. Dukalbin with a knife. He remembers that the knife was snatched away from him by Baborik. He however does not remember having struck Mt. Thanwarin and her two daughters as he was not on his senses and he struck any one who came before him. The accused has neither suggested in the lower Court that he was ever before suffering from insanity nor did he disclose his family history from which such an inference can be drawn. The belated contention for the first time put forward in the

memo of appeal that he suffered from fits of insanity since long before the incident cannot carry much weight, specially as the entire evidence on record positively shows that the accused was quite sane all through before and after the incident, and there is absolutely no evidence to the contrary. We are not, therefore, satisfied that the accused suffered from insanity either before or at the time of the occurrence. Nor is such an inference possible from the acts and conduct of the accused at the time of the occurrence. As was rightly observed in 16 Pat. 333[2] at p. 339 a crime is not excused by its own atrocity. One must look outside the act itself for the evidence as to how much the accused knew about it. The accused has not examined any expert to prove his mental condition and we do not think that the opinion of Dr. Kailash Chandra (P. W. 20) that the accused may have been at the time of the incident in a temporary fit of mania or unsoundness of mind helps us very much.

[13] There is moreover a clear distinction between 'medical insanity' and 'legal insanity'. Regarding legal insanity, the learned Judges in 23 Cal. 604[3] point out that the rule in substance is the same as that laid down by the House of Lords in (1843) 10 Cl. & Fin. 200: 8 E. R. 718.[4] It is pointed out thus:

"Insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed . . . It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law. Instances of unsoundness of mind of this description would be such as these. A person strikes another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong. Or he may under insane delusion believe an innocent man whom he kills to be a man that was going to take his life, in which case by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land."

[14] It is this rule in (1843) 10 Cl. & Fin. 200[4] which is the basis of S. 84, Penal Code. This section has received a strict interpretation and is held as governing only those cases where the cognitive faculties of the accused are completely impaired: *vide* 10 Bom. 512[5]; 12 Mad. 459[6] and 22 Cal. 847.[7]

[15] There are no doubt thinkers who are in favour of extending the rule in (1843) 10 Cl. & Fin. 200[4] even to cases where the accused acts without any motive and under sudden and overpowering impulse. This is, however, the province of Legislature. We, as Judges, have to administer the law as is contained in S. 84, Penal Code. In (1859) 175 E. R. 898,[8] Baron Bramwell told the jury thus:

"It has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But I must remark as to that, that the circumstance of an act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration. We must, therefore, return to the simple question you have to determine—did the prisoner know the nature of the act he was doing; and did he know that he was doing what was wrong."

[16] On a careful consideration of the evidence and the circumstances of the present case we find ourselves quite unable to hold that the cognitive faculties of the accused were completely impaired and that he is, therefore, entitled to be acquitted by anything contained in S. 84, Penal Code.

[17] We are, however, of the opinion that we ought to alter the sentence to one of transportation for life. The accused had no motive to kill Mt. Thanwarin and her three children. If he had any motive howsoever feeble, it was only against his wife but she was not killed. Bahorik himself admits that the accused loved his children and used to feed them. There was no premeditation or pre-arrangement. There was no accomplice with and no secrecy on the part of the accused. The evidence on record shows that the accused was highly excited and complained of reeling sensation. The accused is not shown to be cruel or quarrelsome by nature. Still he under a sudden and strong impulse has committed the murders. It is no doubt true that the accused has not succeeded in bringing his case within the exemption described in S. 84, Penal Code, but the fact still remains that at the time of the occurrence he was completely unhinged and had lost the balance of his mind, the sudden impulse proved too strong for him to resist and it was under that impulse that he acted quite abnormally. These are, in our opinion, extenuating circumstances which impel us to modify the sentence of death passed against the accused by

the learned Sessions Judge. We are supported in modifying the sentence by several reported cases where in similar circumstances the accused while found guilty of the offence under S. 302, Penal Code, was awarded a sentence of transportation for life with a further recommendation to the Provincial Government that the case against him be dealt with under S. 401, Criminal P. C.

[18] In 16 Pat. 333,[2] their Lordships of the Patna High Court set aside acquittal on the ground that the accused failed to bring himself within the exemption described in S. 84, Penal Code, and convicted him under S. 302, Penal Code, but sentenced him only to transportation for life, with a further recommendation for action under S. 401, Criminal P. C. In 8 Lah. 684[1] their Lordships of the Lahore High Court dismissed the appeal and maintained the sentence of transportation for life but felt themselves bound to make a recommendation for the case to be dealt with under S. 401, Criminal P. C. In 7 Luck. 341[3] the conviction of the accused under S. 302, Penal Code, was maintained but the sentence was reduced from one of death to one of transportation for life on grounds *inter alia* that the accused committed the act in a moment of extreme excitement. Accordingly, while maintaining the conviction of the accused under S. 302, Penal Code, we reduce the sentence passed against him to one of transportation for life. In our opinion, no separate sentence need be passed for a minor offence under S. 324, Penal Code. The appeals are dismissed except for the modification in the sentence.

G.N. *Sentence modified.*

A. I. R. (35) 1948 Nagpur 24 *[C. N. 8.]*

SEN J.

Nemichand s/o Uttamchand Jain—*Appellant* v. *Commissioner, Nagpur Division, Nagpur* — *Respondent.*

Misc. First Appeal No. 286 of 1944. Decided on 9-4-1946. from order of Dist. Judge, Wardha, D/- 28-8-1944.

(a) C. P. Local Fund Audit Act (9 [IX] of 1933), S. 10 — Loss caused by gross negligence — Municipal Committee removing servant drawing salary of Rs. 90. p. m. from service — Order set aside by Deputy Commissioner on appeal—Appeal to Commissioner against order of Deputy Commissioner under R. 2 (iii) of Rules framed under S. 25 (7) of C. P. Municipalities Act (2 [II] of 1922), at instance of Municipal Committee is competent — Commissioner dismissing appeal as being incompetent — Revision petition lies to Provincial Government against order of Commissioner under S. 58, C. P. Municipalities Act read with S. 39, C. P. Land Revenue Act (2 [II] of 1917) — Municipal members voting for resolution for filing such revision petition and for its expenses on advice of experienced lawyer act with due care and attention and in good faith and are not grossly negligent—C. P. Municipalities Act (2 [II] of 1922), Ss. 25, 49 and 58.

One *W* who was in the service of Arvi Municipality on a salary of Rs. 90 p. m. was removed from service by a resolution of the municipality. This order was set aside on appeal by the Deputy Commissioner. The municipality filed an appeal before the Commissioner which was dismissed on the ground that the appeal was not competent. The Municipal Committee consulted T., a senior lawyer of the place who advised the committee to file a revision petition to the Provincial Government against the order of the Commissioner as the same was wrong. Accordingly resolutions were passed by the committee sanctioning the filing of the revision petition and Rs. 60 for the expenses of the revision petition. The revision petition was dismissed by the Provincial Government on the ground that no revision petition was maintainable as *W* was drawing a salary less than Rs. 200 p. m. The Examiner of Local Fund Accounts submitted a report under S. 8, C. P. Local Fund Audit Act objecting to the expenditure of Rs. 60. The Commissioner by his order held that the members voting for the resolution sanctioning the filing of the revision petition acted in a grossly negligent manner—thus causing an unnecessary expenditure of Rs. 60 and charged that sum against the members voting for the resolution under S. 10, C. P. Local Fund Audit Act :

Held that in view of the change of language in R. 2 (iii) of the Rules framed under S. 25 (7), C. P. Municipalities Act it is now arguable that sub-rr. (ii) and (iii) contemplate a second appeal to the Commissioner against the order of the Deputy Commissioner whether filed by an employee or by the Municipal Committee. Sub-rule (iii) as it now stands does not restrict that an appeal shall lie at the instance of the employee and not at the instance of the Municipal Committee. Reading S. 58, C. P. Municipalities Act and S. 39, C. P. Land Revenue Act together the Provincial Government is empowered to exercise the powers of revision against the order of the Commissioner in matters connected with the C. P. Municipalities Act unless it is otherwise provided in the Act, or in the rules made thereunder. No power has been conferred by the statute on the Provincial Government to divest itself of its responsibility in the matter or to frame rules providing that no revision shall lie in particular cases. Rule 3 of the Rules framed under S. 25 (7) dealing with revision is in excess of the rule making-power and to that extent it is *ultra vires*. T was thus justified in advising the Municipal Committee that the order of the Commissioner was wrong and that a revision petition to the Provincial Government was competent. The members who voted for the resolution sanctioning the filing of the revision petition acted with due care and attention and in good faith as they acted on the advice of the senior and experienced lawyer who was justified in giving his advice which he did and could not be made liable for the action they took in sanctioning the resolution for filing the revision petition. [Paras 9, 12, 14, 15, 18, 23, 26]

(b) C. P. Municipalities Act (2 [II] of 1922), S. 25 —Sub-sections (6) and (7) of S. 25 are contradictory to each other.

Sub-sections (6) and (7) are contradictory. Sub-section (6) gives an unqualified and unrestricted right of appeal against an order of the Municipal Committee dismissing an officer or servant of the committee. Sub-section (7) purports to qualify the general right leaving it to the Provincial Government to make rules as to the classes or grades of officers and servants who shall have the right of appeal under sub-s. (6). [Para 6]

(c) C. P. Municipalities Act (2 [II] of 1922), S. 49 —Standard of care expected of municipal member is not higher than that of trustee.

The standard of care expected of a municipal member is not higher than that of a trustee who is required under S. 15, Trusts Act, 1882 to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own.

[Para 22]

Cases referred :—

1. (1837) 132 E. R. 490 : 6 L. J. N. S. (C. P.) 92, Vaughan v. Menlove.
2. (1856) 11 Ex. 781 : 25 L. J. Ex. 212, Blyth v. Birmingham Water Works Co.
3. ('45) I. L. R. (1945) Nag. 218 : 32 A. I. R. 1945 Nag. 111, Beni Madhava v. Commissioner, Jubbulpore Division.
4. ('38) I. L. R. (1938) Nag. 409 : 25 A. I. R. 1938 Nag. 156 : 173 I. C. 369, Krishnarao v. Trimbak.
5. ('33) 20 A. I. R. 1933 Lah. 568 : 144 I. C. 627, Uttamchand v. Vishan Das Bhagwan Das.
6. ('08) 12 C. W. N. 28, Mohesh Chandra v. Radha Kishore.

M. Adhikari — for Appellant.

W. B. Pendharkar, Additional Government Pleader —for Respondent.

Judgment. — This is an appeal by Nemichand under S. 14 (3), Central Provinces Local Fund Audit Act, 1933, to set aside the order dated 28th August 1944 passed by the District Judge, Wardha, in Miscellaneous Judicial Case No. 4 of 1944 upholding the order of the Commissioner, dated 22nd December 1943.

[2] The relevant facts which led to the present appeal are briefly these. Govind Suryabhan Wankhede was a Water Works Overseer employed by the Municipal Committee, Arvi and was drawing Rs. 90 p. m. as his salary. He was removed from service by the resolution of the Municipal Committee passed on 30th August 1937. This order was set aside on appeal by the Deputy Commissioner, Wardha, on 2nd May 1938. The Municipal Committee filed an appeal before the Commissioner, Nagpur Division which was dismissed on 29th October 1938 on the ground that the appeal was not competent. The Municipal Committee consulted Mr. Thengdi, an advocate, whether a revision application should be filed before the Provincial Government against the order of the Commissioner. Mr. Thengdi was of the opinion that the order of the Commissioner was wrong and advised the Municipal Committee to file a revision application. Accordingly a resolution was passed by the Municipal Committee on 7th December 1938 sanctioning the filing of a revision application. At that meeting eight municipal members were present and Nemichand the appellant, was one of them. On 19th January 1940 another resolution was passed by the Municipal Committee sanctioning the expenditure of Rs. 60-2-0 for the expenses of the revision application made to the Provincial Government. The revision application made to the Provincial Government was dismissed on the ground that no revision application was maintainable as Wankhede was drawing a salary less than Rs. 200 p. m. A copy of the minutes of 19th January 1940 has not been filed and it is not clear whether the appellant was one of the persons who were present at the meeting of the 19th and voted for the resolution sanctioning the expenditure of Rs. 60-2-0 The Examiner of Local Fund Accounts submitted a report under S. 8, C. P. Local Fund Audit Act objecting to the expenditure of Rs. 60-2-0. The Commissioner, Nagpur Division by the order dated 22nd December 1943 held that the members voting for resolution No. 598, dated 7th December 1938, acted in a grossly negligent manner thus causing unnecessary expenditure of Rs. 60-2-0 which must be considered to be a loss to the municipal fund and charged that sum against the eight municipal members who voted for the resolution in equal proportions, i. e., each one of them was made liable to pay Rs. 7-8-3. The appellant was thus made liable for the payment of Rs. 7-8-3 under the order of the Commissioner. The members who were made liable for the payment of Rs. 7-8-3 filed applications to set aside the order of the Commissioner. All these cases were consolidated by the order of the District Judge, Wardha, who upheld on 28th August 1944 the order of the Commissioner. It is against the order of the District Judge that the present appeal has been filed.

[3] It may be noted at the outset that the members who voted for the filing of an appeal before the Commissioner against the order of the Deputy Commissioner, Wardha, dated 2nd May 1938, were not made liable for the filing of an appeal befor the Commissioner or for voting for the expenditure on account of the appeal; nor does it appear that any objection was taken at the time an appeal had been filed previously before the Commissioner Nagpur Division against the order of the Deputy Commissioner, dated 23rd September 1936.

[4] The defence of the appellant was that the municipal members acted with due care and attention and in good faith in order to protect the interest of the Municipal Committee, Arvi. Nemichand has supported his case by his evidence. Mr. Thengdi was examined as witness 2 for the applicant, and he fully supported the evidence of Nemichand. Mr. Thengdi is an advocate and a senior and an experienced lawyer of Arvi and had put in about 26 years practice at the Bar and is considered one of the leading lawyers of the place. He stated that the secretary, Municipal Committee, Arvi and Nemichand, the appellant, a municipal member, had consulted him whether a revision application should be filed. He deposed that he gave his opinion that the order of the Commissioner was not legal and advised the Committee to file a revision

application before the Minister and that there was a fair chance of success on merits. He was cross-examined and he stated that a second appeal lay against the order of the Deputy Commissioner and that the order of the Commissioner was incorrect and could only be remedied by a revision to the higher authority. No cross-examination was directed to elicit the grounds on which he held the opinion that a revision application against the order of the Commissioner was competent.

[5] The learned District Judge accepted the evidence of Mr. Thengdi to the effect that his advice was sought by the Municipal Committee before the revision application was filed before the Provincial Government.

[6] Section 25, C. P. Municipalities Act, 1922, deals with appointment, duties and conditions of service of officers and servants of the Municipal Committee. Sub-sections 6 and 7 of S. 25 are reproduced below:

"(6) An appeal shall lie from any decision of the Committee dismissing an officer or servant otherwise than under sub-section (5).

(7) The Provincial Government may make rules under this Act as to the classes or grades of officers and servants who shall have the right of appeal under sub-section (6), and the authorities to whom and the conditions subject to which such appeal shall lie."

It may be noted that the two sub-sections are contradictory. Sub-section (6) gives an unqualified and unrestricted right of appeal against an order of the Municipal Committee dismissing an officer or a servant of the committee. Sub-section (7) purports to qualify the general right leaving it to the Provincial Government to make rules as to the classes or grades of officers and servants who shall have the right of appeal under sub-section (6).

[7] The relevant rules framed under sub-s. 7 of S. 25 are reproduced below:

"2. (i) The following classes of employees shall have no right of appeal:—

(a) Employees referred to in proviso to sub-s. (1) of S. 25.

(b) All other employees drawing less than Rs. 10 per mensem.

(c) All employees who are temporary or on probation.

(ii) Employees drawing Rs. 10 per mensem and above shall have a right of appeal to the Deputy Commissioner. The Deputy Commissioner's order shall be final in the case of employees drawing less than Rs. 30 per mensem and shall not be subject to revision.

(iii) A second appeal shall lie to the Commissioner in case of employees drawing Rs. 30 per mensem or over. Except as provided in rule 3, the Commissioner's order shall be final.

3. Revision of the Commissioner's order shall lie to the Local Government in the case of employees drawing Rs. 200 per mensem and above."

[8] The Commissioner Nagpur Division rightly pointed out in his order dated 29th October 1938 (EX. N. A. 2):

"The two sub-ss. (6 and 7) are inconsistent with one another and as a result it is difficult to say whether R. 2 of the rules framed under sub-s. (7) is or is not *ultra vires*. An amendment of the Act so as to make these two sub-sections consistent with one another is certainly desirable."

[9] The contention of Mr. Thengdi that a second appeal was competent to the Commissioner seems justified by the terms in which the rules have been framed. In R. 2 (i) the classes of employees who shall have no right of appeal have been stated. Rule 2 (ii) states that the employees drawing Rs. 10 per mensem and above shall have a right of appeal to the Deputy Commissioner. In these two sub-rules what is stated is that employees have a right of appeal. The language of R. 2 (iii) has been changed and is no longer that an employee drawing Rs. 30 per mensem or over shall have a right of appeal to the Commissioner. The language is that a second appeal shall lie to the Commissioner in case of employees drawing Rs. 30 per mensem or over. It is arguable in view of the change of the language that these two sub-rules contemplate a second appeal whether filed by an employee or by the Municipal Committee.

[10] Under S. 175 the Provincial Government has been empowered to frame rules consistent with the Central Provinces Municipalities Act. Under S. 176 in addition to any power specially conferred by this Act, the Provincial Government may make rules generally for the purpose of carrying into effect the provisions of this Act. Sub-section (2) enumerates, without prejudice to the generality of the foregoing power, that the Provincial Government may make rules as regards certain matters Item NO. (vii) runs thus: "as to cases in which, and the authorities to whom, and the conditions subject to which, orders and decisions given under any provisions of this Act, and not expressly provided for as regards appeal, shall be appealable."

[11] The Municipal Committee is vitally interested in the proper administration of the Municipality and in exercise of its power it can appoint and dismiss a servant whom it considers inefficient or undesirable. Sub-sections 6 and 7 of S. 25 protect the officers and servants of the Municipal Committee from unjust dismissal, and safeguards have been provided.

[12] It is conceivable that the Municipal Committee may be dissatisfied with the order of the Deputy Commissioner setting aside the order of dismissal passed by the Municipal Committee. Rule 2 (iii) gives a right of appeal to the Commissioner. It does not restrict that an appeal would lie only at the instance of an employee and not at the instance of the Municipal Committee. The rule in its wide terms goes beyond the terms of S. 25 (7) but can be supported by invoking the powers under S. 176 which the Pro-

vincial Government undoubtedly had as regards the right of appeal to the Municipal Committee against the order of the Deputy Commissioner.

[13] The question whether an appeal to the Commissioner was competent or not is not relevant at this stage because the Municipal Committee has not been made liable for the filing of an appeal before the Commissioner or for sanctioning the expenses for the appeal. The question however is relevant only for the purpose of showing that the advice given by Mr. Thengdi, Advocate, to the effect that the order of the Commissioner was wrong, was justified.

[14] Rule 3 deals with revisions. The sub-section did not confer any power on the Provincial Government to frame rules about the filing of revision application and the rule framed is in excess of the rule making power and to that extent it is *ultra vires*.

[15] Section 58, C. P. Municipalities Act is important and is reproduced below:

"In all matters connected with this Act, unless it is otherwise provided for in this Act, or in the rules made thereunder, the Provincial Government shall have and exercise over the Commissioners and Deputy Commissioners, and Commissioner shall have and exercise over the Deputy Commissioners, the same authority and control as they respectively have and exercise over them in the general and revenue administration."

[15] Section 39, C. P. Land Revenue Act, confers the powers of revision on superior Revenue Officers from the orders of the inferior officers. These two sections have to be read together and it leaves no doubt that the Provincial Government has been empowered under statute to set aside the order of the Deputy Commissioner or the Commissioner in matters connected with the C. P. Municipalities Act, unless it is otherwise provided for in the Act or in the rules made thereunder. No power has been conferred by the statute on the Provincial Government to divest itself of its responsibility in the matter or to frame rules providing that no revision shall lie in particular cases.

[16] Mr. Thengdi was thus justified on the terms of the Municipalities Act in advising the Municipal Committee that a revision application to the Provincial Government was competent. The learned District Judge erred in thinking that the advice of Mr. Thengdi was given carelessly and recklessly in this case.

[17] The liability of a municipal member is defined in S. 49 (1) and (2), C. P. Municipalities Act, which is in these terms:

"(1) If any member, officer or servant of a committee makes or directs to be made any payment or application of any money or other property belonging to or under the control of such committee to any purpose not authorized by or under this Act, or assents to, or concurs or participates in any affirmative vote or proceedings relating thereto, he shall be individually liable to such committee for the loss or damage caused thereby, unless he proves that he acted in good faith and with due care and attention.

(2) Every member or officer or servant of a committee shall be liable to such committee for the loss of any money or the loss of, or damage to, other property belonging to it or under its control, if such loss or damage is a direct consequence of his negligence or misconduct."

[18] The appellant consulted Mr. Thengdi, an advocate, and under his legal advice the Municipal Committee sanctioned the resolution for the filing of a revision application. The appellant as well as the other members who voted for the resolution sanctioning the filing of a revision application acted with due care and attention. There can be no doubt that they acted honestly and it has not been suggested that the members did not act honestly in voting for the resolution.

[19] A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not: S. 2 (22), C. P. General Clauses Act. The standard of care is that of a man of ordinary prudence. Tindal, C. J. in (1837) 132 E. R. 490[1] observed:

"Instead of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

[20] In (1856) 11 Ex. 781[2] at p. 784 'negligence' is defined in these terms:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

As Winfield in his Law of Torts, Edn. 2, p. 444 has happily put:

"He is 'the man on the Clapham omnibus.' He has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules."

[21] Under S 10, C. P. Local Fund Audit Act, 1933, the liability is imposed for the loss caused by gross negligence of a person who is sought to be made liable. The Commissioner has found that the appellant and other members of the Municipal Committee acted in a grossly negligent manner and has not found them guilty of misconduct. The expression 'gross negligence' denotes a high degree of careless conduct: *vide* Charlesworth's Law of Negligence, 1938 edition, page 5, and I. L. R. (1945) Nag. 218[3] at p. 222.

[22] The standard of care expected of a municipal member is not higher than that of a trustee who is required under S. 15, Trusts Act, 1882, to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own.

[23] After careful consideration of the circumstances under which the revision application was filed by the Municipal Committee, Arvi, to

the Provincial Government, I hold that the members who voted for the resolution acted with due care and attention and in good faith, as they acted on the advice of a senior and experienced lawyer who was justified in giving his opinion which he did.

[24] The learned District Judge relied on I. L. R. (1938) Nag. 409,[4] and A. I. R. 1933 Lah. 568[5] which are not apposite. In these cases appeals had been filed in the proper Court after limitation had expired. The question was whether the appeal should be admitted under S. 5, Limitation Act. After the period for filing an appeal has expired a valuable right accrues in favour of the party in whose favour a decree has been passed and that right cannot be displaced unless good and sufficient cause is shown for not filing an appeal in time.

[25] In 12 C. W. N. 28[6] it was held that a person does not become the agent of another merely because he gives him advice in matters of business. When Mr. Thengdi gave his advice to the Municipal Committee he did not act as an agent of the Municipal Committee.

[26] The principle stated in the above cases is that where a litigant employs an agent or a lawyer and loses limitation on account of the wrong advice he must suffer and the fact that he acted on their advice is no ground for admitting the appeal after the expiration of limitation. That is not the position here. The question here was whether a revision application should be filed against an order of the Commissioner. That was a matter for a lawyer to decide. The municipal members consulted Mr. Thengdi as they would have consulted in a matter affecting their private interest and after they took that care and caution they are protected and are not liable for the action they took in sanctioning the resolution for filing a revision application.

[27] The appeal is allowed with costs. The order of the District Judge is contrary to law and is set aside. The amount of Rs. 7-8-3 already paid by the appellant be refunded to him. Counsel's fee Rs. 30.

D.H. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 28 *[C. N. 9.]*

NIYOGI C J.

Emperor v. *Vijaidatta Jha Naraindutta Jha — Accused — Non-applicant.*

Criminal Revn. No. 45 of 1946, Decided on 28-6-1946, against order of District Magistrate, First Class, Mandla, D/- 7-11-1945.

(a) Criminal P. C. (1898), S. 110 — Object — Use of section as indirect means of securing conviction.

The object of S. 110 is preventive and not punitive. The section is intended to deal with and control ex-convicts or habitual criminals and dangerous and desperate outlaws and to secure the interest of the community from injury at their hands. It is not intended to provide an indirect means of securing conviction in cases where a prosecution for a substantive offence is likely to fail. The section should be used with caution and discretion otherwise it might become an engine of oppression: 25 A. I. R. 1938 Mad. 35 and 15 A. I. R. 1928 All. 682, *Rel. on.* [Paras 5, 6]

Annotation : ('46-Com.) Criminal P. C., S. 110, N. 2, Pts. 1, 2, 3, 9, 10.

(b) Criminal P. C. (1898), S. 110 — Proceedings under — Nature of — Accused must be told as to under which particular sub-section he is charged.

The proceedings under S. 110 are judicial and not executive and the Court is expected to follow the procedure strictly: 6 A. I. R. 1919 Mad. 633, *Rel.* on. [Para 6]

When a person is sought to be proceeded against under S. 110 it must be made clear to him as to which particular sub-section he is charged under. Mere assertion that a person is of criminal tendencies or of tyrannical habits is not enough. It must be specifically stated under which of the categories specified in S. 110 the accused is alleged to come : 13 A. I. R. 1926 Lab. 45, *Rel. on.* [Para 6]

Annotation : ('46-Com.) Criminal P. C., S. 110 N. 2, Pts. 12, 13.

(c) Criminal P. C. (1898), S. 110 — Evidence for defence at least as good as that for prosecution — There can be no order under S. 110 : 17 A. I. R. 1930 Lab. 1051, *Rel. on.* [Para 7]

Annotation : ('46-Com.) Criminal P. C., S. 117, N. 7, Pt. 38.

(d) Criminal P. C. (1898), S. 110 (f) — Desperate or dangerous character.

The fact that a man is by temperament quarrelsome and that he occasionally gives threats does not make him a desperate character or one who is dangerous to the community. The owner of a forest, which served the needs of a large group of adjacent villages, who used threats to prevent evasion of his dues cannot be denounced as a dangerous or desperate character ; 18 A.I.R. 1931 All. 437, *Rel. on.* [Para 7, 17]

Annotation : ('46-Com.) Criminal P. C., S. 110 N. 15, Pts. 5, 8, 9.

(e) Criminal P. C. (1898), S. 439 — Finding that Cattle were found grazing in a particular forest cannot be questioned in revision : 33 Mad. 85 *Rel. on.* [Para 14]

Annotation : ('46-Com.) Criminal P. C., S. 439 N. 15, Pt. 1.

Cases referred :—

1. ('38) 25 A. I. R. 1938 Mad. 35 : 172 I. C. 866, In re Rathinam Pillai.
2. ('29) 51 All. 459 : 15 A. I. R. 1928 All. 682 : 116 I. C. 804, Emperor v. Mannilal.
3. ('19) 6 A. I. R. 1919 Mad. 633 : 47 I. C. 277, Kirpa Sindhu v. Emperor.
4. ('26) 13 A. I. R. 1926 Lah. 45 : 89 I. C. 513, Sohan Singh v. Emperor.
5. ('30) 17 A. I. R. 1930 Lah. 1051 : 129 I. C. 276, Ahmad Ali v. Emperor.
6. ('31) 18 A. I. R. 1931 All. 437 : 133 I. C. 535, Bangi Lal v. Emperor.
7. ('10) 33 Mad. 85 : 4 I. C. 1057, Velu Tayi Ammal v. Chidambara Velu Pillai.
8. ('46) 1946 A. L. J. 206 : 33 A. I. R. 1946 P. C. 20 : 223 I. C. 153 (P. C.), Kwakumensah v. The King.

W. B. Pendharkar, Addl. Government Pleader — for the Crown.

V. R. Sen — for the accused.

Order. — This is a reference under S. 438, Criminal P. C., by the District Magistrate,

Mandla, with the recommendation that the order of discharge passed by the Sub-Divisional Magistrate in proceedings under S. 110, Criminal P. C., should be set aside and further enquiry be ordered.

[2] The non-applicant Vijaidatta is the malguzar of a number of villages including Bhawartal. This village has a large area of forest which is used for purposes of *nistar* by the residents of the surrounding villages. It was alleged that in the year 1941, the non-applicant got into heavy debts to satisfy which he had to part with two of his villages and ever since he had been endeavouring to augment his income by taking recourse to harassing and bullying the villagers who used the Bhawartal forest for *nistar*, that he was in the habit of extorting money from ignorant villagers by bringing unlawful pressure on them by forcibly impounding their cattle or by wrongfully detaining the villagers and their carts and subjecting them to mal-treatment such as tying them by their necks and tramplig them under his horse and threatening their lives with a gun. He struck terror in the hearts of the villagers by declaring that he was exempt from punishment for the offence of murder. He also threatened to implicate innocent villagers in false cases and refused to pass receipts for the amounts which he received from the villagers.

[3] The proceedings under S. 110, Criminal P. C., were started on a report received by Mr. Hyde, the then District Magistrate. An enquiry was made by Mr. B. S. Choukse, Magistrate, First Class, Mandla, who was also the Sub-Divisional Magistrate. Both parties examined a number of witnesses and the learned Magistrate after a careful scrutiny of the evidence came to the conclusion that the circumstances did not justify an order calling upon the non-applicant to enter into a bond for good behaviour in terms of S. 110, Criminal P. C.

[4] The learned District Magistrate regards the case as one of administrative nature designed to secure protection of tenants from oppression by malguzars and points out that the effect of this decision is likely to affect adversely the already low morale of poor tenants, and to strengthen the hands of the bullies amongst the the malguzars. It is stressed that the Sub-Divisional Magistrate overlooked some important decisions of the civil Court filed by the prosecution and that he gave undue prominence to some part of the evidence and ignored the significance of another part, and that he was wrong in allowing himself to be misled by the defence evidence and that the case as between the harassed tenants and tyrannical malguzars was not viewed in proper perspective. Lastly it is emphasized that the Sub-Divisional Magistrate failed to appreciate the attempt of the police to secure protection for the oppressed tenantry as honest and *bona fide*.

[5] Before proceeding to deal with the facts of the case, it may be observed that the object of S. 110 is preventive and not punitive as the very terms of the section show, that it is intended to control the activities of persons who are by habit robbers, house-breakers, thieves, or forgers, receivers of stolen property or those who habitually protect or harbour thieves or aid in the concealment or disposal of stolen property, or those who habitually commit or attempt to commit, or abet the commission of the offence of kidnapping, abduction, extortion, cheating or mischief, or who are in the habit of committing or getting involved in the commission of offences involving a breach of peace, or generally those who are so desperate and dangerous as to render their being at large without security hazardous to the community.

[6] As pointed out in A. I. R. 1938 Mad. 35[1] S. 110 is intended to deal with ex-convicts, or habitual criminals, and dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of condign punishment for crime are not sufficient deterrents or adequate safeguards for the public. The section is not intended to provide an indirect means of securing conviction in cases where a prosecution for a substantive offence is likely to fail : *see* 51 ALL. 459.[2] The section is really intended to curb the dangerous activities of hardened criminals, and to secure the interest of the community from injury at their hands. If it is not used with caution and discretion it might easily become an engine of oppression. It may further be pointed out that the proceedings under this section are judicial and not executive : A. I. R. 1919 Mad. 633[3] at p. 634 and the Court is expected to follow the procedure strictly. When a person is sought to be proceeded against under this section it must be made clear to him as to which particular sub section he is charged with. Mere assertion that a person is of criminal tendencies or of tyrannical habits is not enough. It must be specially stated under which of these categories of cases the accused is alleged to come : A.I R. 1926 Lah. 45.[4]

[7] When the evidence for the defence is at least as good as that for the prosecution there can be no order under S. 110, Criminal P. C. : *see* A I.R. 1930 Lah. 1051[5] The fact that a man is by his temperament quarrelsome and that he occasionally gives threats does not make him a desperate character or one who is dangerous to the community : A.I.R. 1931 ALL 437[6]

[8] The facts of the case are that on 30th

August 1944 Mr. Hyde, the then Deputy Commissioner, received complaints from the cultivators of the village Amdongri to the effect that the non-applicant who was the malguzar of Bhawartal seized their cattle from the area of Amdongri, drove them to his own village Bhawartal and kept them in his enclosure and that when the owners of the cattle demanded their release he compelled them under the threat of a gun to pay annas 10 per head of cattle as grazing charges. Mr. Hyde caused a report to be sent to the police through his reader whereon the police began to collect material for initiating proceedings under S. 110, Criminal P. C. The police officers went round and got as many as 21 reports from the villages round about Bhawartal.

[9] Most of the reports are of 14th or 19th september 1944 and one is of November 1944. Some of the reports e. g., Exs. P-4, P-9 and P-18, do not bear any date. The persons who have been examined to substantiate the allegations contained in the reports are from the villages Khari, Amdongri, Bijegaon, Manga and Lafra.

[10] The general story told by them is that when they were peacefully grazing their cattle within an area in Government villages under their licences, or when they entered the non-applicant's village Bhawartal, for purposes of *nistar* their cattle were impounded and when they protested they were threatened with a gun, or with being trampled over by his horse or with being tied with rope. There is no evidence, however, of any man having suffered from the trampling of the horse or the firing of the gun, or even whether the gun was loaded when the gun was pointed at them. Except the complaint made by the residents of Amadongri to Mr. Hyde the complaints related to the happenings nearly two years before the incident.

[11] Going to the particulars it would appear that the witnesses spoke about the incidents at Khari, Bijegaon, Lafra, Manga and Bamni, besides the main incident at Amadongri which form the basis of the Deputy Commissioner's report. As the last one is most prominent I may consider it first.

[12] According to Laxman (P. W. 2) the cattle were grazing near Paniwala tree within the boundary of Amadongri when they were unlawfully seized by Vijaidutta. As against the witnesses examined for Crown P. W. 9 to P. W. 18 there are witnesses for the defence D. w. 13, D. w. 16, 17, 21, 22, 23, 27 and 28 who say that the cattle at Amadongri were grazing in the forest of Bhawartal. There is no evidence for the Crown as to the exact boundary between the forest of Amadongri and Bhawartal, and it is extremely difficult to say on the evidence on record that the cattle were not grazing in the Bhawartal forest and we have it from Mulchand patwari (P. W. 60) that even the people of Amadongri admitted that their cattle were grazing in the Bhawartal jungle although they complained that the cattle were impounded by the malguzar and that the people were forced to agree to pay compensation. There is ample evidence on record to show that the malguzars owning these forests levy some charges by way of penalty or compounding fee or compensation for the damage done to the forest on those who graze or take any forest produce without licence. Amadongri people were in the wrong and because the cattle were caught trespassing they had to agree to the compensation.

[13] The gun seems to have played no prominent part in the affair. It is not even known whether it was loaded so as to strike terror in the hearts of the people. Even assuming the story to be true the circumstances show that but for that threat the people would have taken away their cattle by force. Whether the threat given by Vijaidutta was justified or not there could be no extortion if Amadongri people were the culprits and liable to pay compensation according to the usual custom. There is nothing on record to help the determination of the question whether compensation that was demanded by Vijaidutta and agreed to be paid by the Amadongri people was reasonable or excessive. Even assuming that it was excessive it would only show that Vijaidutta was inclined to be harsh with people invading his right in the jungle.

[14] The lower Court's finding that the cattle of the complainants from Amadongri were found grazing in Bhawartal forest is fully sustained by the weight of the evidence on the record, apart from the fact that the finding is not open to question in revision : 33 Mad. 85.[7]

[15] The main complaint which was the immediate cause of the initiation of proceedings against Vijaydutt having collapsed it is unnecessary to look into the complaints which relate to stale incidents that had occurred 2 or 3 years before the proceedings were started. In the first instance, they are robbed of much of their gravity because they were elicited by the police long after the parties concerned had forgotten about the incidents. It is not improbable that when the police took the initiative the complainants would try to magnify petty happenings of the daily life in the forest villages and add some embellishments to make their stories pass muster. They would at all events try to show themselves in the right and Vijaydutt in the wrong. As they are the interested parties their word would naturally not carry the weight which would normally be attached to the

word of a disinterested witness. Apart from general considerations, there is concrete material on the record which casts a cloud of suspicion on the complaints. The Brijgaon incident illustrates the point. The report relating to the village is EX. P-11. It said that the cattle were taken from the Government forest to Bhawartal. But P. W. 19 Pardeshi states that Vijayutt declared the cattle to have trespassed into Bhawartal forest and threatened with the gun if they tried to take them away by force without payment of the customary compensation. This witness eventually had to admit that all of them had lathis and that they were mistaken in starting to drive their cattle without permission. Reading between the lines, the case was that the party of the owners whose cattle trespassed into Bhawartal were armed with sticks and were driving their cattle home by show of force. Would not Vijayadutt be justified in using threats which in fact proved effective? Pointing of a gun only constitutes the offence of assault, and it is unlawful only when it is done without lawful excuse : *see* 1946 A.L.J. 206[8] at p. 208.

[16] I have carefully read the evidence, adduced on both sides, bearing on the incidents of Khari, Manga, Lafra and Bambni and I find nothing in these incidents except a *bona fide* dispute between the parties as to the place where the cattle were grazing. No credence can be attached to such cock and bull stories—stale as they were—as that the people were threatened with being trampled over by horse and with being tied with ropes. It is remarkable that even the complainant's witnesses admit that Vijayadutt troubled no one who grazed his cattle under a licence.

[17] One thing prominently emerges from the evidence as a whole. It is that Vijayadutt purported to act in defence of his property and levying compensation as penalty for invasion of his rights as owner of the forest. Right or wrong, the custom was respected even by the trespassers as they used to pay the charges levied according to it. Even granting for the nonce that Vijayadutt who was the owner of the forest which served the needs of a large group of adjacent villages used threats to prevent evasion of payment of his dues, he cannot rightly be denounced as a dangerous or desperate character within the meaning of that expression used in S. 110, Criminal P. C. He had to take recourse to them for the more efficient management of his property. On the evidence there is no case of extortion for the reason that he was not making any illegal gain to himself or causing illegal loss to others and there is overwhelming evidence of persons including responsible officers of Government to disprove the allegation that Vijayadutta is a man of dangerous and desperate character. The bulk of the witnesses are indeed malguzars, though there are some cultivators also, but even if all the witnesses were malguzars, why should their evidence be rejected? A man is best judged by his own peers.

[18] I find there was intrinsically nothing in the case to justify initiation of proceedings under S. 110, Criminal P. C. The case acquired adventitious importance by the fact that the report was made to the police by the Deputy Commissioner. I see no ground to justify acceptance of the reference. I discharge the reference.

G.N. *Reference discharged.*

A. I. R. (35) 1948 Nagpur 31 *[C.N. 10.]*

POLLOCK J.

Jairam Govinda—Defendant—Appellant v. *Anandrao Vinayak—Plaintiff—Respondent.*

Second Appeal No. 428 of 1942, Decided on 29-7-1946, from appellate decree of Second Addl. Dist. Judge, Nagpur, D/- 18-7 1942.

Bengal Alluvion and Diluvion Regulation (11 [XI] of 1825), S. 4 (1)—Applicability—Land forming part of bed of small and shallow river—River-bed belonging to landlord when submerged — Land cannot cease to be landlord's when it ceases to be submerged — Clause 1 cannot apply to such case : 13 M.I.A. 467 (P.C.) and 13 A.I.R. 1926 Cal. 368, *Rel. on*, 2 A.I.R. 1915 Cal.742, *Not foll.*: *Case law referred.*

Cases referred :—

1. ('69-70) 13 M. I. A. 467 : 5 Beng. L. R. 521 : 2 Suther 336:2 Sar. 594 (P.C.), Lopez v. Muddun Mohun.
2. ('27) 6 Pat. 481 : 14 A. I. R. 1927 P.C. 89 : 54 I. A. 156 : 101 I. C. 1 (P. C.), Keshava Prasad v. Secy. of State.
3. ('39) 26 A. I. R. 1939 All. 626, Mahadeo v. Baleshwas Prasad.
4. ('24) 90 I. C. 1010 : 13 A. I. R. 1926 Cal. 368, Andoru Akanda v. Nasir Akanda.
5. ('75) 24 W. R. 317, Jagdish Chunder v. Zahoorul Huq.
6. ('15) 26 I. C. 406 : 2 A. I. R. 1915 Cal. 742, Ramjan Ali v. Maharam Ali.
7. ('18) 45 I. C. 929: 5 A.I.R. 1918 Cal. 205, Govinda Hota v. Kristapada Singha.

S. C. Dutt Choudhury—for Appellant.

A. V. Khare and S. A. Zinjarde — for Respondent.

Judgment. — The defendant-appellant owns a malikmakbuza field, Khasra No. 19, in mouza Bharatwada in Nagpur district. At the last settlement in 1914, it was bounded on the north by the southern bank of what may be described as a small and shallow river. Subsequently, there was an accretion because of the subsidence of this river, and this accretion which measured. 09 acres is shown by the dotted red line in the map. Later, there was a considerably larger accretion shown by the solid redline in the map. The second accretion has been numbered as Khasra No. 16/3 and has an area of 2 08 acres. The river-bed, which was given Khasra No. 16 at the settlement admittedly belongs to the landlord. The present river-bed is khasra No. 16/1.

[2] This suit was brought on behalf of the landlord to recover possession of these two areas .09 and 2.08 acres, which have emerged on the northern boundary of the defendant's field, and the question is whether under the Bengal Alluvion and Diluvion Regulation, 1825, this forms an accretion to the defendant's field. At first sight, cl. 1 of S. 4 of that Regulation appears to favour the defendant's contention that this land must be considered an increment to his field. That clause runs as follows:

"When land may by gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed."

A limitation however has been placed on the application of this clause by the Judicial Committee. In 13 M. I. A. 467,[1] they remarked

"when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with, was the gain which an individual proprietor might take in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State."

That decision was approved by the Judicial Committee in 6 Pat. 481.[2] In A.I.R. 1939 ALL. 626[3] at p. 629 the law deduced from these decisions was that if the land in dispute is identifiable with rerefence to its physical features, land marks or by measurement, it should be deemed to continue to belong to the former owner. The decision in 90 I. C. 1010[4] is precisely in point, and it was there held, following the decisions in 24 W. R. 317[5] and 26 I. C. 406,[6] that if the bed of a river is the property of a private individual when it is submeged it remains his property when it emerges from the water. There is a decision to the contrary in 45 I. C. 929[7] but with great respect the decision in 90 I. C. 1010[4] appears to be in accordance with the decision of the Judicial Committee. If Cl. 1 of S. 4 of the Regulation is to be limited in the sense they have laid down, it cannot apply in the present case, and there is then no reason why land forming part of the river bed that belonged to the landlord when submerged should cease to be his when it ceases to be sub merged. The appeal fails and is dismissed with costs. Counsel's fee Rs. 15.

V.R *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 32 *[C. N. 11.]*

PADHYE J.

Rambhau Wamanrao Joshi and another—*Plaintiffs — Applicants* v. *Ganesh Deorao Patil and others*—*Defendants — Non-Applicants.*

Civil Revn. No. 311 of 1945, Decided on 3-9-1946, from order of Sub-Judge, First Class, Daryapur, D/- 26-4-1945.

Civil P. C. (1908) O. 2, R. 3—Claim for pre-emption and in the alternative for declaration of title — Vendee and rival pre-emptor made parties—Maintainability of suit.

W sold certain joint family property to *D*. One *H* claimed to pre-empt the property. Pending the suit of *H* for pre-emption sons of *W* brought a suit against *D* and *H*. The plaintiffs claimed possession on pre-emption as the main relief and possession on declaration that the sale was not binding on them for want of legal necessity as an alternative relief:

Held, that there was no joinder, much less a misjoinder of causes of action in the suit. Assuming, however, that two causes of action were joined, such joinder was perfectly unobjectionable as it would not render the suit in any way vexatious or harassing to the defendants: *Case law referred.* [Para 11]

Held further that there was no misjoinder as to defendants also, as *H* was a necessary party to the suit and was interested in both the reliefs claimed alternatively by the plaintiffs. [Para 12]

Annotation:—

('44-Com.) Civil P. C., O. 2, R. 3, Note 1, Note 5 and Note 7 Pts. 1 & 2.

Cases referred:—

1. ('67) 8 W. R. 15 : Beng. L. R. Sup Vol 731 (F.B.), Rajaram Tiwari v. Luchman Persbad.
2. ('10) 9 N. L. R. 18 : 18 I. C. 826, Mohanlal v. Tekchand.
3. ('42) I. L. R. (1942) Nag. 325 : 28 A. I. R. 1941 Nag. 199 : 195 I. C. 671, Damodhar Narayan v. Narayan Gangaji.
4. Misc. S. A. No. 311 of 1943, D/-5-4-1945, Bhagirath v. Mansingh.
5. *Since reported in* ('47) 34 A. I. R. 1947 Nag. 229 : I. L. R. (1947) Nag. 124 : 229 I. C. 513, Marutirao v. Nathmal.
6. ('33) 60 Cal. 918:20 A. I. R. 1933 Cal. 706: 147 I.C. 455, Alexander Broult v. Indrakrishna Kaul.
7. ('14) 36 All. 476: 1 A.I.R. 1914 All. 271: 25 I.C. 283, Bhagwati Saran Man Tiwari v. Parmeshar Das.
8. ('33) 29 N. L. R. 330 : 20 A. I. R. 1933 Nag. 257 : 147 I. C. 21, Laxminarayan v. Faijulal.
9. ('46) 33 A. I. R. 1946 Bom. 266 : I. L. R. (1946) Bom. 184 : 225 I. C. 311 (F. B.), Raychand v. Manekkal.

V. L. Prabhune—for Applicants.
Y. S. Tambe—for Non-Applicant No. 3.

Order.—This revision by the plaintiffs (hereinafter called applicants) arises out of an order passed by the Court of the Sub-Judge, 1st Class, Daryapur, holding their suit as framed was multifarious, involving misjoinder of defendants and causes of action and requiring them either to elect or to withdraw the suit. The lower Court also observed that the plaintiffs have no right to claim pre-emption until the sale of the property in question by their father is set aside.

[2] On 29-7-1943, Wamanrao, father of the plaintiffs, transferred by sale entire land in subdivision No. 10/2 (a) in favour of Deorao, the father of the present non-applicant 1, Ganesh, for Rs. 300. Deorao, in his turn, sold away the same in favour of non-applicants 2 and 4, viz. Bajirao and Namdeo. Non-applicant 3 Haribhau was jointed in the suit only on the ground that he claimed to pre-empt the property sold

and that his suit for pre-emption (Civil Suit No. 324A of 1943) was pending.

[3] The plaintiffs contended that the property in suit was their joint family property, acquired by their father, Wamanrao, on 29.12.1942 out of joint family nucleus in his hands and the sale of property by Wamanrao was not binding on them for want of legal necessity. They also contended that the consideration of Rs. 300 was inadequate. The plaintiffs claimed that they, as sons of the vendor, Wamanrao, have a preferential right to pre empt and that they be allowed to pre-empt for Rs. 300, which amount they were willing to pay to the vendee. They further claimed in the alternative that in the event of their being not allowed to pre-empt, the sale be held not binding on them and they should be put in possession of the property either on pre-emption or on declaration as stated above.

[4] The plaintiffs' claim was denied by all the defendants (non-applicants) but the only plea that is relevant for this revision is contained in the written statement of defendant 3 in these words:

"The sale deed dated 29-7-43 stands till it is set aside by a properly instituted suit. No suit for pre-emption lies till then. The relief of setting aside the sale or the possession on the ground of absence of legal necessity and the claim of pre-emption cannot be claimed in this suit. There is a misjoinder of causes of action and defendants."

This objection was accepted by the lower Court and the plaintiffs were ordered either to elect or withdraw the suit and this is the order sought to be revised.

[5] In 8 W. R. 15[1] Sir Barnes Peacock, C. J. observed:

"Such a joinder in one suit of distinct causes of action against different defendants, each of whom is unconnected with the cause of action against the other, complicates the case before the Judge, and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him, though admissible against one or more of the others. Moreover, it is vexatious and harassing to the different defendants."

This is the basic principle why suits involving misjoinder of causes of action and parties are regarded bad and the plaintiff is required to elect.

[6] The learned counsel for the applicants contended that what the plaintiffs claim in the present suit is possession of property and the cause of action for this relief is furnished by the fact that the property is the joint family property in which the plaintiffs have vested interest and that this property has been sold away by their father without legal necessity. Under Hindu law, the plaintiffs are entitled on proof of these facts to the restoration of possession as held in 9 N. L. R. 18[2] and subsequent cases following it. Under the provisions of the Berar Land Revenue Code they are entitled to pre-empt preferentially, as on account of their status as co-parceners, they are in the position of co-occupants. I notice that the plaintiffs have claimed in their plaint possession on pre-emption as the main relief and possession on declaration that the sale was not binding against them for want of legal necessity as an alternative relief. This is, however, not very material, as the grant of proper relief is under O. 7, R. 7, Civil P. C., always within the discretion of the Court. It is quite possible that even on the grant of declaration the plaintiffs may ask for and be permitted to pre-empt the share of their father in the property sold as is open for them to do under the Berar Land Revenue Code.

[7] According to I. L. R. (1942) Nag. 325[3] the sons in a joint Hindu family have a right of pre-emption as they are not in the position of a vendor in the sale effected by their father. This case is distinguished by Pollock J. in the unreported decision in Misc. S. A. No. 311 of 1943[4] in which the learned Judge further observed that the pre-emptor can challenge the vendor's title to sell part of the property sold as he cannot claim to be placed in possession of the property which is his in substitution for the vendee. In another case, Civil Revn. No. 544 of 1944, dated 5-7-1946[5] Puranik J. observed as under:

"Under the terms of S. 183, Berar Land Revenue Code itself the Court is bound to examine the transaction and cannot say that it will not go into the question of lease which, it has been asserted, has been introduced in the sale deed by the defendants with a view to defeating the rights of the pre-emptor as stated by him in the plaint. On pre-emption the plaintiff is entitled to be placed in possession of the property, and it is but proper that he should have good title on payment. If, as the plaintiff says, the lease is bogus, and if defendant 1 himself is in possession, defendant 2, being merely a benamidar, the plaintiff is entitled to have that point cleared up in this very suit instead of being driven to another suit. There is nothing in the Berar Land Revenue Code stating that an inquiry of the nature contemplated by the plaintiff in this suit should not be held. Inasmuch as defendant 2 is a necessary party to such an inquiry, and as that inquiry must be held in his presence the plaintiff is right in joining him as a party. The Court below had jurisdiction to hold the inquiry in this very suit. Assuming that the plaintiff in this suit for pre-emption is joining a claim for a declaration regarding the lease deed, which is a distinct cause of action, I am clearly of the opinion that in the circumstances of the case and on the allegations made in the plaint the plaintiff ought to be permitted to join the same and not be driven to a separate suit."

[8] Even according to the learned lower Court the plaintiffs cannot claim pre-emption until they get the sale set aside and still he wants them to have the same done by a separate suit with the possible result that by the time

such a declaration is obtained by the plaintiffs their claim for pre-emption would be barred by time. This itself should have convinced the learned Judge that an inquiry into the binding nature of the sale deed must be gone into in this very suit even for the purpose of granting to the plaintiffs the relief of pre-emption.

[9] In 60 Cal. 918[6] cause of action is defined as meaning every fact which, if traversed, would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. In other words, it refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. In the present case the only facts on which the plaintiffs ask the Court to give judgment in their favour are that the property sold away by their father is their joint family property in which the plaintiffs have a share and that the sale by their father is not binding on them. These facts being established, the plaintiffs would be entitled to a judgment in their favour, and the Court shall grant appropriate relief which on the facts proved they would be found entitled to in law.

[10] The main contention of the learned counsel for the non-applicants is that the plaintiffs cannot in the same suit claim alternative reliefs on inconsistent facts. I do not see much force in this contention. The facts on which the plaintiffs' suit is based are the same though the reliefs claimed are inconsistent and this is permissible in law. In 36 ALL. 476[7] their Lordships of the Allahabad High Court held that where a plaintiff sues to recover a part of the property sold by the vendor as owner and the remaining part of the property on the ground that he is entitled to pre-empt, such a suit is not bad for misjoinder of causes of action and the owner (plaintiff) can be allowed to pre-empt on payment of proportionate price. It is now well established that the pleas of ownership and easement though inconsistent can be put forward in the alternative in the same suit: *vide* 29 N. L. R. 330.[8] The Full Bench of the Bombay High Court in a case reported in A. I. R. 1946 Bom. 266[9] has after an exhaustive discussion of the point observed at page 270:

"It is certainly open to a party to raise inconsistent defences in the alternative, but at the time when evidence is led he has got to elect as to which of the two alternative inconsistent defences he is going to prove. If he relies on the plea of ownership and leads evidence on that point and fails in doing so, and if he thereafter relies on the same evidence for easement rights, he will be met with a serious difficulty in establishing a claim of easement because of the plea of ownership for which he led evidence and failed. However, it does not necessarily follow that, if a person makes inconsistent pleas he should not be allowed to lead evidence on those pleas. A party, if he chooses, is entitled to lead evidence on both the alternative pleas; and it is for the Court to decide whether he is entitled to succeed on either of the pleas. Certainly he cannot succeed on both."

[11] In my opinion there is no joinder and much less a misjoinder of causes of action in this suit. Assuming, however, that two causes of action are joined in the suit, such joinder is perfectly unobjectionable as it would not render the suit in any way vexatious or harassing to the defendants. The rule that a pre-emptor should not be permitted to deny the title of the vendor is as already shown above not rigid; otherwise the right of pre-emption could be successfully defeated by a vendor by fraudulently including in the sale deed some property which did not belong to him and belonged to the pre-emptor himself. Order 2, R. 1, Civil P. C., requires that every suit shall, as far as practicable, be so framed as to afford grounds for final decision upon the subject in dispute and to prevent further litigation concerning it. It is moreover neither necessary nor even advisable that the plaintiffs should be obliged to file separate suits when in those suits common questions of fact and law would arise.

[12] It is further contended by the non-applicant (defendant 3) that the suit as framed involves a misjoinder of the defendants as he is not concerned with that part of the plaintiffs' claim in which they claim possession on the ground that the sale deed by their father was not binding on them. The contention is not sound. Defendant 3 has instituted a suit for pre-empting the entire property sold by the plaintiffs' father. He is faced with two objections, firstly that he cannot pre-empt at all as the plaintiffs are entitled to pre-empt preferentially and secondly that he can pre-empt, if at all what Wamanrao, the plaintiffs' father, could validly convey to his vendee. He is thus interested in both the reliefs claimed alternatively by the plaintiffs though to justify his joinder it is not necessary that he should be interested in the entire claim of the plaintiffs. Defendant 3 claims to be substituted by pre-emption to the right, title and interest of defendants 1, 2 and 4 and he is therefore not only a proper but also a necessary party to a suit in which the right, title and interest of the vendee whom he desires to pre-empt are to be determined. Undoubtedly as a rival pre-emptor he is a necessary party to the plaintiffs' suit.

[13] Thus the plaintiffs' suit as framed is not bad on the ground that it is multifarious. It does not involve, according to me, either misjoinder of causes of action or misjoinder of defendants and the plaintiffs cannot therefore be called upon to elect or to withdraw the suit. It may be that the plaintiffs may be well-advised

to amend the plaint in order to clarify and to set out the reliefs claimed in proper order but this is a matter which I leave to the plaintiffs.

[14] That the order of the lower Court in so far as it has refused to try the suit as framed amounts to a denial of jurisdiction vested in it. It is necessary with a view to shorten litigation and to save unnecessary costs that the order of the lower Court should be interfered with at this initial stage of the suit.

[15] I therefore allow this revision with costs. Counsel's fee Rs. 25. The order of the lower Court requiring the plaintiffs to elect or to withdraw the suit is set aside and the case is sent back to the lower Court for trial on merits.

D.H. *Revision allowed.*

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* A. I. R. (35) 1948 Nagpur 35 *[C. N. 12.]*

PURANIK AND POLLOCK JJ.

Meghraj Ramkaranji Golcha — Decree-holder — Appellant v. *Kesarimal Rikhabchand — Judgment-debtor — Respondent.*

Misc. Second Appeal No. 265 of 1943, Decided on 21-3-1946, from order of District Judge, Amraoti, D/- 23-7-1943.

* (a) Civil P. C. (1908), O. 21, R. 2— Adjustment of decree—Modes of—Variation of decree—Execution.

Agreements to compromise a claim to execute a decree may be divided into three classes. In the first class, the decree-holder agrees to give up all his rights under the decree on the judgment-debtor's doing something or other, and there is no adjustment until the judgment-debtor has done whatever he promised. The second class of agreement is where the decree-holder agrees to give up all his rights under the decree in return for a promise by the judgment-debtor to do something or other; on the recording of such an adjustment, the decree becomes fully satisfied and the decree-holder can enforce the fulfilment of the judgment-debtor's promise only by a separate suit. It is now well settled that such an agreement amounts to an adjustment of the decree: 20 A. I. R. 1933 Mad. 28; 28 A. I. R. 1941 Lah. 149 (F.B.); 22 A. I. R. 1935 Bom. 303 and 26 A. I. R. 1939 P. C. 80, *Rel. on.* [Para 4]

The third class of agreement is one in which the parties agree that the decree shall be modified in some way or other and that the decree-holder shall be entitled to execute the decree as modified but not the original decree. The question of the class in which the compromise falls is a question of fact. [Para 4]

Where the decree-holder, by the compromise never intended to give up his right to execute the decree (for money) merely in return for a promise by the judgment-debtor to put him in possession of the judgment-debtor's bungalow at some future date, but the handing over of possession to the decree-holder was an essential term of the compromise, and in execution the judgment-debtor did not contend that the compromise had fallen through because he had not fulfilled, and was not willing to fulfil, his promise to put the decree-holder in possession but demanded that the adjustment should be recorded and the application for execution be dismissed as fully satisfied:

Held the agreement fell within the third class and it was intended that decree-holder should have the right to execute the decree as modified. [Para 5]

It is within the power of parties to a decree by agreement to vary that decree and ask the Court to record such an agreement and the Court will then have jurisdiction to execute that agreement: 16 A. I. R. 1929 Cal. 687; (1874) L. R 5 P. C. 516; 15 Beng. L. R. 383 (P. C.); 23 A. I. R. 1936 Cal. 518; 26 A. I. R. 1939 P. C. 80 and 12 A. I. R. 1925 Nag. 49, *Rel. on*; 15 A. I. R. 1928 Cal. 527; 20 A. I. R. 1933 Mad. 28 and 24 A.I.R. 1937 Cal. 222, *Dissent.*; 24 Mad. 1 (P.C.), *Expl.* [Paras 6 & 8]

Annotation ('44-Com.) C. P. C., O. 21, R. 2, N. 6.

(b) Civil P. C. (1908), O. 21, R. 2—Enquiry whether decree has been adjusted—Decree-holder if can withdraw application for adjustment.

Upon filing the petition of compromise of decree signed by both the decree-holder and judgment-debtor, the Court may record that the decree has been satisfied. But where before it deals with the application the decree-holder objects to the recording of satisfaction, the Court can enquire whether the decree had been satisfied. There is nothing in O. 21, R. 2 to prevent the decree-holder from withdrawing or modifying his application for adjustment before the adjustment is recorded: 29 A. I. R. 1942 Bom. 59, *Rel. on*; 18 A. I. R. 1931 Rang. 332, *Dissent.* [Para 9]

Annotation ('44-Com.) C. P. C., O. 21, R. 2, N. 6, Pt. 13.

Cases referred:—

1. ('38) 56 Mad. 198: 20 A. I. R. 1933 Mad. 28: 141 I. C. 429, Ramanarasu v. Venkata Reddi.
2. ('41) I. L. R. (1941) 22 Lah. 383: 28 A. I. R. 1941 Lah. 149: 194 I. C. 1 (F. B.), Udham Singh v. Atma Singh.
3. ('35) 22 A. I. R. 1935 Bom. 303: 157 I. C. 646, Kalyanji Dhana v. Dharamsi Dhana & Co.
4. ('39) 14 Luck. 192: 26 A. I. R. 1939 P. C. 80: I.L.R. (1939) Kar. P.C. 136: 66 I. A. 84: 180 I. C. 378 (P. C.), Oudh Commercial Bank Ltd. v. Bind Basni Kuer.
5. ('01) 24 Mad. 1: 27 I. A. 197: 7 Sar. 678 (P. C.), Kotaghiri Venkata Subbamma Rao v. Vellanki Venkatarama Rao.
6. ('30) 57 Cal. 789: 16 A. I. R. 1929 Cal. 687: 127 I. C. 258, Hridaymohan Sanyal v. Khagendranath Sanyal.
7. (1874) L. R. 5 P. C. 516: 30 L. T. 729: 22 W. R. 900, Pisani v. Attorney-General for Gibralter.
8. ('75) 2 I. A. 219; 15 Beng. L. R. 383: 24 Suth. W. R. 193: 3 Sar. 519 (P. C.), Sadasiva Pillai v. Ramalinga Pillai.
9. ('36) 23 A. I. R. 1936 Cal. 518: 167 I. C. 285, Kurani Debya v. Jogamaya Debya.
10. ('28) 15 A. I. R. 1928 Cal. 527: 113 I. C. 9, Azizur Rahman v. Aliraja Chaudhry.
11. ('37) 24 A. I. R. 1937 Cal. 222: 172 I. C. 282, Surput Singh v. Maharaj Bahadur Singh.
12. ('24) 20 N. L. R. 122: 12 A. I. R. 1925 Nag. 49: 83 I. C. 162, Dulichand v. Gorelal.
13. ('32) 54 All 573: 19 A. I. R. 1932 All. 273: 138 I. C. 583 (F. B.), Gobardhan Das v. Dau Dayal.
14. ('42) I. L. R (1942) Bom. 132: 29 A. I. R. 1942 Bom. 59: 198 I. C. 557, Dattatraya Kashinath v. Vithaldas Bhagwandas.
15. ('31) 18 A. I. R. 1931 Rang. 332: 134 I. C. 213, Maung Kyaw Min v. Ma Hpaw.

R. N. Padhye and N. B. Chandurkar — for Appellant.

Dr. D. W. Kathalay and K. V. Brahma — for Respondent.

Judgment. — In Civil Suit No. 36 of 1929 Sadaram obtained a decree against Kesarimal, the respondent in this Court, and took out exe-

cution, apparently early in 1932. Kesarimal put in an application to the executing Court on 19-4-1932 asking that the attachment of his bungalow in the Amraoti Civil Station should be postponed as a marriage was to be performed there in May. The attachment was accordingly postponed, and on 2-5-1932 Kesarimal took advantage of the postponement to execute a document by which he purported to sell this bungalow to Meghraj, the appellant in this Court, for Rs. 15,000 with a right to re-purchase within five years. On 3-5-1932 Kesarimal executed another document by which he purported to take the bungalow on lease on a rent to Rs. 111 per month. It was Meghraj's son who was to be married to Kesarimal's niece. Sadaram subsequently attached the bungalow, and Meghraj, after an unsuccessful objection to the attachment, filed a suit under O. 21, R. 63, Civil P. C., to establish his title to the bungalow. That suit failed, and an appeal to this Court, First Appeal No. 17B of 1935, was compromised on 6th April 1939. By this compromise Meghraj undertook to pay Rs. 7000 to Sadaram in part payment of Sadaram's decree against Kesarimal, this sum to be a charge on the bungalow; in return Sadaram recognized Meghraj's title to the bungalow and reserved his right to recover from Kesarimal the rest of the money due under this decree. In the meantime Meghraj had instituted a Civil Suit No. 51B of 1938 against Kesarimal for the rent of the bungalow, and on 17th October 1939 he obtained a decree for Rs. 4692-11-3 and costs.

[2] On 15th January 1941 Meghraj took out execution of his decree against Kesarimal. On 4th February 1941 Sadaram, Meghraj and Kesarimal, with the help of their legal advisers, came to an agreement among themselves. They agreed that Meghraj should pay Rs. 7000 to Sadaram and that Sadaram should get his decree against Kesarimal certified as fully satisfied. It was also agreed that Meghraj should give up his claim against Kesarimal to the amount due to him under his decree and to all rent accured since and should also give up his right to recover Rs. 7000 from Kesarimal on account of the payment he (Meghraj) had made to Sadaram, and that Kesarimal should put Meghraj at once in possession of the bungalow and should disclaim all interest in the bungalow henceforth. Meghraj paid Rs. 7000 to Sadaram on that day, and Meghraj and Kesarimal signed a document in which the terms of the compromise between themselves were embodied. It was stated in that document that possession of the bungalow had been given to Meghraj, though admittedly it had not been given: Kesarimal had however promised to give it within four days. This petition of compromise was filed in the executing Court. The case was fixed for hearing in the executing Court on 5th February 1941, but nothing was done on that day as Meghraj was absent. By the next date, 8th March 1941, a dispute had arisen because possession had not been given, and the case was adjourned on two occasions to allow the parties to settle the dispute. Eventually however on 3rd July 1941 Meghraj put in an application stating that he had agreed to the compromise on the distinct understanding that he would be given immediate possession of the bungalow and asking that either he should be put in possession or that he should be allowed to execute his decree. Kesarimal, with unblushing dishonesty merely contended that it was not open to the executing Court to inquire into the allegation that possession had not been delivered and demanded that the application for execution should be dismissed as fully satisfied.

[3] The point was a short one and there was little evidence to be recorded in the matter, but the executing Court proceeded in a most leisurely manner and eventually ordered on 18th September 1942 that Meghraj be put in possession of the bungalow and that the decree should be recorded as fully satisfied. Against that decision Kesarimal appealed, and the learned District Judge held that the executing Court could not enforce the promise of Kesarimal to deliver possession of the bungalow and that that promise must be enforced by a separate suit. He accordingly ordered that the application for execution should be struck off as fully satisfied. Against that decision Meghraj has preferred this second appeal.

[4] Agreements to compromise a claim to execute a decree may be divided into three classes. In the first class of agreement, the decree-holder agrees to give up all his rights under the decree on the judgment-debtor's doing something or other, and there is no adjustment until the judgment-debtor has done whatever he promised. The second class of agreement is where the decree-holder agrees to give up all his rights under the decree in return for a promise by the judgment-debtor to do something or the other; on the recording of such an adjustment, the decree becomes fully satisfied and the decree-holder can enforce the fulfilment of the judgment-debtor's promise only by a separate suit. It has in some cases been doubted whether such an agreement termed an "executory agreement," could amount to an adjustment of the decree, but it is now well settled that it can; *see* for example, 56 Mad. 198,[1] 22 Lah. 383[2] and A. I. R. 1935 Bom. 303,[3] where the point has been discussed at length, and also 14 Luck. 192.[4] The third class of agreement is one in which the parties agreed

that the decree shall be modified in some way or other and that the decree-holder shall be entitled to execute the decree as modified but not the original decree. The question of the class in which the compromise falls is a question of fact.

[5] In the present case, we think it is quite clear that Meghraj never intended to give up his right to execute the decree merely in return for a promise by Kesarimal to put him in possession at some future date. The evidence shows that handing over possession to Meghraj was an essential term of the compromise. It might have been open to Kesarimal to contend that the compromise had fallen through because he had not fulfilled, and was not willing to fulfil, his promise to put Meghraj in possession. He did not however take that line, but demanded that the adjustment should be recorded and the application for execution be dismissed as fully satisfied. It therefore appears to us that the agreement falls within the third class and that it was intended that Meghraj should have the right to execute the decree as modified.

[6] The question then remains whether the parties to a decree can, by agreement, vary that decree and ask the Court to record such an agreement and whether the Court will then have jurisdiction to execute that agreement. In 56 Mad. 198,[1] Anantakrishna Ayyar J. remarked:

"The Court would not accept that new contract as a satisfaction of the decree when in essence it purports to vary the terms of the decree with a view to enable the parties to carry out in execution something contrary to the provisions of the decree."

For that remark, which was *obiter*, the learned Judge relied on the decision of the Judicial Committee in 24 Mad. 1,[5] but that decision does not, in our opinion, support that proposition. It was a case in which the title of the plaintiff, who was suing for possession of an estate, was admitted by defendants 1 and 4 and contested by defendants 2 and 3. After the plaintiff had obtained a decree and died, his widow came to an agreement with defendant 3 by which she accepted a sum of money from him and agreed to give up her claim against him. This was embodied in the decree and their Lordships of the Judicial Committee stated that the High Court had no power to alter its own decree except under the provisions of either S. 206 (now S. 152) or S. 623 (now O. 47, R. 1), Civil P. C. They went on however to say:

"A plausible explanation of the extraordinary order made by the High Court is that it was really based on an agreement between all the parties to the litigation including defendants 1, 2 and 4 as well as defendant 3 who made the compromise to which effect was given by the order. But no such agreement was proved or even suggested."

And subsequently they stated:

"The petition asked only that the razinama might be placed on the files of the Court, and the decree amended accordingly, i. e., so as to give effect to the compromise between the appellant and defendant 3 only. It was no doubt erroneous in asking for any amendment of the decree, and the only order which should have been made on it was to make the razinama a rule of Court, and stay all further proceedings on the decree against defendant 3 except for the purpose of enforcing the compromise."

This does not indicate that the decree, as modified, cannot be executed.

[7] In 57 Cal. 789[6] where the parties to the decree agreed that the decree should be payable by instalments and it should be open to the decree-holder to recover these instalments by execution, a Division Bench, relying on (1874) L. R. 5 P. C. 516[7] and 2 I. A. 219,[8] held that it was open to the parties, by agreement, to arrange their own procedure and give jurisdiction to the Court to adopt that procedure and that the parties should be held to their agreement and the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*. A similar view was taken by another Division Bench of the Calcutta High Court in A. I. R. 1936 Cal. 518.[9] A contrary view had been taken in A. I. R. 1928 Cal. 527[10] and in A. I. R. 1937 Cal. 222.[11] Ameer Ali J. expressed the view that a decree once passed is immutable and cannot be varied by an agreement between the parties but that there would be much injustice in departing from the view that a subsequent adjustment could be executed if the parties had agreed that it should be, and he left the point open. Though it is unnecessary and perhaps improper for a Court to amend the decree whenever an adjustment is recorded, yet it is clear that every such adjustment does in effect vary the decree: *see* 20 N. L. R. 122.[12]

[8] More recently, in 1939, the Judicial Committee again considered the matter in 14 Luck. 192.[4] In repelling the argument that the original decree cannot be altered or varied by the parties even with the sanction of the Court and that in any case mere consent of the parties cannot confer such a jurisdiction on the executing Court, their Lordships remarked:

"This line of reasoning is not without support from other decisions of Indian High Courts though authority and practice to the contrary is also to be found. On this difficult and important question their Lordships are not in agreement with the view taken by the Chief Court. They do not consider that it takes sufficient account of the facts that the Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of S. 47 involve that questions relating to such terms may fall to be determined by the executing Court .... If it appears to the Court, acting under S. 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of

certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under S. 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court. Their Lordships are in agreement with the statement in 54 All. 573[13] at p. 583 that 'in numerous cases a compromise between the decree-holder and the judgment-debtor entered into in the course of execution proceedings, which was duly recorded, has been enforced' and they are not of opinion that the practice, which is both wide-spread and inveterate, is contrary to the Code."

We are, therefore, of opinion that it was open to the parties to the decree in this case to agree that the decree should be executed by placing Meghraj in possession and that the executing Court therefore had jurisdiction to place him in possession.

[9] The point has been taken that when the petition of compromise was filed in the executing Court on 4th February 1941, then under O. 21, R. 2, Civil P. C. the Court had no option but to record that the decree had been satisfied. The Court might have recorded satisfaction on 4th February 1941; but before it dealt with the application the decree-holder objected to the recording of satisfaction, and the Court was therefore correct in enquiring whether the decree had been satisfied. We agree with the view taken in I.L R. (1942) Bom. 132[14] that there is nothing in O. 21, R. 2 to prevent the decree-holder from withdrawing or modifying his application for adjustment before the adjustment is recorded, and we respectfully dissent from the view in A. I. R. 1931 Rang. 332[15] that once an application has been put in by the decree holder the Court must record the decree as adjusted, whatever happens between the putting in of the application and the recording of the adjustment. We see no reason why amendment should not be allowed in cases where it is equitable to allow it. The decision of the executing Court was, in our opinion, correct, and the appeal will therefore be allowed with costs throughout. The order of the executing Court will be restored. Counsel's fee Rs. 100.

R.G.D. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 38 *[C. N. 13.]*

NIYOGI C. J. AND HIDAYATULLAH J.

Ganpatrao Jageshwar Udhoji and others—Applicants v. *Secretary, Municipal Committee, Nagpur—Non-applicant.*

Misc. Case No. 161 of 1942, Decided on 30-7-1946, from order of Extra Asst. Commissioner (with revenue appellate powers), Nagpur, D/- 30-10-1943.

(a) C. P. Municipalities Act (2 [II] of 1922), S. 66 (1) (k)—Assessment on agricultural lands.

Lands lying within the municipal limits must pay the general water-rate under S. 66 (1) (k) and the byelaws thereunder irrespective of whether the water is used by the occupier or not. The fact that the lands are agricultural and already assessed to land revenue does not make any difference as the Municipalities Act contains no prohibition against double taxation and the present use of the lands for agricultural purpose does not eschew use of the land for domestic purpose or consumption of water for a domestic purpose'

[Paras 3, 4, 5 & 6]

(b) C. P. Municipalities Act (2 [II] of 1922), S. 66 (1) (k)—Assessment on well.

There can be no assessment of water rate only on a well under S. 66 (1) (k) and the byelaws thereunder but where a piece of land contains a well and by reason of that well an increase in value of the land results, assessment can be made on the land taking into account the increased value of the land due to the well.

[Para 7]

(c) C. P. Municipalities Act (2 [II] of 1922), S. 66 (1) (a) — Assessment on agricultural lands.

Agricultural lands lying within the municipal limits and already assessed to land revenue or rent under the C P. Land Revenue Act are liable to be assessed to municipal taxes under S. 66 (1) (a); 37 Cal. 697, *Rel. on*; 20 N. L. J. 238 and 25 Mad. 627, *Disting.*

[Para 8]

(d) C. P. Municipalities Act (2 [II] of 1922), Ss. 66 (1) (a) and 81 — Recovery of tax from occupier.

Though the property tax must be assessed on the owner, the municipality can also recover it from the occupier who is entitled in his turn to recover it from the owner unless there is a contract to the contrary.

[Para 9]

Cases referred :—

1. ('40) I. L. R. (1940) Bom. 667 : 27 A. I. R. 1940 Bom. 269 : 190 I. C 249, Brahmin Mitra Co-operative Housing Society Ltd. v Municipality of Ahmedabad.
2. ('35) 22 A. I. R. 1935 Nag. 224, Seoni Municipality v. Firm Sheodayal Jagannath.
3. ('39) I. L R. (1939) Nag. 330 : 25 A. I. R. 1938 Nag. 466 : 178 I. C. 755, Dr. Laxman Wasudeo Paranjape v. Municipal Committee, Nagpur.
4. ('37) 20 N. L. J. 238, Kesheorao Gopalrao Buty v. Civil Station Sub Committee, Nagpur.
5. ('02) 25 Mad. 627, Emperor v. Alexander Allan.
6. ('10) 37 Cal. 697 : 6 I. C. 410, Mahadeo Aon v. Chairman of Howrah Municipality.

N. G. Udhoji; M. R. Indurkar; and B. R. Mandlekar—for Applicants Nos 1, 3 and 5, respectively.

R N. Padhye—for Non-applicant.

Order.—These are two references made by the Extra Assistant Commissioner with revenue appellate powers, Nagpur, under S. 83 (2), C. P. Municipalities Act. References cover four separate questions arising out of the assessment of water rate and property tax. It is convenient to take these matters separately.

[2] With regard to the water rate the questions which have been referred are these :

(1) Whether agricultural lands lying within municipal limits of Nagpur, and already assessed to the land revenue under the C. P. Land Revenue Act are liable to be assessed to water tax under clause (k) of S. 66, C. P. Municipalities Act, and the bye-laws thereunder and

(2) Whether a private well belonging to the private individuals but used by the public within the muni-

cipal limits is liable to be assessed with water rate under the above provisions.

The first question as framed is a limited one, but the arguments ranged over a considerable field involving adjudication on facts. It was pointed out to the learned counsel that the reference does not involve any adjudication on facts, and the question is, therefore, considered purely as a matter of law irrespective of facts or equity involved in any particular case.

[3] The power to assess water-rate is claimed by the municipality by virtue of S. 66 (1), clause (k) which reads thus :

"A committee may, from time to time, and subject to the provisions of this chapter, impose in the whole or in any part of the municipality any of the following taxes, for the purposes of this Act, namely .....
(k) a water-rate, where water is supplied by the committee."

At the outset, an argument was advanced that the assessment of water-rate is dependent upon the supply of water by the Committee, and admittedly as these agricultural lands are not receiving a supply of water from the municipality they cannot be assessed to the general water-rate. The assessment of water-rate is not dependent upon the consumption of the water by the assessee but upon the supply of water by the municipality in the area under its administration. Under S. 50 (1) (k) the municipality is under a duty of providing a supply of water proper and sufficient to prevent danger to the health of the inhabitants and their domestic cattle. Where the municipality fulfils its statutory duties rules have been framed to enable it to collect water-rate from the public. Under the rules framed under this section, it has been provided *inter alia* that water-rate is assessable even on every building or land which may not be provided a supply from the municipal waterworks but which is situated within 200 yards from a public water standard or main pipe. Where the building or land is rented the amount of water-rate is calculated on the basis of a schedule given in the Rules, and where the building or land is not rented but is occupied by the owner himself it is calculated on the annual letting value. It is admitted by the assessees that the water standards or main pipes are situated within 200 yards of their lands. They, however, contend that they are not liable to the water-rate because (a) the land is agricultural land and (b) they do not take any water from the main pipes. The question of not taking water from the main pipes was considered in I. L. R. (1940) Bom. 667[1] by Beaumont C. J. and the reasoning there is applicable here also. It makes no difference whether water is taken or not so long as the water-main-pipe or standard is found within 200 yards of the land in question. The words "where water is supplied by the committee" do not refer to supply of water to individuals but refer to committees which have undertaken the supply of water to the areas controlled by them. A comparison of the other clauses of this section shows this clearly. The learned counsel for the assessees questioned the wisdom of charging a tax from persons who do not avail themselves of the privilege but it may be pointed out that it is not possible to consider the policy underlying the rules because so long as the rules are *intra vires* the question of policy cannot be considered. It was held in A. I. R. 1935 Nag. 224[2] by one of us that the rules form part of the statute and they are as unquestionable on the ground of policy as the statute itself. In our opinion, therefore, lands lying within the municipal limits which are within 200 yards of a water standard or main pipe must pay the general water-rate irrespective of whether the water is used by the occupier or not. Since the municipality is under a statutory obligation to supply water and is compelled to embark upon an expensive venture, there is nothing *prima facie* unfair in its claim for a contribution in the shape of a general water-rate from all the owners of buildings or lands to whom water is made available whether they take it or not.

[4] The next question is: Is there any difference because these lands are agricultural lands and are already assessed to land revenue? It was urged that this would amount to double taxation. This contention has no force, as the Municipalities Act contemplates the levy of taxes on properties which are already paying other taxes and contains no prohibition against double taxation. The contention founded upon these lands being agricultural has some plausibility but as will be shown presently there is little force in it. Under the rules, water-rate is assessable only if the main pipe is situated within 200 yards of assessee's land and the expression "main pipe" has been defined as meaning any municipal pipe from which connections can be allowed for private consumers for domestic purposes or for other public purposes. The question need not be considered from the point of view of public purpose as *ex hypothesi* the lands, though agricultural, are private property. It is argued that agriculture cannot be described as a domestic purpose. In support I. L. R. (1939) Nag. 330[3] is cited. The words "domestic purpose" were defined by one of us in this case, and it was held that the true test was whether or not the water was used for a purpose which could be described as "domestic." The word "domestic" ordinarily means pertaining to one's home or one's household or family. Now water

used for agricultural purpose, i.e., for irrigating the land, can hardly be called water used for domestic purpose.

[5] On this view, it would appear to follow that neither the owner of the agricultural land is entitled to the supply of water from the main pipe nor can the municipal committee be compelled to supply water so that the presence of the main pipe within the specified area would have no legal significance. The contention so formulated, plausible as it looks, involves the fallacious assumption that there could be no supply, even potentially, for domestic purpose. If the owner of the land were to build a farm house for his residence on the farm, he would be entitled to ask for water supply to the farm house, i e., for domestic consumption. It must also be presumed *prima facie* that all vacant lands lying within the limits of the municipality are potentially building sites. It is also on this presumption that the owners of vacant lands may be made liable to pay the general water-rate irrespective of the use to which the land is put, provided the land is situated as the rules lay down. It is not the actual use but the potential use that is material for consideration in construing the rule relating to the general water-rate. The present use of the land for agricultural purpose does not eschew use of the land for domestic purpose or consumption of water for a domestic purpose. The rule is meant to enable the water rate to be assessed, and the use of the words "domestic purpose" in a definition clause does not introduce any exception in favour of persons who are not, for the time being, using any water for domestic purposes; and if a water main pipe or standard be located within the stated distance, assessment can take place on the assumption that a connection for water for domestic purposes is not entirely precluded.

[6] It was further argued that just as there is an exemption in respect of the conservancy cess so also there ought to be an exemption in respect of water-rate when the land is used exclusively for agricultural purposes. The argument is based upon rules framed under S. 66 (1), cl. (b), Municipalities Act. There a note is appended to these rules which reads as under:

"(ii) The tax under cls. (a) and (b) shall not be assessed on any land which is used exclusively for agricultural purpose."

It was argued that similar considerations apply to the assessment of water-rate on agricultural property. We do not see how that follows. If Provincial Government has chosen to give an exemption in respect of conservancy tax on agricultural lands it does not follow that the Provincial Government is compelled to give a similar exemption in respect of the water-rate. Nor can we read the exemption into rules where no such exemption is specifically stated. Further if Provincial Government exempts one and not the other it must be presumed that the discrimination was intentional. It is not competent to any Court to assume that the Legislature or legislative authority made a mistake, there being a strong presumption that the Parliament does not make mistakes. No provision which is not in the statute can be implied to remedy an omission, in the absence of any ground for thinking that such a course is necessary to carry out the intention of Parliament. (*See* Halsbury's Laws of England, Vol. 31, P. 497, Hailsham Edition.) The same rule must apply to any legislative body, authority or agency. In the present case the omission could not be a mistake, for the reason that water-rate unlike conservancy cess is not a service tax. This is clear from the wording of cls. (h) and (k) of S. 66, Municipalities Act: latrine or conservancy tax is "payable by an occupier, upon private latrines" whereas water-rate is payable "where water is supplied by the Committee". The water-rate is not limited to any occupier. The fact is that for supply of water the municipal committee has to incur capital expenditure for providing water supply to the town as a whole, whereas in the case of latrine tax it has only to maintain a conservancy staff according to the extent of the demand for scavenging. We would, therefore, answer the first question in the affirmative.

[7] The second question is whether, under the above provisions, water-rate can be assessed on a private well within the municipal limits belonging to a private individual but used by the public? We have examined cases which have been sent to us along with these references, but we have not been able to find a case in which assessment was entirely on a well. Now, the assessment for water-rate follows a schedule based upon the annual letting value of the property. The annual value of the property will certainly be fixed taking into account the existence of a well on the land. The existence of a well increases the value of the property and consequently its annual letting value. In assessing the water-rate, there may be an indirect assessment on the well but that appears permissible. We have not found any case in which there has been an assessment only on a well. Our answer, therefore, to the second question would be that where a piece of land contains a well and by reason of that well an increase in value results, assessment can be made taking into account the increased value of the land due to the well.

[8] The second set of questions are connected with the levy of property tax and the first question referred is:

"(1) Whether agricultural lands lying within the municipal limits of Nagpur, and already assessed to the land revenue or rent under the C. P. Land Revenue Act, are liable to be assessed to municipal taxes under S. 66 (1) (a) of the Municipal Act ?"

We have already indicated that there is no prohibition against double taxation in the Municipal Act. The power to levy property tax is provided in S. 66 (1) (a) and it does not in terms make any distinction between agricultural and non-agricultural lands. It is argued that the words "a tax payable by the owners of the building or land situated within the limits of the municipality" indicate that the land must be either part and parcel of a building, or at any rate, a building site. It is said that the term 'land' must be interpreted as excluding agricultural lands. Reliance is placed on 20 N. L. J. 238.[4] That case has no bearing upon this matter. There is no warrant for putting such a restricted meaning upon the term "land." It is to be noticed that in some municipalities agricultural land is exempted by a specific provision of law. Thus we find that in the Local Government Act, 1929 (19 Geo. V, Chap. 17) S. 67, relief is given in respect of the valuation by providing in sub-s. (2) that

"for the purposes of valuation lists in force at the appointed day, agricultural land and agricultural buildings shall be deemed to have no rateable value."

Similarly, as we find that in 25 Mad. 627[5] at p. 629 under a Madras statute lands which were solely used for agricultural purposes were exempt from taxation by reason of a special provision. However, in 37 Cal. 697[6] it was held that the word "holding" in the Bengal Municipal Act of 1894 was wide enough to cover arable land which was liable to be assessed under the provisions of the Calcutta Act. In that case it was argued that the Legislature must have contemplated municipal taxation only in respect of some sort of habitation and residence and therefore, purely agricultural holdings were outside the scope of the Act. In interpreting the language of the statute, their Lordships negatived this contention and said that in the absence of any qualifying words used in the statute they must give the words of the statute their plain meaning. The word "land" must, therefore, be construed in its widest sense. Land does not cease to be land because it is put to agricultural use. The proximity of the word "building" does not place any restraint upon the generality of the meaning of the word "land." In the Act before us, we find that the language admits of no limitation and, therefore, we are of the view that agricultural lands are liable to be assessed to municipal taxes under S. 66 (1) if they lie within the municipal limits.

[9] The next question is :

"(2) When the land is in possession of the lessee, is lessee not primarily liable to pay the tax, or can the Municipal Committee recover the tax from the owner or the holder of the land when he is not in actual possession of the land ?"

So far as collection of the tax is concerned, S. 81, C. P. Municipalities Act, gives a complete answer because under that section any tax or sum leviable under this Act from the owner may be recovered from the occupier and in such a case occupier shall, in the absence of any contract to the contrary, be entitled to recover the same from the owner and may deduct the same from any rent then or thereafter due by him to the owner. The property tax is really leviable from the owner who should be assessed as the words of S. 66 (1) (a) and the rules made thereunder clearly show. The answer to this question, therefore, would be that though the tax must be assessed on the owner, the Municipality can also recover it from the occupier who is entitled in his turn to recover it from the owner unless there is a contract to the contrary. There will be no order as to costs.

D.H. *Answered accordingly.*

A. I. R. (35) 1948 Nagpur 41 *[C. N. 14.]*

GRILLE C. J. AND HIDAYATULLAH J.

Alafkhan and another — Plaintiffs — Appellants v. *Kurbankhan and others — Defendants — Respondents.*

Letters Patent Appeal No. 8 of 1942, Decided on 30-9-1946, from judgment of Stone C. J., D/- 10-4-1942, in S. A. No. 494 of 1940.

(a) Limitation Act (1908), S. 3—Appellate Court's power to dismiss suit *suo motu* — Civil P. C. (1908), O. 41, R. 33.

Where in an appeal by the plaintiff against a partial decree the suit appears to be patently time-barred and the point can be decided without any evidence being taken, it is the duty of the appellate Court to take judicial notice of the law and to dismiss the whole suit even though the defendants have not appealed against the decree : *Case law discussed.* [Para 16]

Annotation: ('42-Com.) Lim. Act, S. 3 N. 18 Pt. 6.

(b) Limitation Act (1908), S. 3—Duty of Court to act *suo motu.*

The Act lays a duty upon Courts to act *suo motu* in all cases where the suit is instituted beyond the statutory period and the fact that the parties may have thought differently or may not have noticed the point does not make the slightest difference. [Para 14]

Annotation: ('42-Com.) Lim. Act, S. 3 N. 2.

Cases referred :—

1. ('36) 60 Bom. 1027 : 23 A. I. R. 1936 Bom. 363 : 165 I. C. 672, Manubhai Chunilal v. General Accident Fire & Life Assurance Corporation Ltd.
2. ('28) 55 Cal. 154 : 15 A. I. R. 1928 Cal. 204 : 109 I. C. 752, Durga Priya Chowdhury v. Durga Pada Roy.
3. ('41) I. L. R. (1941) 65 Bom. 202 : 28 A. I. R. 1941 P. C. 6 : I. L. R. (1941) Kar. P. C. 11 : 67 I. A. 416 : 193 I. C. 225 (P. C.), General Accident Fire and Life Assurance Corporation Ltd. v. Janmahomed Abdul Rahim.

4. ('35) 57 All. 242 : 22 A. I. R. 1935 P. C. 85 : 62 I. A. 80 : 155 I. C. 205 (P. C.), Maqbul Ahmad v. Onkar Pratap Narain Singh.
5. ('84) 8 Bom. 535, Dattu v. Kasai.
6. ('93) 15 All. 123, Ahmad Ali v. Waris Husain.
7. ('91) 13 All. 300 : 18 I. A. 55 : 6 Sar. 14 (P. C.), Raja Har Narain Singh v. Bhagwant Kuar.
8. ('12) 8 N. L. R. 174 : 17 I. C. 638, Ganesh Das v. Mt. Nimbi.
9. ('44) I. L. R. (1944) Nag. 419 : 31 A. I. R 1944 Nag. 145 : 217 I. C. 295, Gulabsingh v. Nathu Ram Krishna
10. ('09) 5 N. L. R. 50 : 2 I. C. 229, Chandrabhan v. Maruti.
11. ('90) 12 All. 461 (F.B.), Bechi v. Ahsan Ullah Khan.
12. ('30) 53 Mad. 881 : 17 A. I. R. 1930 Mad. 801 : 127 I. C 624 (F.B.), Subramania Chettiar v. Sinnammal.
13. ('44) I. L. R. (1944) Mad. 147 : 30 A. I. R. 1943 Mad. 698 : 209 I. C. 479 (F. B.), Venkata Rao v. Satyanarayanamurthy.

R. S. Dabir — for Appellants.

S. P. Kotwal and P. R. Padhye — for Respondents 6 and 7, respectively.

Judgment.—This is a Letters Patent Appeal from a judgment of Stone C. J., in Second Appeal No. 494 of 1940 decided on 10th April 1942. The suit out of which this appeal arises was brought by two plaintiffs who were the sons of one Abdul Wahab (also called Aboo) against seven defendants, the first five of whom were the legal representatives of one Moulvi Munawar Khan and the last two the legal representatives of one Munshi Mohammad Azimullah Khan On 29th September 1915, Munawar Khan was appointed by the District Judge, Saugor, guardian of the property of the plaintiffs who were then minors, and Azimulla Khan was his surety in the sum of Rs. 4000 and both the guardian and the surety executed a bond which is Ex. P-5 in the case.

[2] The suit was filed on 15th June 1939 on the bond, which was assigned by the District Judge to the present plaintiffs on 16-6-1936 under S. 35, Guardians and Wards Act. The plaintiffs alleged that Munawar Khan was placed in charge of property worth about Rs. 6500, and they claimed that this property should be returned to them and that the defendants 1 to 5 should be asked to give account of all the property and its income received by Munawar Khan. If defendants 1 to 5 were held responsible but could not meet the demands of the plaintiffs it was prayed that a decree should be passed also against defendants 6 and 7 who were the legal representatives of the surety. Defendant 5 in the suit was one Mt. Asha Bi who was appointed guardian of the plaintiffs after the death of Munawar Khan in 1924.

[3] Defendants 1 to 5 denied liability. Defendants 6 and 7 said that Azimulla Khan had died in the year 1922 and must, therefore, be deemed to be discharged from his liability under the bond. They further said that after Munawar Khan's death in 1924 Mt. Asha Bi (defendant 5) was appointed guardian of the property of the minors, and that this also resulted in the discharge of the surety. These defendants also pleaded that the suit was barred as not having been brought within the requisite period required by law. Defendants 2, 3 and 4 pleaded that they were not liable to render accounts as accounts had already been explained and further that there were no assets of the deceased Munawar in their hands; nor had they any property belonging to the minors. They also pleaded that the suit was barred under the Limitation Act.

[4] The trial Court decided on the authority of 60 Bom. 1027[1] that the suit was within time. It further decided on the authority of 55 Cal. 154[2] that the death of the surety did not make any difference to the liability arising under the continuing guarantee indicated by the terms of the bond, Ex. P-5. Since the bond itself made a mention of the legal representatives of the surety it was held that it formed an exception to the rule contained in S. 131, Contract Act. The learned trial Judge, therefore, passed a preliminary decree against all the defendants and ordered :

"In the proceedings hereafter the dates of death of Munawarkhan and Azimulla Khan shall have to be found out. It shall also have to be found out as to what Munawarkhan received in respect of the property of the plaintiffs and what expenses he incurred and what money or property he (Munawarkhan) failed to account for or spent or disposed of in contravention of the orders of or without the sanction of the District Judge. After doing all this the liability of Munawarkhan can be determined. It would be useful to find out the liability of Munawarkhan before the death of M Azimulla Khan and the liability incurred after his (M. Azimullakhan's) death."

[5] From this judgment and decree only defendants 6 and 7 appealed. The other defendants did not appeal. The learned Additional District Judge held that the plaintiffs were entitled to recover the property left to them though he held that the plaintiffs were not entitled to have the accounts explained to them inasmuch as such accounts were periodically filed before the District Judge. He also held on the authority of 60 Bom. 1027,[1] that the suit was not barred by limitation but was within time.

[6] The learned appellate Judge, therefore, set aside the decree for accounts passed by the Court of first instance against defendants 6 and 7 and he also extended the benefit of his judgment and decree to the remaining defendants 1 to 5, even though these defendants had not appealed. The learned Judge further ordered the case to be remanded for the determination of the liability of the defendants for the return of the property which was in the hands of

Munawar Khan at the time of his death. No specific mention was made as to the liability of defendants 6 and 7 but it would be correct to assume that their responsibility was also to be determined.

[7] The plaintiffs alone appealed against this judgment and decree. The learned counsel for the appellants appended a note to his memorandum of second appeal which reads thus:

"The appellants do not object to the order of remand as in fact it is only sending back the case for final decree proceedings. In any case the appellants are not aggreived by the order of remand."

The note is somewhat inaccurate inasmuch as the case was not sent for final decree proceedings but was sent for the trial of an entirely new issue which had not been decided by the trial Judge but which perhaps arose upon a true construction of the plaint and the pleadings in the case. That issue was whether defendants 1 to 5 were liable to return any property which Munwar Khan might have had in his hands at the time of his death and which belonged to the then infants (plaintiffs). On reading the grounds of appeal, it is apparent that the grievance of the plaintiffs was that the decree against defendants 1 to 5 was set aside without any appeal on their part, that defendants 6 and 7 were discharged from all liability to account and that there was no direction that the enquiry ordered by the first appellate Court was also to be directed against defendants 6 and 7.

[8] The case was heard by Stone C. J., who passed an order on 25-3-1942 dismissing the appeal. It is convenient to reproduce it *in extenso* here.

"25-3-42. ORDER.

The appeal fails because (whatever may be the result of argument on the grounds of appeal) of the limitation point. That went in favour of the appellants in the lower Court. The lower Court followed 60 Bom. 1027.[1] That decision has since been overruled by the Privy Council in I.L.R. (1941)Bom. 202.[3] As a consequence the claim should have been dismissed as out of time. In all the circumstances, costs in this Court are not pressed for and the appeal is dismissed; no order as to costs. The suit would appear to have to be dismissed as time barred.

Adjourned to Tuesday morning next for counsel to consider the position.

Sd/- Gilbert Stone, Chief Justice.

[9] The learned Chief Justice then heard arguments in the appeal on the point as to whether the appeal or the entire claim should be dismissed and pronounced a judgment on 10-4-1942 at the same time granting leave to the appellants to file an appeal under the Letters Patent.

[10] At the hearing on 25-3-1942, the learned counsel for the appellants prayed for permisson to withdraw their appeal. That application is on record. It is now argued that the learned Chief Justice, having dismissed the appeal by his order dated 25-3-1942, could not consider whether the suit was liable to be dismissed on the point of limitation. It was also pointed out that the decree of the first appellate Court could not be set aside as these defendants had not appealed against that decree.

[11] We say (with all due respect) that the somewhat unusual course adopted by the learned Chief Justice in first dismissing the appeal by an order and then proceeding to judgment on the merits of the question of limitation, has caused a certain amount of difficulty. The learned Chief Justice decided in his judgment dated 10th April 1942 that the suit was *ex facie* time-barred in view of the reversing decision of their Lordships of the Privy Council in I. L. R. (1941) 65 Bom. 202,[3] in the very case on which the two lower Courts had relied. The learned Chief Justice dismissed the suit as against defendants 6 and 7 on the authority of the Privy Council case referred to here. He, however, held that the effect of the order of the Additional District Judge was to set aside the decree and order a retrial and that the trial was of a new issue and one which might affect defendants 1 to 5 and might affect also defendants 6 and 7. Whether it would affect defendants 6 and 7 depended upon the bond and the limitation. The learned Chief Justice commented upon these questions and said:

"It is now clear that because of limitation they cannot be successfully sued,"

and be further held that the question of limitation was not concluded but was open. This is apparent from the following sentence:

"I am accordingly of the opinion, on the special facts here present, that the question of limitation is not concluded but is open."

[12] It is obvious from this that the learned Chief Justice upheld the order of remand upon the grounds on which remand was ordered by the learned Additional District Judge. But he dismissed the entire suit against defendants 6 and 7 on the point of limitation.

[13] The learned counsel for the appellants contends that defendants 6 and 7 (respondents here) have been enabled to get a decision in their favour without filing an appeal in the case. His contention is that S. 3, Limitation Act does not apply after a decree has been passed unless the decree is challenged by way of an appeal and in this case there was no appeal against the decision of the first appellate Court, by defendants 6 and 7. He argued that the learned Chief Justice could not either *suo motu* or on objection by the respondents invoke S. 3, Limitation Act and dismiss the suit against these defendants and thus nullify a decree which had not been challenged. He also contended that the learned Chief Justice could not pro-

nounce any opinion on the question as the matter was not open for consideration after the counsel for the appellants had withdrawn the appeal and the learned Chief Justice had dismissed the appeal by his order dated 25th March 1942. The last point does not arise as the order dated 25th March 1942 expressly reserved the consideration of the question of limitation.

[14] It is obvious that defendants 6 and 7 had succeeded in their appeal in so far as the taking of accounts was concerned and they could not appeal on the point. The point of limitation was decided against them and they could have appealed if they had chosen to do so. The question is not one of the rights of the parties but of the duties and powers of Courts. In S. 3, Limitation Act it is provided that:

"Subject to the provisions contained in Ss. 4 to 25 (inclusive), every suit instituted . . . after the period of limitation . . . . shall be dismissed, although limitation has not been set up as a defence."

This section was considered by the Judicial Committee in 57 ALL. 242[4] and their Lordships said:

"In their Lordships' opinion it is impossible to hold that, in a matter which is governed by the Act, an Act which in some limited respect gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that S. 3 of the Act is peremptory and that the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings."

The logical result of this observation is that the Act lays a duty upon Courts to Act *suo motu* in all cases where the suit is instituted beyond the statutory period and that the fact, that parties may have thought differently or may not have noticed the point, does not make the slightest difference.

[15] It was argued that this may be true while the suit lasted but once a decree had been passed it became absolute and the appellate Court could not take action unless the party adversely affected filed an appeal against the judgment and decree passed in the suit. In 8 Bom. 535[5] and 15 ALL. 123[6] such a view was taken but these cases were distinguished in later cases, because, in those cases, the bar of limitation was not patent upon the proceedings. Where a statute plainly lays down the duty of Courts, it is for the Courts to apply the provisions of the Act concerned. In 13 ALL. 300[7] at p. 304 their Lordships said:

"This objection to the award was apparently not brought to the notice either of the Subordinate Judge or the High Court. But the statute is there, and the Judges were bound to take judicial notice of it."

The cases in 8 Bom. 535[5] and 15 ALL. 123[6] were not followed in 8 N. L. R. 174[8] at p. 176 and bar of limitation was held to be fatal even though the benefit went to a defendant who had not appealed. Stanyon A. J. C. said:

"The plaintiff has now made this second appeal, and the only ground which is, and can be, urged on his behalf is that, upon the appeal of the plaintiff as to a part of his claim which had been dismissed, the lower appellate Court has reversed even the partial decree which the appellant had obtained, and moreover has done so upon a ground not raised by the defendants in either Court. On the face of it, this argument seems to carry force, and in many cases would be irresistible. But that is not the position here. The decision of the lower appellate Court is quite correct. The bar of limitation is patent upon the face of the record. Therefore S. 3, Limitation Act, 1908, applies, and the dismissal of the whole suit was compulsory. Even if O. 41, R. 33, Civil P. C., 1908, had not been in existence, the application of the statutory mandate as to limitation could not have been avoided by applying any rules of pleadings."

In I. L. R. (1944) Nag. 419,[9] Bobde J. said:

"Courts have not been given power to devise their own technique for saving claims from the bar which the statutes of limitation create."

The statute must be applied at whatever stage it is found applicable provided it is before a final order or decree is passed. In 5 N. L. R. 50,[10] Skinner A. J. C. held:

"I have been asked on his behalf to treat Major Morris' decision of the question of limitation as final since it was not appealed against. I am clear, however, that under S. 4, Limitation Act I am bound (as held by a Full Bench of the Allahabad High Court in 12 All. 461[11] to take cognizance of the question of limitation, even if the respondent is precluded from raising it."

[16] In 53 Mad. 881[12] and I. L. R. (1944) Mad. 147[13] it has been pointed out that the powers of the appellate Court under O. 41, Rr. 33 and 22 are very wide. It is, however, not necessary to go to these provisions. Upto date there is no decree in favour of anybody. All that the Court has decided is to remand the case for the trial of a fresh issue which properly arises upon a true construction of the pleadings. In so far as defendants 6 and 7 are concerned, the suit is patently time-barred. This point can be decided without any evidence being taken, and it matters not whether these defendants have or have not appealed. It was, with great respect, in our opinion, the duty of the learned Chief Justice to take judicial notice of the law and to dismiss the suit as against these defendants. There is no room for interference and the appeal must, therefore, fail. The appeal is dismissed with costs.

G.B. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 44 *[C. N. 15.]*

POLLOCK AND BOSE JJ.

Mt. Savitribai w/o Sheonarayan Shukal — Plaintiff — Appellant v. *Radhakisan s/o Sheocharan Dube and others — Defendants —Respondents.*

First Appeal No. 40 of 1943, Decided on 14-10-1946, from decree of Addl. Dist. Judge, Hoshangabad, D/- 31-12-1942.

(a) Hindu Law—Maintenance—Decree for—Suit for variation of amount — Retrospective effect.

When the amount of maintenance is fixed in a decree the figure of amount stands until it is varied by a second decree in a separate suit brought for the purpose unless the original decree on the face of it provides machinery for its own variation. The decree-holder has a right to the figure fixed in the decree down to the date of the bringing of the suit for variation. Whatever is decided in the subsequent suit takes effect only from the date of that suit. Hence, there can be no retrospective variation of the figure either up or down : 26 A. I. R. 1939 Nag. 249 and 27 A.I.R. 1940 Nag. 163, *Rel. on.* [Para 7]

(b) Hindu Law — Maintenance decree — Subsequent partition — Right of decree-holder to proceed against family estate.

Once the maintenance is fixed and a charge declared, whether by a decree or otherwise, a floating charge over the property is created which crystallises month by month as each arrear falls due and the principles which enable a creditor to proceed against the family estate in respect of a pre-partition debt in the case of crystallised charges apply with equal force in the case of a floating charge of this character. [Para 10]

(c) Hindu Law—Widow— Maintenance—Charge decree—Enforceability against whole family estate after partition.

When a Hindu widow obtains a charge decree for her maintenance and in a subsequent partition a fair share of the estate is assigned to the branch of the family to which the widow belongs and to which alone she is entitled under the law to look for her maintenance, the person who represents her husband's branch of the family takes his place and the other members are freed from further liability ; but where the partition is not between the widow's branch of the family and the others but between the others *inter se* the widow's right to have the charge on the whole family estate is not affected : 31 A.I.R. 1944 Bom. 235 and 26 A.I.R. 1939 Mad. 781 (F.B), *Disting.* [Paras 14 and 15]

(d) Contract Act (1872), S. 43 — Decree charging number of properties—Right of decree-holder to proceed against any item—T. P. Act (1882), S. 60.

Where there is a decree charging a number of properties, the charge-holder can proceed to enforce his charge against any item of property he pleases, whether the charge be divisible or indivisible. [Para 12]

(e) Hindu Law — Maintenance decree — Suit for reduction of amount — Relevant considerations — Sale of property in execution of maintenance decree.

When a suit asks for reduction of the amount fixed in a maintenance decree the plaintiff must prove substantial alteration in the fortunes of the family. The fact of the sale of some of the properties, in execution of the maintenance decree resulting in a loss of income is not a relevant consideration, the diminution being due to the plaintiff's default in not paying the maintenance charges : 8 Mad. 94 and 24 Bom. 386, *Rel. on.* [Paras 8 and 31]

(f) Civil P. C. (1908), O. 7, R. 18 — Production of account books at late stage.

Where in a suit for reduction of amount fixed in a maintenance decree the account books are not mentioned in the list of reliance and no copies of the relevant entries of the books are filed with the plaint, the production of the original account books not for refreshing the memory of a witness but for proving them would not justify their admission, at a late state: 15 A.I.R. 1928 P.C. 80, *Disting.* [Paras 24 and 25]

Annotation : ('44-Com.) C. P. C., O. 7, R. 18 Note 2 Pt. 1.

Cases referred :—

1. ('41) I.L.R. (1941) Nag. 513 : 27 A. I. R. 1940 Nag. 163 : 194 I.C. 861, Ghasiram v. Mt. Kundanbai.
2. ('41) I.L.R. (1941) Nag. 437 : 26 A. I. R. 1939 Nag. 249 : 185 I. C. 580, Trimbak v. Mt. Bhagu Bai.
3. ('44) I.L.R. (1944) Bom. 604 : 31 A.I.R. 1944 Bom. 235. Laxmibai v. Radhabai.
4. ('39) I. L. R. (1939) Mad. 877 : 26 A.I.R. 1939 Mad. 781 : 188 I.C. 696 (F.B.), Lakshmidevamma v. Veera Reddi.
5. ('28) 15 A.I.R. 1928 P. C. 80 : 7 Pat. 305 : 55 I. A. 107 : 107 I. C. 337 (P.C.), Jivan Lal Daga v. Nilmani Chaudhuri.
6. ('85) 8 Mad. 94, Vijaya v. Shripathi.
7. (1900) 24 Bom. 386, Gopikabai v. Dattatraya.

M. R. Bobde and S. C. Dube — for Appellant.

G. R. Mudholkar for No. 1 (a) and 1 (b) and K. S. Tare (for No. 3) — for Respondents.

Judgment. — This appeal by the plaintiff arises out of a suit which asks that the amount fixed in a maintenance decree be reduced. A genealogical tree will be necessary :

TULSIRAM

Rameshwardas wife Kundanbai (Deft. 1)	Shaligram
	Shrinarayan wife Godawaribai (deft. 2)
	Sheonarayan wife Savitribai (Plff.)

[2] Defendant 1, Kundanbai, who died during the pendency of the appeal, obtained a decree against Shaligram in the year 1895. This decree, which has been the subject-matter of much litigation in the family, will be found set out, or rather the relevant portion of it will be found at p. 516 of I. L. R. (1941) Nag. 513.[1] It was unfortunately (see p. 538) construed to be merely declaratory and inexecutable by the Court of the Judicial Commissioner in Second Appeal No. 565 of 1935. Accordingly Kundanbai was driven to filing a succession of suits for recovery of the maintenance decreed to her, the decree having declared her right (*see* p. 531). The decree awarded her Rs. 250 a month which was reduced by agreement to Rs. 200 a month in 1916.

[3] When Shaligram died, the burden of maintaining Kundanbai, in accordance with the decree, fell on his sons, Shrinarayan and Sheonarayan. They are said to have partitioned but as they made no arrangement for payment of Kundanbai's dues she is entitled to ignore it. In due course the sons died and were succeeded by their respective widows.

[4] One of the numerous suits which Kundanbai was forced to file came up to this Court, and the decision will be found in the case we have just cited. In the course of that suit Savitribai, who was a defendant, asked that the Rs. 200 be reduced still further. The Division

Bench held that the sum having been fixed in a decree could not be varied in proceedings brought by Kundanbai for the purpose of enforcing the rights declared to her by the previous decree. That could only be done in a separate suit (*see* pp. 536 and 557). Savitribai has accordingly brought the present suit and asks that the maintenance be reduced to Rs. 50 a month with retrospective effect from 5-2-1930 when the circumstances are said to have changed. The suit was filed in 1933.

[5] The plaint also asks that this sum be apportioned between Godavaribai and herself, and that each be made liable for half, that is for Rs. 25 a month. The plaint also asks, somewhat impudently in our opinion, seeing that Kundanbai has never been paid a pie of her money unless she sued for it and enforced her decrees by execution, that an injunction be issued against her restraining her from filing any more suits after 5-2-1930.

[6] The only question we have to decide is whether the circumstances have changed in such a way as to justify any further reduction as we have said the amount was reduced from Rs. 250 a month to Rs. 200 a month by consent in 1916. The lower Court finds that this has not been proved and so dismisses the plaintiffs' suit.

[7] The law on this point has been dealt with by a Division Bench in I. L. R. (1941) Nag. 437.[2] So far as the plaint seeks reduction with retrospective effect from 5-2-1930, that relief cannot, according to the previous decision, be given. The Division Bench held at p. 449 that the Court has to see whether the right to the figure stated in the plaint existed at the date when the cause of action accrued. It is true these remarks had reference to a suit by the maintenance-holder, but the principle is, we think, the same when the other side sues for reduction. According to this decision, at p. 449 and again at page 537 in I. L. R. (1941) Nag. 513[1] when the figure is fixed in a decree the figure stands until it is varied by a second decree in a separate suit brought for the purpose unless the original decree on the face of it provides machinery for its own variation. Therefore, down to the bringing of the suit for variation the decree-holder has a right to the figure fixed in the decree. It follows that in such case there can be no restrospective variation either up or down. Whatever is decided in the subsequent suit takes effect only from the date of that suit. To that extent the plaintiff's claim must fail in any event.

[8] On the merits the plaintiff has to prove a substantial alteration in the fortunes of the family. We agree with the lower Court that she has not done this. One of the circumstances on which she relies is a partition in the family after Shaligram's death: *see* p. 449 of I. L. R. (1941) Nag. 437.[2] When there is a partition in the family the rule is that the creditor is not affected in respect of a pre-partition debt, particularly when no provision is made for the payment of the debts. The creditor can, in such a case, enforce his claim just as if there had been no partition, subject only to this proviso, that he must join the person to whom the property has fallen if he desires to proceed against that particular item. The reason for this is that the father, or other representative of the family, ceases to represent the others after partition, and so the others can no longer be reached through the father or manager as before: *see* Mullu's Hindu Law, Edn. 9, p. 337 and Mayne's Hindu Law, Edn. 10, page 438. In our opinion, the same rule applies when a creditor seeks to enforce a charge settled on the family property.

[9] It was argued that this is not so because, in the first place, the decree created no debt. There was no charge until the cause of action for each month's maintenance accrued. Until then there was only a possibility of a charge coming into existence. Therefore, there being no debt in respect of maintenance accruing after the partition of 1916, the rule does not apply.

[10] We are unable to agree. Once the maintenance is fixed and a charge declared, whether by decree or otherwise, a floating charge over the property is created which crystallises month by month as each arrear falls due. The family is as much bound to take note of this at partition as of any other debt, and the principles which enable a creditor to proceed against the family estate despite the partition in the case of crystallised charges apply with equal force in the case of a floating charge of this character.

[11] It was then argued that the charge must be apportioned. It was said that the plaintiff is not in possession of all the family property so the charge must be divided and distributed proportionately over the various items of property. The contention was based on the assumption that a charge decree does not come under S. 100, T. P. Act, and, therefore, S. 60 which contains the rule of indivisibility does not apply. (*See* I. L. R. (1941) Nag. 513[1] at p. 519). As it does not apply, the plaintiff has a right to ask that the charge be apportioned; and in any case the Court has power to do that when it would be just and equitable.

[12] We need not consider the question of law implicit in this contention because Judges have differed on this point. It is enough for us to say that even if all that the plaintiff's counsel contends be true we can see no justification for apportionment in this case. Here we have a

decree charging a number of properties. Whether the charge be divisible or indivisible the ordinary rule is that the charge-holder can, in such a case, proceed to enforce his charge against any item of property he pleases, just as he can against any person who is liable to him for a debt jointly with another. It has been held in mortgage cases that a mortgagee who releases one of several mortgagors has the right to proceed against the rest for the whole debt, and the same rule applies if he releases part of the mortgaged estate. This is not only because a mortgage is indivisible, though that is an additional consideration in mortgage cases. The rule is more broadly based and is to be found in S. 43, Contract Act. Section 43 does not apply to this case any more than S. 60, Transfer of Property Act, but the principle is the same. Once it is conceded that there are charges which do not fall under S. 100 then it becomes necessary to determine the rules which govern them. In some cases, like decrees, there are special rules which apply, such as the doctrine of estoppel by record and the rules which govern parties and privies, but over and beyond that the general principles set out in the Transfer of Property Act and in the Contract Act also apply except in so far as the more special rules applicable to the special cases exclude them.

[13] Reliance was placed on I. L. R. (1944) Bom. 604[3] which holds that a widow's claim for maintenance cannot be claimed personally against any member of the family except her sons. All she is entitled to is to be maintained out of her husband's share in the property. Accordingly, it was argued that since the partition she can only claim a charge against such property as would have been assignable to her husband's share if he had been alive. Reference was also made to I. L. R. (1939) Mad. 877.[4]

[14] In our opinion, neither of these cases is in point because in each it was possible to say with certainty what property would have gone to her husband's share had he been alive. The position in those cases can be stated thus.

X

A B

widow. C

Son D

The widow C obtained a charge decree against B for her maintenance. Subsequent to this B, and C's son D partitioned. It was held that she could only look for her maintenance, after the partition, to the property falling to her son's share. That is understandable when a fair share of the estate is assigned at the partition to the branch of the family to which the widow belongs, and to which alone she is entitled under the law to look for her maintenance. In that event the person who represents her husband's branch of the family takes his place and the other members are freed from further liability. But until that occurs, as the Madras Full Bench observe (their remarks are in respect of prepartition arrears for maintenance), the charge has to be on the whole family estate.

[15] In the present case the partition was not between the widow's branch of the family and the others, but between the others *inter se*. In such a case we do not think the widow's rights are affected. Whatever rights Kundanbai had against Shaligram stand in tact, not only against Shaligram but also against all who represent him. The position would be different if Shaligram's estate had been divided, not only between those who represent him but also between members belonging to the widow's husband's branch of the family, who on partition are under the sole obligation to maintain her. The Bombay case expressly agrees with the following proposition which the Madras Full Bench enunciated :

"But if before a partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court her rights cannot be taken away by any subsequent partition effected among the members of the family."

In the circumstances, we see no reason to modify Kundanbai's rights under the decree even if we have the power to do so; nor does the conduct of those members of the family call for the exercise of any special consideration on their behalf.

[16] As regards the merits, the plaintiff studiously avoided furnishing particulars of the estate except when forced to do so and has done all she can to hide the true position from the Court. In her plaint she stated definitely:

"The plaintiff does not file any papers herewith. Hence list A is a blank.

In support of her claim the plaintiff relies on the papers mentioned in list B."

List B consisted of (1) a judgment in Civil Suit No. 26 of 1946, (2) the decree in that suit, (3) "jamabandis of various mouzas" (no details given), (4) "other documents" (no details given). Actually, she filed no documents of any kind—not even the judgment and decree referred to.

[17] Exception was taken to this vagueness, and on 18-1-1940 (two years after the suit had been launched), the Court said :

"The plaintiff has not given any description of the property and what was the previous income and what is the present income . . . . . The plaintiff should give all the particulars asked for and referred to in para. 21 of the written statement of defendant 1 within 20 days or the suit shall stand dismissed."

Among the particulars asked for by the defendant were the extent of the properties and the gross income therefrom in 1894 and the state of affairs at the date of suit. The plaintiff was also asked to furnish particulars about the arrears of rent, the income and expenditure of the home farm lands and the debts. In addition, she was asked to furnish particulars about the Bhopal property.

[18] The twenty days, expired, and on 15-2-1940 the Court noticed that some schedules had been filed. These were examined on 29-3-1940 and were found to be unverified and defective. They were also incomplete. The plaintiff was given a month to rectify these errors, and the Court added :

"If the full particulars are not supplied now and all schedules properly verified the plaintiff shall not get any further adjournment."

[19] On 24-6-1940 there was further trouble and the Court observed :

"The particulars in their present form therefore cannot be accepted ..... This is the last adjournment which is allowed. For 26-6-1940."

On 6-9-1940 the Court observed :

"The plaintiff has been given sufficient time and I do not think there is any justification for grant of further time."

[20] Next, certain interrogatories were served on the plaintiff's counsel on 26-9-1940 and the plaintiff was ordered to reply to them within 20 days on 30-9-1940. On 4-12-1940, this order had not been properly complied with and the plaintiff was given a week to furnish her affidavit.

[21] On 11-12-1940, the plaintiff brought a large number of account books to Court, and the order-sheet states :

"They are not necessary at this stage and the plaintiff is allowed to take them back."

[22] It will be remembered that the books are not mentioned in the list of reliance and are not entered either in list A or list B which were filed with the plaint. No copies of the relevant entries were produced, and there was no application for their admission as evidence. Not even a list of the books produced was furnished. In the circumstances, we are unable to say the order was wrong. There was nothing else the Judge could have done in these circumstances except to direct that they be left in Court, but there was no need for that. Nothing further was done regarding this for 2 years.

[23] On 17-12-1942, the plaintiff endeavoured to use some of these books during the examination-in-chief of P. W. 6. She was not allowed to do so, and the Court remarked :

"It was for plaintiff to file relevant entries of account-books with the plaint or at the most when schedules were filed. Mere production of original account-books on that date (i. e. on 11-12-1940) would not justify their admission at this stage. The application, therefore, is disallowed."

[24] With this order we find ourselves in agreement. A party who, with her predecessors, has behaved towards Kundanbai as the plaintiff has, is not entitled to special consideration. She had already been given far more latitute than she deserved. The trial of a simple issue had dragged on for three years already. It would have been impossible for the other side to cross-examine witnesses on the strength of books stretching over 46 years, if they were all in order, without copies of the entries and so forth. A long adjournment would have been necessary, and it would have been a wrong exercise of discretion to grant it. Incidentally, P. W. 6 was called with reference to the Bhopal property alone and so he would not in any case have carried the matter far.

[25] Reliance was placed on A. I. R. 1928 P. C. 80[5] at p. 81, where their Lordships say that a witness should be allowed to refresh his memory from account books even if they are produced late, that being a matter which will touch the weight of his evidence and not the admissibility of the books for the purpose. That of course we accept, as we must, but the position which arose in their Lordships' case did not arise here. The witness here did not want to refresh his memory. He appears to have done that before he came to Court and had no difficulty in giving the figure which, he said, would be found in the books. We are prepared to accept this fact and are prepared to assume that if he had refreshed his memory he would have given the same evidence. But that leads us nowhere because this late production of the books in the face of all we have shown throws so much suspicion on them, and on this man's evidence, that we are not prepared to believe him. This is particularly so as the plaintiff said in an answer to one of the interrogatories served on her that she could not say whether her books were regularly kept or not. We stress again that no prejudice has been caused to the plaintiff here. The witness did not want to refresh his memory and was able to give the figure without reference to the books; therefore the attempt was not to refresh the witness' memory but to prove the books. That distinguishes this case from the one before their Lordships.

[26] The oral evidence on the point is worthless and has not been accepted by the Judge who recorded the evidence. P. W. 1 is the plaintiff Savitribai. She has very little personal knowledge, and all she says can be discounted at once when we find her saying that

"for the last 20 years I am not getting any profit from cultivation, on the other hand I have to pay cesses."

The schedules filed in the course of the case show that there are 11 villages in the plaintiff's possession alone in addition to another 4 in the Bhopal State. We find it impossible to believe that for a space of 20 years, some of them boom years, there has never been any profit from cultivation. In addition to this, the plaintiff says in an answer to an interrogatory that she has never received any *siwai* income from any of her villages from 1900 to 1929. This also we cannot accept.

[27] P. W. 6 (Imratlal) has already been referred to. He speaks about the Bhopal property. We do not believe him. P. W. 10 (Dwarkaprasad) is the plaintiff's brother and he prepared the schedules which the plaintiff filed, but he has no personal knowledge. He admits that Schs. A to D were prepared from lists furnished by the plaintiff and on the information given by her. The original lists have not been filed, and as we have shown the plaintiff knows next to nothing personally. Therefore, these schedules have no greater value than the plaintiff's testimony.

[28] As regards the other four schedules, the witness says they were prepared on the strength of information supplied by one Mishrilal and the plaintiff. Mishrilal has not been called, and the plaintiff we have already commented on.

[29] This is all the evidence except for D. W. 3 (Umraobeg) who says that there has been a diminution in income generally during the last 15 or 20 years. But that takes us back to 1922, and until we have the basis on which the original decree of 1894 was reduced to Rs. 200 a month in 1916 this does not carry us much further. Anyway, prices have risen again. It all comes down to this. Without furnishing any details, the plaintiff makes statements which we cannot believe and says that she has received no profits from cultivation for 20 years and no *siwai* income for 10; and P. W. 6 says that the Bhopal property is run at a loss of Rs. 250 to Rs. 200 a year. On these two bare statements we are asked to infer a change of circumstances justifying a reduction in a decree from Rs. 200 a month to Rs. 50 a month. We are unable to do so.

[30] An argument was addressed to us to the effect that Kundanbai's needs are less now that she has grown older, but that is not a circumstance we are prepared to act on here. In the first place, we are not satisfied that they are less. She was a widow in 1894 and also in 1916 and is still a widow. She was alone in those years, as she is now, and the figures of Rs. 250 and Rs. 200 were fixed with reference to those circumstances. Moreover, they were fixed when there were male members of the family alive on the other side of the family. Now, there are only two widows like the plaintiff herself. We do not consider this will justify a reduction in the sum decreed even if it is a relevant circumstance.

[31] Next, it is said that we must take into consideration that villages have been sold in execution of the decree and that therefore that has resulted in a loss of income. But this is not a relevant consideration. As regards this we are in respectful agreement with the learned Judges in 8 Mad. 94[6] at p. 96 and 24 Bom. 386.[7] The diminution is due to the plaintiff's default and that of her predecessor in not paying the plaintiff's charges.

[32] We agree with the findings of the lower Court and hold that no case has been made out for an alteration of the consent decree of 1916. The appeal fails and is dismissed with costs.

D.H. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 49 *[C. N. 16.]*

POLLOCK AND BOSE JJ.

Mt. Savitribai—Defendant 1 — Appellant v. *A. Radhakishan Sheocharan, Plaintiff and others, Defendants 2 and 3—Respondents.*

First Appeal No. 106 of 1938, Decided on 14th October 1946, from decree of Addl. Dist. Judge, Hoshangabad, D/- 28-4-1938.

(a) Interest Act (1839), S. 1—Instrument—Decree whether.

The term "instrument" is wide enough to cover a decree: 27 A. I. R. 1940 Oudh 305, *Foll.* [Para 5]

(b) Interest Act (1839), S. 1—Proviso—Maintenance decree—Power of Court to allow interest.

The proviso applies to cases in which a Court of equity exercises jurisdiction to allow interest. In maintenance cases where a charge is created by a decree the Court is exercising equitable powers and the Court has power to allow interest, particularly so when the amount of maintenance has not been paid for over 50 years: 25 A. I. R. 1938 P. C. 67, *Rel. on.* [Para 6]

Cases referred :—

1. ('41) I. L. R. (1941) Nag. 437 : 26 A. I. R. 1939 Nag. 249 : 185 I. C. 580, Trimbak v. Mt. Bhagu Bai.
2. ('41) I. L. R. (1941) Nag. 513 : 27 A. I. R. 1940 Nag. 163 : 194 I. C. 861, Ghasiram v. Mt. Kundanbai.
3. ('40) 15 Luck. 537 : 27 A. I. R. 1940 Oudh 305 : 187 I. C. 624, Deputy Commissioner, Kheri v. Brijendra Bahadur Singh.
4. ('38) I. L. R. (1938) 2 Cal. 72 : 25 A. I. R. 1938 P. C. 67 : 32 S. L. R. 374 : 65 I. A. 66 : 173 I. C. 15 (P. C.), B. N. Ry. Co., Ltd. v. Ratanji Ramji.

M. R. Bobde, S. C. Dube and V. R. Sen — for Appellant.

G. R. Mudholkar and P. K. Tare — for Respondents 1, 2; and 4, respectively.

Judgment. — This appeal was heard along with First Appeal No. 40 of 1943,* in which we have written a separate judgment. The facts of the case will be found in the other judgment. In this case Kundanbai sues to enforce her

* *Since reported in* ('48) 35 A. I. R. 1948 Nag. 44.

charge decree of Rs. 200 a month against the plaint properties in the defendant's hands.

[2] It was first contended that the sum fixed in the consent decree of 1916 should be further reduced because of an alteration in the circumstances of the family. We have already held in the other judgment, following I. L. R. (1941) Nag. 437[1] and I. L. R. (1941) Nag. 513[2] that in the case of a decree such reduction can only be made by a decree obtained in a separate suit filed for the purpose, unless the decree provides machinery for its own alteration; also that the reduction can only have effect from the date of the plaint in the suit so filed. The suit out of which this appeal arises is not such a suit. First Appeal No. 40 of 1943 is the suit instituted for that purpose, and that suit we have dismissed. Accordingly, nothing more need be said on this point.

[3] The point argued about the divisibility of the charge decree has also been dealt with in the other judgment. For the reasons given there, we see no reason to apportion the sum due over the various properties and we hold that the charge-holder is free to realise her money from any portion of the charged property and is not bound to proceed against the rest of it if she does not want to do so. The transferees are accordingly not necessary parties.

[4] The argument regarding the effect of the partition between Shrinarayan and Shivanarayan has also been decided in the other appeal. For the reasons given there, we hold that Kundanbai is entitled to disregard the partition and enforce her charge in the way she seeks to do in this case.

[5] The only question which arises here and which did not arise in the other cases relates to the plaintiff's claim for interest. It is relevant to note that interest was decreed in the previous suits which the plaintiff was forced to file. It is said that this operates as *res judicata*, but we need not proceed on that ground because we agree with 15 Luck. 537,[3] that the Interest Act of 1839 applies. As the learned Judges said there:

"The claim in the present case is for a certain sum payable at a certain time, that is monthly allowance of *guzara* impliedly payable at some time in every month for that month,"

and again,

"In our opinion a monthly maintenance or allowance made payable under a compromise in a suit comes within the scope of this provision."

It was argued that a decree is not an "instrument" within the meaning of the Act. We find, however, that the word "instrument" is used in various senses, in some it includes a decree, in others it does not. Thus, S. 17 (1) (b), Registration Act makes non testamentary "instruments" of the type set out there compulsorily registrable. Sub-section (2) exempts a number of documents, deeds and so forth from the scope of S. 17 (1) (b), among them certain decrees in sub-cl. (v). There would have been no need to exclude these decrees if the word "instrument" did not cover a decree. It is to be observed that certain compromise decrees are not exempted. Therefore, they are "instruments" for the purpose of the Registration Act. We see no reason why we should limit the use of the word in the Interest Act. Accordingly, we hold that the term is wide enough to cover a decree.

[6] That apart, the proviso extends the Act to all cases in which interest is "now payable by law." The Privy Council say at page 79 in I. L. R. (1938) 2 Cal. 72[4] that this applies to cases in which a Court of equity exercises jurisdiction to allow interest. We are of opinion that we are exercising equitable powers in maintenance cases where a charge has been created by a decree. We consider that a Court of equity would, and should, allow interest in a case of this kind where for over 50 years this unfortunate plaintiff — we are speaking of the original plaintiff Kundanbai—has not been paid a pie of her money without interminable litigation in which the same matter is fought and contested at every stage over and over again. In our opinion, interest was rightly allowed. But we think that 6 per cent. per annum is too high. We reduce it to 3 per cent. per annum and accordingly reduce the figure claimed to Rs. 1827-8-0. The decree of the lower Court will be modified accordingly.

[7] In addition, we allow interest on the decretal amount at the same rate from the date of suit to the date of payment.

[8] Except for this modification, the appeal fails and is dismissed with costs. We see no reason to allow the defendants any costs because of the comparatively small modification we have made in the lower Court's decree. The costs will be paid out of the estate and not personally.

G.B. *Decree modified.*

A. I. R. (35) 1948 Nagpur 50 *[C. N. 17.]*

SEN J.

Sitaram Bhiosan Raoot — Appellant v. *Wamanrao Bablaji Raoot and another — Respondents.*

Second Appeal No. 564 of 1946, Decided on 23-7-1946, from appellate decree of Addl. Dist. Judge, Ellichpur, D/- 24-7-1945.

Limitation Act (1908), S. 12—"Time requisite"—Exclusion of day on which funds are supplied for copy.

In computing the period of limitation for an appeal, the appellant is entitled to deduct under S. 12 the day on which he paid the funds to the copying department as part of the time requisite for obtaining the copy of

the decree : 25 A, I. R. 1938 Nag. 287 and Civil Revn. No. 21 of 1946, *Foll*; 31 A. I. R. 1944 Nag. 356, *Dissent.*; *Case law referred.* [Para 15]

Annotation : ('42-Com.) Lim. Act, S. 12, N. 14.

Cases referred :—

1. ('22) 49 Cal. 999 : 9 A. I. R. 1922 P. C. 352 : 49 I. A. 207 : 68 I. C. 900 (P.C.), Pramatha Nath Roy v. William Arther Lee.
2. ('28) 6 Rang. 302 : 15 A. I. R, 1928 P. C. 103 : 109 I. C. 1 : 55 I. A. 161 (P.C.), J. N. Surty v. T. S. Chettyar Firm.
3. ('36) 17 Lah. 429 : 23 A. I.R. 1936 Lah. 771 : 166 I. C. 467 (F.B.), Kishore Chand v. Bahadur.
4. ('41) I. L. R. (1941) 1 Cal. 536 : 28 A. I. R. 1941 Cal. 378 : 196 I. C. 193, Jamadar Singh v. Naiyab Ali.
5. ('44) I. L. R. (1944) Nag. 725 : 31 A. I. R. 1944 Nag. 356, Ramkrishna v. Shrawan Kisan.
6. ('40) I. L. R. (1940) Nag. 312 : 25 A.I.R. 1938 Nag. 287 : 177 I. C. 538, Mt. Hira Bai v. Indrabahadur Singh.
7. Civil Revn. No. 21 of 1946, dated 27-2-1946, Narayan v. Ramchandra.

C. P. Kalele — for Appellant.
N. B. Chandurkar — for Respondents.

Order. — Two questions arise for decision at this stage : (1) whether the appeal was filed within time, and (2) if not whether the appellant had made out sufficient cause for admission of the appeal under S. 5, Limitation Act.

[2] The decree against which the present appeal was filed was passed on 24th July 1945. The appeal was filed on 12th November 1945. i. e., on the 111th day. 11th November 1945 was Sunday and if the limitation expired on that date, the appeal filed on the next day, i. e., 12th November 1945 would have been within time. The office put up a note that the appeal was barred by limitation by two days and in computing the period of limitation it allowed 19 days as the time requisite for obtaining the copy and stated that the appeal was barred by two days.

[3] The counsel for the appellant filed an application on 29th November 1945 under S. 5, Limitation Act, stating reasons why the appeal was not filed earlier. The application was supported by an affidavit of the counsel. The reason assigned was that while reading the endorsement in column 8 of the table on the back of the certified copy of the judgment he read '28-9-1945' as '25-9-1945' and he made calculation accordingly. The figure '8' in '28' has been so written in the endorsement on the judgment that it could be mistaken for '25'. I accept the explanation of the counsel as true and hold that the mistake was a *bona fide* one and that sufficient cause had been made out under S. 5, Limitation Act, for admission of the appeal.

[4] The limitation for filing an appeal to this Court is 90 days from the date of the decree or order appealed from: (*see* Art. 156, Limitation Act). In computing the period, the time requisite for obtaining a copy of the decree appealed against has to be excluded: (*see* S. 12 (2), Limitation Act).

[5] The application for copy was made on 3rd September 1945. In column 7 '18 9-1945' is noted as the date on which an intimation was sent to the appellant to supply funds. In column 8, '28 9-1945' is noted as the date on which funds were supplied. The copy was delivered on 1st October 1945. The appeal was filed on 12th November 1945. The office has allowed 19 days' period from 3rd September 1945 to 18th September 1945 and from 29th September 1945 to 1st October 1945 as the time requisite for obtaining a copy. The learned counsel for the respondent supported the objection made by the office that the appeal was barred by limitation.

[6] The contention of the learned counsel for the appellant is that he was entitled to '28th September 1945' when the amount was paid in computing the period requisite for obtaining a copy, and if that is allowed the applicant is entitled to exclude 20 days as the time requisite for obtaining a copy. The appeal would be within limitation as in that case the limitation expired on Sunday the 11th November and the appeal filed on the next day was within limitation.

[7] In 49 Cal. 999[1] it was held that no period could be regarded as 'requisite' under S. 12 (2), Limitation Act, which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order. If that test is applied the appellant is entitled to exclude 28th September 1945 as he took reasonable and proper steps in obtaining a copy of the decree because he paid the funds on that day.

[8] In 6 Rang. 302[2] it was held that the word 'requisite' was a strong word and it means something more than the word required ; it meant 'properly required,' and it throws upon the appellant necessity of showing that no part of the delay beyond the prescribed period is due to his default.

[9] In some cases the applicant has been allowed the entire period from the date on which demand is made for funds and on which the funds were paid and the intervening period. In 17 Lah. 429[3] at p 448 it was held that an applicant is entitled to exclude from the prescribed period of limitation the period between the date of presentation of the application and the date on or by which the full costs of preparing the required copy is deposited, provided he deposits with reasonable diligence the aforesaid amount as and when required by the Copying Department.

[10] In I. L. R. (1941) 1 Cal. 536[4] the applicant had applied for copies on 18th March and had duly furnished stamps and folios on 19th

March when 25th March was fixed for delivery of copies. On 20th March the Copying Department notified by the necessary entry in the prescribed register that further stamps and folios would be required. The appellant came to know of this on March 25th. March 26th to 29th were holidays. On 30th March the appellant supplied the additional stamps and folios and copy was delivered on 31st March. It was contended that the period between 20th to 31st March was not period requisite for copy and should not be excluded in computing limitation. It was held that the entire period from 18th March 1937 to 31st March 1937 was time requisite for obtaining copies and that period should be deducted. In that case, the applicant was held entitled to exclude the entire period i.e., the date on which he came to know of the deficiency, the date on which the amount was paid and the intervening period.

[11] The rules framed by various High Courts are different and decisions of one High Court on the question of period which an applicant is entitled to exclude as time requisite for obtaining a copy may not be very helpful in deciding a case in another Court where the rules are different. In this case, it has not been disputed that the applicant is entitled to the date on which a demand was made for funds from the appellant. The dispute in this appeal is whether the appellant is entitled to exclude under S. 12 (2), Limitation Act, the date on which he paid the funds. That the applicant was entitled to exclude that date has been so held in the cases cited above. The question whether the appellant is also entitled to the intervening period is not before me and I refrain from expressing my opinion on that point.

[12] In I. L. R. (1944) Nag. 725[5] Bose J., held that an applicant is not entitled to deduct under S. 12, Limitation Act, the day on which he pays the subsequent advance demanded though he is entitled to deduct the day on which he is informed of the insufficiency of the amount already deposited by him. This is a direct authority in support of the contention of the office and of the learned counsel for the respondent that the appellant was not entitled to exclude 28th September 1945 in calculating the time requisite for obtaining a copy.

[13] I respectfully dissent from the decision. Law does not take into consideration the fraction of a day and it is not permissible to exclude the day on which funds are supplied in computing the time requisite for obtaining a copy on the supposition that the funds may have been supplied late and it may not have been possible for the Copying Department to start the work of copying on that date.

[14] If there had been no decision to the contrary, I would have been bound to refer the case to the Honourable the Chief Justice for constitution of a Bench for reconsideration of that decision as I respectfully disagree with it. The decision in I. L. R. (1944) Nag. 725[5] was based on I. L. R. (1940) Nag. 312.[6] In that case copying had been stopped for want of funds on 28th January 1935. The appellant came to know that more funds were required on 2nd February 1935 and he supplied the necessary funds on 7th February 1935 and the copy was delivered to him on 9th February 1935. The period between 2nd February 1935 and 7th February 1935 was allowed at the time requisite for obtaining a copy and was not taken into consideration in calculating the period of 30 days within which an appeal had to be filed in the District Court. The *ratio decidendi* of the case was that the applicant was entitled to the date on which he paid the necessary funds. This was also the view taken by Niyogi J. in Civil Revn. No. 21 of 1946.[7]

[15] I prefer the view taken in I. L. R. (1940) Nag. 312[6] and in Civil Revn. No. 21 of 1946[7] and hold that the appellant was entitled to deduct under S. 12, Limitation Act, the day on which he paid the funds as part of the time requisite for obtaining a copy. The appellant was consequently entitled to deduct 28th September 1945—the day on which he paid the money—in computing the period of limitation. The appeal consequently was filed within limitation.

[16] In view of my finding that the appeal was within limitation, the question about admission of the appeal under S. 5, Limitation Act, does not arise. As I had accepted the affidavit of the counsel and held that there was sufficient cause for not filing the appeal earlier I would have admitted the appeal under S. 5, Limitation Act, if I had held that the appeal was otherwise barred by limitation.

N.S.D. *Order accordingly.*

A. I. R. (35) 1948 Nagpur 52 *[C. N. 18.]*

PADHYE J.

Ballabhdas Lachminarayan Maheshwari—Decree-holder—Applicant v. *Sobhaji Keshare-singh and another—Judgment-debtors—Non-Applicants.*

Civil Revn. No. 236 of 1945, Decided on 8-10-1946, from order of Dist. Judge, Nimar, D/- 27-4-1945.

(a) Limitation Act (1908), Art. 166—Applicability.

Article 166 as amended by the Act of 1927 is quite general and governs every application by a party to set aside a sale, whether under S. 47 or O. 21, Rr. 72, 89, 90 or 91, Civil P. C: 7 A. I. R. 1920 Cal. 165, *Rel. on.* [Para 8]

Annotation : ('42-Com.) Lim. Act, Art. 166, N. 2, Pt. 1.

(b) Limitation Act (1908), Art. 166—Void sale.

Article 166 does not apply when the sale is void or a nullity. No application is required to set aside what is a nullity and there is no limitation for declaring that a sale which is already void is a nullity and does not affect the property which is put to sale: 11 A. I. R. 1924 Mad. 431 (F.B.) and 32 Cal. 296 (P.C.), *Foll.* [Para 9]

Annotation: ('42-Com.) Lim. Act, Art. 166, N. 2, Pts. 5 to 7.

(c) Civil P. C. (1908), S. 151—Setting aside sale—Fraud practised on Court—Civil P.C., O. 21, R. 90.

The practice of fraud on the Court is a serious matter and it renders void everything which is founded on such fraud. It is not only within the powers but it is the duty of the Court to take notice of such fraud when detected or brought to its notice. The Court cannot permit a party guilty of a fraud on the Court to enjoy what it has secured thereby. [Para 12]

Where a decree-holder got the venue of a sale changed by practising fraud on the Court:

Held, that the sale was void and the Court had inherent power to set aside the sale even after confirmation. [Paras 12 and 13]

Annotation: ('44-Com.) Civil P. C., S. 151, N 6.

(d) Civil P. C. (1908), S. 151 — Setting aside sale.

The Court has inherent powers to set aside an auction sale when it was held contrary to the express orders or directions of the Court: 18 A. I. R. 1931 Lah. 344 and 20 A. I. R. 1933 Mad. 399, *Rel. on.* [Para 11]

Annotation: ('44-Com.) Civil P. C., S. 151, N. 2, Pt. 43.

(e) Limitation Act (1908), Art. 166—Applicability.

The article does not apply to the exercise of Court's inherent powers under S. 151, Civil P. C. to set aside a sale. [Para 9]

Annotation: ('42-Com.) Lim. Act, Art. 166, N. 15, Pt. 1.

Cases referred:—

1. ('19) 46 Cal. 975 : 7 A. I. R. 1920 Cal. 165 : 54 I. C. 431, Satis Chandra v. Nishi Chandra.
2. ('21) 45 Bom. 174 : 8 A. I. R. 1921 Bom. 285 : 58 I. C. 231, Bhai Chand Kirparam v. Ranchhoddas Mancharam.
3. ('24) 51 Cal. 1014 : 12 A. I. R. 1925 Cal. 351 : 82 I. C. 322, Haripada Haldar v. Barada Prasad Roy.
4. ('23) 2 Pat. 65 : 9 A. I. R. 1922 Pat. 507 : 77 I. C. 957, Ramdhuri Chowdhuri v. Deonandan Prasad.
5. ('42) I. L. R. (1942) Lah. 559 : 29 A. I. R. 1942 Lah. 153 : 203 I. C. 166 (F.B.), Gauri v. Ude.
6. ('24) 47 Mad. 288 : 11 A. I. R. 1924 Mad. 431 : 80 I. C. 92 (F.B.), Rajagopala Ayyar v. Ramanujachariar.
7. ('90) 17 Cal. 769, Mohendro Narain v. Gopal Mondul.
8. ('23) 45 All. 316 : 10 A. I. R. 1923 All. 282 : 71 I. C. 631, Sheo Ram Koeri v. Ikram-Unnissa Bibi.
9. ('05) 32 Cal. 296 : 32 I. A. 23 : 8 Sar. 734 (P. C.), Khiarajmal v. Daim.
10. (1844-58) 2 H. L. C. 281, Bowen v. Evans.
11. ('31) 18 A. I. R. 1931 Lah. 344 : 12 Lah. 602 : 134 I. C. 292, Mul Raj v. Bura Mal.
12. ('33) 20 A. I, R. 1933 Mad. 399 : 143 I. C. 454, Govinda Padayachi v. Velu Murugayya Chettiar.

R. S. Dabir — for Applicant.

K. B. Tare and P. K. Tare — for Non-Applicants.

Order. — This is a revision petition by the decree-holder auction-purchaser against the appellate order confirming the order of the executing Court setting aside the auction sale held on 1-9-1944 and confirmed in the applicant's favour on 7-10-1944.

[2] The few relevant facts are these. The decree obtained by the applicant against the non-applicants was transferred for execution to the Court of the Sub-Judge. Execution was sued upon and the judgment-debtors' property i. e., a 6 anna share of mouza 'Soundhal' area 409.37 acres, jama Rs. 43-2-0 was attached. The sale notices were served. On 19-4-1944 the decree-holder applied that the auction sale be held at Khandwa in court-house rather than at the spot which is far away from Khandwa. The executing Court on 19-4-1944 ordered notices of this application to issue for 6-5-1944 as it was thought inadvisable—particularly in view of instructions issued in that behalf—to deviate from the ordinary rule of holding the auction sale at the spot, at least without hearing the judgment-debtors. On 6-5-1944, it was found that the decree-holder failed to apply for the issue of notices as ordered by the Court and no explanation was offered at any stage for non-compliance. The executing Court therefore, in effect, rejected the decree-holder's prayer for holding the auction sale at Khandwa and ordered proclamation of sale to issue for holding the auction sale on the spot on 17-7-1944. The proclamation was accordingly prepared and was signed by the Judge. The process-server to whom it was entrusted for execution however fell ill and it was found on 4-7-1944 that the proclamation remained unexecuted with the process-server. The Judge therefore ordered on 4-7-1944 that proclamation and warrant of sale be issued on the same process for sale to be held on 1-9-1944.

[3] In the proclamation that was actually issued, the clerk changed the date of sale and in addition he also changed the place and time of sale. According to the corrected proclamation the sale was to be held on 1-9-1944 at the court house at Khandwa at 3 P. M. These corrections are signed by the clerk himself and it appears that this corrected proclamation was never placed before the Judge and it was issued on the strength of the Judge's signature on it when it was prepared for holding the sale on spot on 17-7-1944.

[4] It is alleged that the corrections as to place and time were made on the strength of the alleged order of the Court contained in the order-sheet dated 8-7-1944. This order-sheet is wholly written by the clerk himself and signed by the Judge. The decree-holder had applied for permission to bid and the order was that his bid should not be below Rs. 500.

[5] The sale was accordingly held on 1-9-1944 and the decree-holder was the highest bidder; his bid was for Rs. 525. This bid list is not signed by the Judge in acceptance of the highest bid. The judgment-debtors did not put in appearance and did not object to the sale within 30 days and the sale was confirmed on 7-10-1944.

[6] On 3-11-1944 the judgment-debtors put in an application purporting to be one under Ss. 47 and 151, Civil P. C., to set aside the sale. They accused the decree-holder of having committed a fraud in bringing into existence collusively and fraudulently the order sheet dated 8-7-1944 and securing the signature of the Judge thereon. The decree-holder thereby fraudulently secured a change in the place of holding the sale in spite of the Judge's prior order which, in effect, rejected that prayer. The auction sale, according to the judgment-debtor, was void and was liable to be set aside under the inherent powers of the Court. This application was hotly contested by the decree-holder auction-purchaser. The executing Court wrote a very elaborate order and set aside the auction sale and this order is confirmed in appeal. Both the Courts have treated the application as one under S. 47 read with S. 151, Civil P. C.

[7] In a very careful argument, Mr. Dabir, Advocate for the applicant, put forth mainly the following points: (i) That the application for setting aside the sale whatever may be the grounds and whether it was under O. 21, R. 90 or S. 47, Civil P. C., is governed for the purposes of limitation by Art. 166, Limitation Act. Article 181 had no application and the application of the judgment-debtors filed on 3-11-1944 was thus barred by time. (ii) That no application for setting aside sale lies after the sale is once confirmed. (iii) That the fraud alleged in the application is not established and even if it was established it would at best render the sale voidable and can be set aside only on a proper application under O. 21, R. 90, Civil P. C., filed within 30 days of sale. (iv) That the judgment-debtor's should have raised an objection to the place of sale before the sale was held. Under the proviso to O. 21, R. 90, this objection cannot be taken after the sale.

[8] Article 166, Limitation Act, as amended by the Act of 1927, is quite general and it governs every application by a party to set aside sale, whether the application falls under S. 47 or under O. 21, Rr. 72, 89, 90 and 91, Civil P. C.: *vide* 46 Cal. 975[1] at p. 977; 45 Bom. 174[2]; 51 Cal. 1014[3] at p. 1018; 2 Pat. 65[4] and I. L. R. (1942) Lah. 559.[5] The judgment-debtors could not therefore avail themselves of the remedy open to them under the Code of Civil Procedure to have the sale set aside. The remedy was barred by limitation. The sale was moreover confirmed on 7-10-1944 long before the judgment-debtors' application to set it aside.

[9] Article 166, Limitation Act does not however apply when the sale is void or a nullity. No application is required to set aside what is a nullity; *vide* 47 Mad. 288.[6] It does not also apply to the exercise of the Court's inherent powers under S. 151, Civil P. C. Nor is the Court deprived of its powers to exercise inherent powers merely because the sale is confirmed in ignorance of the ground rendering it void: 17 Cal. 769;[7] 45 ALL. 316.[8] As held by their Lordships of the Privy Council in 32 Cal. 296[9] there is no limitation for declaring that a sale which is already void is a nullity and does not affect the property which is put to sale.

[10] The two Courts have come to a conclusion that the decree-holder got the venue of sale changed by practising fraud on Court and by abusing the process of the Court. Fortunately the Judge who passed the original order was himself the subject of the alleged fraud and he has very frankly and honestly put down what actually happened. What he stated is fully corroborated by the record and inferences therefrom and this surely constitutes a legal evidence in proof of the alleged fraud. The learned Judge on 19-4-1944 refused to change the venue of sale merely at the request of the decree-holder. In fact he regarded the matter so important as not to pass any order in that respect without hearing the other side and ordered notices to issue. The decree-holder did not carry out, for reasons best known to him, this order of the Court. On 6-5-1944 the Judge decided to hold the sale on the spot and the proclamation was ordered to be issued accordingly. It is thus clear that the Judge was not ready to have the sale held at the Court house far away from the spot, at least without hearing the other side and the decree-holder was fully aware of this fact. In these circumstances, we find that without any fresh application to the Court the clerk writes an order-sheet dated 8-7-1944 changing the venue of sale, contrary to the previous order of the Court, and a proclamation already signed by the Judge was issued after making corrections not initialled by the Judge and presumably without his knowledge. The order-sheet dated 8-7-1944 no doubt bears the signature of the Judge but he has explained that his signature was obtained on the representation that the several papers put up for signature of which this order-sheet was one contained nothing but formal orders in uncontested cases. I fully believe the explanation of the learned Judge, and I agree with the Courts below that the order regarding the change of venue of auction sale was secured by the decree-holder by practising fraud on the Court. There is thus no judicial order for holding the auction in Court premises on 1-9-1944 and the previous order of the Court to hold it on the spot was the operative order. It follows that the sale held in Court premises on 1-9-1944 was against the express orders of the Court and this fact was

brought to the notice of the Court by the judgment-debtors' application dated 3-9-1944.

[11] 'Fraud' said De Grey C. J. vitiates the most solemn proceedings of Courts of justice.' Lord Coke says it avoids all judicial acts ecclesiastical and temporal. In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud: *vide* Kerr on Fraud and Mistake, Edn. 6, p. 425. In (1844-58) 2 H. L. C. 281[10] it is observed that if a case of fraud is established, the Court will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. Even apart from fraud the Court has inherent powers to set aside an auction sale under its inherent powers when it was held contrary to the express orders or directions of the Court: *vide* A. I. R. 1931 Lah. 344[11] and A. I. R. 1933 Mad. 399.[12]

[12] The practice of fraud on a Court is a serious matter and it must render void everything which is founded on such fraud. It is not only within the powers of the Court but in fact it is the duty of the Court to take notice of such fraud whenever detected or whenever it is brought to its notice. The Court cannot permit a party guilty of fraud on a Court to enjoy what it secured thereby. The Court could have acted *suo motu* and declared the sale a nullity under its inherent powers and this is what the Courts below have done. The mere fact that the applicants (judgment-debtors) brought the fraud to the notice of the Court does not in the least change the legal position.

[13] The learned Advocate contended correctly that the Court cannot exercise its inherent powers in matters governed by a specific provision in the Code. He relied on several cases in support of this proposition. I need not refer to them as the proposition, is in general, beyond dispute. These cases furnish however no authority for the proposition that the Court is incompetent to set aside something which has been brought into existence contrary to its express orders and directions or as a result of fraud practised on it. The present case proves the necessity of the existence and the exercise of the inherent powers of Courts.

[14] None of the points raised by the learned Advocate affect the exercise of the inherent powers of the Court in declaring that the sale held on 1-9-1944 at Khandwa was a nullity and these powers are, in my opinion, properly exercised in the present case. At any event, I do not feel justified in exercising in favour of the applicant (decree holder) the revisional powers which are only enabling and which are to be exercised in furtherance of justice. The result of the orders of the Courts below is to leave the parties where they were before 8-7-1944 and the decree-holder (auction-purchaser) should not feel aggrieved thereby. The applicant who has only a money decree in his favour is yet free to realize it. The orders of the Court below are in the circumstances of the present case quite just and proper and I do not interfere with them. The revision is therefore dismissed with costs. Counsel's fee Rs. 30.

G.B. *Revision dismissed.*

A. I. R. (35) 1948 Nagpur 55 *[C. N. 19.]*

HIDAYATULLAH J.

Rambabu Shrinarayan Agarwal — Plaintiff — Applicant v. *Gulabsingh Saljisingh Thakur — Defendant — Non-Applicant.*

Civil Revn. No. 308 of 1945, Decided on 12-11-1946, from order of 1st Sub-Judge, 2nd Class, Nagpur, D/- 24-4-1945.

Civil P. C. (1908), O. 9, R. 9 — Minor plaintiff if entitled to indulgence—Absence of agent.

There is no distinction between a minor plaintiff and any other plaintiff in so far as R. 9 is concerned: 22 A. I. R. 1935 Mad. 565, *Approved*. [Para 2]

Though no difference is made in the Code in the case of a minor still in practical operation it is to be remembered that a minor is unable to protect his interests except through agents, and unless it can be shown that the agent was either grossly negligent or that there was a manoeuvring on his part to gain some advantage in the case, the case of the minor must be looked at somewhat indulgently. [Para 3]

The suit of the minor plaintiff was called at 12-48 p. m. and as nobody appeared for the plaintiff the suit was dismissed. The plaintiff's agent came by train at 11-22 a. m. for attending the Court but lingered on somewhere till 12-48 when the suit was called, but attended the Court thereafter;

Held that the negligence on the part of the agent was not so gross as to disentitle the minor plaintiff from having his case restored to file. The suit should be restored subject to payment of costs to the defendant. [Para 3]

Annotation: — ('44-Com.) Civil P. C., O. 9, R. 9, N. 7, Pts. 1, 2; N. 8, Pts. 31, 32, 33.

Case referred: —

1. ('35) 58 Mad. 929: 22 A. I. R. 1935 Mad. 565: 156 I. C. 940, Venkata Surya Subbarayudu v. Bapanna Rao.

G. S. Padhye—for Applicant.

D. T. Mangalmoorti—for Non-Applicant.

Order. — This is an application for revision of the order dated 25-4-1945 passed by Mr. S. N. Raina, First Subordinate Judge, Second Class, Nagpur, in Misc. Judicial Case No. 86 of 1944. The applicant-plaintiff who is a minor had sued through next friend, mother, the present non-applicant, on a bond. The order-sheet dated

28-3-1944 shows that the defendant had filed a written statement alleging that the amount was not due. The plaintiff wanted time for amendment of his plaint. Time was granted, and the case was fixed for 1-5-1944. On that date the suit was called three times at 12-48 P. M. The defendant was present but nobody appeared for the minor plaintiff. The suit was, therefore, dismissed. The plaintiff applied for restoration of the suit and an affidavit was sworn on the same day though it was filed on 3-5-1944. In the application for restoration of the suit as well as the affidavit, the agent of the plaintiff alleged that he was delayed in reaching the Court because the train from Kamptee arrived late. Parties led evidence in the case. Plaintiff examined two witnesses. Ghasilal, the agent of the plaintiff, entered the box and said

"the train reached the Nagpur station at 12-30 p. m. or even after that. I rushed to the Court and found that the suit was dismissed."

The other witness, Mahadeo, said "the train had come to Nagpur at about 12 that day." On behalf of the non-applicant, S. K. Ghosh, Number Taker of the Railway, was examined and he brought the registers from the Nagpur Railway Station. In them the time of the arrival of the train was shown as 11-22 A. M. It is obvious that if the agent rushed to the Court, as he says he did, he could have reached before 12-48 P. M. when the suit was dismissed. On this evidence the learned Judge of the trial Court declined to restore the suit to the file. Hence this revision.

[2] In the revision petition it is urged that the plaintiff is a minor and some concession should be shown to him. There is no distinction between a minor plaintiff and any other plaintiff in so far as O. 9, Civil P. C. is concerned. It is true that some High Courts treat the case of an infant more liberally, the earlier Madras view being that the minority of a plaintiff is a sufficient cause if the next friend or guardian is found to be negligent. That view has now been modified by the Madras High Court itself in 58 Mad. 929.[1] The earlier view of the Madras High Court has not been accepted in the Oudh Chief Court and in certain other High Courts. I have been unable to find anything which would differentiate the case of a minor plaintiff from that of any other plaintiff.

[3] Technically speaking, therefore, the learned Judge of the lower Court was right. The question is whether the discretion which he exercised against the minor plaintiff was a judicial discretion. He has not given a finding that there was any indirect purpose in the failure of the agent to be present at the time the case was called. The fact remains that the agent did travel that day from Kamptee to Nagpur and he was actually in Court the same day and he prepared an affidavit and swore it before a Judge. He may be wrong in the timings he has given, and he has probably not made a clean breast of the matter and shown where he lingered from 11-22 A. M. (the time of the arrival of the train) to 12-48 P. M. But the negligence is not so gross as to disentitle the plainitiff who is a minor from having his case restored to the file. Though no difference is made in the Code in the case of a minor still in practical operation it is to be remembered that a minor is unable to protect his interests except through agents, and unless it can be shown that the agent was either grossly negligent or that there was a manœuvring on his part to gain some advantage in the case, the case of the minor must be looked at somewhat indulgently. The law allows the Court to visit laches of this kind with other punishments. In my opinion the Court should have considered whether this was not a proper case in which to visit the plaintiff with some other punishment than the dismissal of his whole claim. I think the failure to consider this in its appropriate setting is a failure to exercise the discretion on judicial lines. I, therefore, allow the application for revision and order that the suit will be restored to the file subject to a payment of Rs. 75 as costs to the defendant. The revision is allowed, the applicant will bear his own costs and will pay the costs of the other side. Pleader's fee Rs. 25.

G.N. *Application allowed.*

A. I. R. (35) 1948 Nagpur 56 *[C. N. 20.]*

GRILLE C. J. AND SEN J.

Madhorao Paikaji— Appellant v. *Eknathrao Balappa and others—Respondents.*

First Appeal No. 4 of 1941, Decided on 3-1-1947 against decree of 2nd Addl. Dist., Judge, Yeotmal, D/- 30-1-1940.

(a) Civil P. C. (1908), S. 97—Appeal against preliminary decree — No appeal against final decree — Effect.

There is no provision in the Code making an appeal filed against the preliminary decree infructuous if an appeal against the final decree is not filed. The function of a final decree is merely to restate and apply with precision what the preliminary decree has ordained and the decree being in the same suit the Court in appeal from the preliminary decree, as it has power to reverse or vary the preliminary decree, has also power to affect the final decree. A passing of a final decree subsequent to the institution of the appeal will not affect the maintainability of the appeal against the preliminary decree : *Case law referred.* [Paras 8, 9]

Annotation : — ('44-Com.) Civil P. C., S. 97, N. 5.

(b) Civil P. C. (1908), O. 34, R. 1—Appeal against decree for foreclosure — All mortgagors not impleaded as parties — Effect.

Order 34, R. 1 is a rule of procedure and is subject, among other things, to O. 1, R. 9. Hence, where a mort-

gagee has obtained a preliminary decree for foreclosure and in appeal against that decree by one of the mortgagors the other mortgagors are not joined as parties the appeal does not fail for non-joinder of other mortgagors if it is possible to work out the right of the appellant mortgagor in the appeal : *Case law referred.* [Para 13]

The fact that in the absence of the other mortgagors it may not be permissible for the appellant to ask for change of the decree from one for foreclosure to one for sale has nothing to do with the competency of the appeal. [Para 14]

Annotation : — ('44-Com.) Civil P. C., O. 34, R. 1, N. 19.

(c) Civil P. C. (1908), O. 34, Rr. 2 and 3—Appeal against preliminary decree — During its pendency final decree passed—Appeal dismissed—Necessity of fresh preliminary decree.

Where during the pendency of an appeal against a preliminary decree in foreclosure suit, a final decree is passed and subsequently the appeal against the preliminary decree is dismissed, it is not necessary that a fresh preliminary decree, after the dismissal of the appeal, should invariably be drawn up, fixing a fresh date for payment after making calculation of the amount payable under the decree : 20 A. I. R. 1933 Nag. 236, *Dissent.*; 13 A. I. R. 1926 P. C. 93, *Explained.* [Paras 17, 21 and 23]

(d) Civil P. C. (1908), O. 34, R. 2 (2)—Extension of time.

The Court has no jurisdiction to extend time for payment, in case of a preliminary decree for foreclosure, unless good cause is shown : 15 A. I. R. 1928 P. C. 137, *Rel. on.* [Para 19]

Annotation : — ('44-Com.) Civil P. C., O. 34, R. 2, N. 18, Pt. 3.

(e) Civil P. C. (1908), O. 34, Rr. 2 and 3—Making of final decree during appeal against preliminary decree.

The trial Court has jurisdiction to make a final decree notwithstanding that an appeal against a preliminary decree is pending in a higher Court : *Case law referred.* [Para 19]

Cases referred :—

1. ('30) 57 Cal. 1013 : 16 A. I. R. 1929 Cal. 689 : 123 I. C. 305 (F. B.), Taleb Ali v. Abdul Aziz.
2. ('31) 27 N. L. R. 197 : 16 A. I. R. 1929 Nag. 349 : 120 I. C. 334, Abdul Sattar v. Bansgopal.
3. ('14) 36 All. 532 : 1 A. I. R. 1914 All. 380 : 24 I. C. 827 (F. B.), Kanhaiya Lal v. Tribeni Sahai.
4. ('38) 25 A. I. R. 1938 Bom. 222 : 175 I. C. 43, Basawant v. Kallappa.
5. ('36) 17 Lah. 53 : 22 A. I. R. 1935 Lah. 482 : 157 I. C. 416, Gurumukh Singh v. Malik Shiv Ram.
6. ('14) 37 Mad. 29 : 2 A. I. R. 1915 Mad. 197 : 12 I. C. 664, Lakshmi v. Maru Devi.
7. ('12) 37 Mad. 455 : 14 I. C. 394, Ramien v. Veerappudayan.
8. ('16) 3 A. I. R. 1916 Pat. 370 : 1 Pat. L. J. 406 : 35 I. C. 873 (F. B.), Mt. Wahid-un-nissa v. Dip Narain Pershad.
9. ('38) I. L. R. (1938) Nag. 370 : 25 A. I. R. 1938 Nag. 42 : 173 I. C. 44, Ghanaram v. Balbhadra.
10. ('30) 52 All. 134 : 16 A. I. R. 1929 All. 941 : 121 I. C. 106, Baldeo Prasad v. Bholanath.
11. ('35) 10 Luck. 70 : 21 A. I. R. 1934 Oudh 220 : 148 I. C. 903, Mahmood Ali Khan v. Ali Mirza Khan.
12. ('40) 15 Luck. 399 : 27 A. I. R. 1940 Oudh 235 : 186 I. C. 540, Lasa Din v. Mohammad Abdul Shakoor.
13. ('33) 60 Cal. 87 : 20 A. I. R. 1933 Cal. 325 : 143 I. C. 315, Umesh Chandra v. Hemanga Chandra.
14. ('31) 10 Pat. 341 : 18 A. I. R. 1931 Pat. 164 : 132 I. C. 100, Mt. Waleyatunnissa Begam v. Mt. Chalakbi.
15. ('37) 24 A. I. R. 1937 Pat. 414 : 169 I. C. 897, Narain Pandey v. Surajbhan Lal.
16. ('39) 18 Pat. 141 : 26 A. I. R. 1939 Pat. 49 : 179 I. C. 549, Muhammad Yunus v. Champamani Bibi.
17. ('33) 29 N. L. R. 130 : 20 A. I. R. 1933 Nag. 236 : 147 I. C. 699, Parasbram v. Umrao Prasad.
18. ('34) 21 A. I. R. 1934 Mad. 65 : 147 I. C. 1179, Ramaswami Ayyar v. Pakkiri Pathar.
19. ('26) 53 I. A. 197 : 6 Pat. 24 : 13 A. I. R. 1926 P. C. 93 : 98 I. C. 499 (P. C.), Jowad Hussain v. Gendan Singh.
20. ('17) 39 All. 641 : 4 A. I. R. 1917 All. 163 : 42 I. C. 93 (S. B.), Gajadhar Singh v. Kishan Jiwan Lal.
21. ('22) 1 Pat. 444 : 9 A. I. R. 1922 Pat. 205 : 66 I. C. 790, Jowad Hussain v. Gendan Singh.
22. ('27) 54 I. A. 52 : 8 Lah. 253 : 14 A. I. R. 1927 P. C. 25 : 100 I. C. 22 (P. C.), Fitzholmes v. Bank of Upper India Ltd.
23. ('37) I. L. R. (1937) 18 Lah. 245 : 24 A. I. R. 1937 P. C. 124 : 64 I. A. 126 : 167 I. C. 786 : 31 S. L. R. 271 (P. C.), Nathu Mal v. Raman Mal.
24. ('28) 24 N. L. R. 182 : 15 A. I. R. 1928 P. C. 137 : 55 Cal. 821 : 55 I. A. 207 : 109 I. C. 467 (P. C.), Motilal v. Thakur Ujiar Singh.
25. ('29) 51 All. 640 : 16 A. I. R. 1929 All. 287 : 119 I. C. 510, Khair-un-nissa v. Oudh Commercial Bank Ltd.
26. ('31) 53 All. 283 : 18 A. I. R. 1931 All. 386 : 135 I. C. 550 (F. B.), Sat Parkash v. Bahal Rai.
27. ('39) I. L. R. (1939) 1 Cal. 477 : 26 A. I. R. 1939 Cal. 601 : 186 I. C. 215, Bhola Nath Sen v. Jogendra Mohan.
28. ('29) 10 Lah. 132 : 15 A. I. R. 1928 Lah. 904 : 111 I. C. 274, Shibba Mal v. Rup Narain.
29. ('37) 24 A. I. R. 1937 Mad. 421 : 171 I. C. 980, Koya Kutti v. Veerankutti.
30. ('39) I. L. R. (1939) Mad. 828 : 26 A. I. R. 1939 Mad. 735 : 185 I. C. 578, Veeran Kutti v. Koya Kutti.
31. ('27) 6 Pat. 780 : 14 A. I. R. 1927 Pat. 215 : 102 I. C. 811, Somar Singh v. Deonandan.
32. ('34) 13 Pat. 379 : 21 A. I. R. 1934 Pat. 225 : 149 I. C. 40, Ishwari Prasad Singh v. Raghubans Lal.

V. V. Kelkar and P. R. Padhye—for Appellant.

B. R. Mandlekar — for Respondent 1.

Judgment. — This appeal arises out of a mortgage suit. Paikaji and his sons executed a mortgage on 24-5-1929 in favour of respondent 1, Eknathrao for Rs. 20,000. Four of his sons, Ghularam and others, defendants 1 to 4, were majors and executed the document as such. The other three sons including the appellant, Madhorao defendant 5, were minors and the mortgage was executed on their behalf by their father Paikaji as their guardian.

[2] The consideration of Rs. 20,000 was stated to be for payment of antecedent debts to the creditors of the mortgagors to the extent of Rs. 16,000, Rs. 200 for the expenses of stamp and registration of the mortgage and Rs. 2800 for expenses of cultivation and for advance to agricultural servants. Interest was agreed to be paid at the rate of 0-14-0 per cent. per mensem and the entire amount together with interests was payable on 24-5-1934. In default of payment of the amount due with interest on the due date, the mortgage amount was payable at the rate of

1 per cent. per mensem till realisation. The property mortgaged was 0-16-0 of Chaparda Ijara, tahsil and district Yeotmal. One of the terms of the mortgage was that the mortgagee had the option to sue either for foreclosure or for sale in default of the payment of the money due on the mortgage.

[3] The mortgagors paid Rs. 2000 to the mortgagee on 21-11-1929 and thereafter nothing was paid towards the mortgage. After the due date for payment had expired on 24-5-1934, respondent 1, the mortgagee, filed Civil Suit No. 8A of 1938 on 28-11-1938 in the Court of the Additional District Judge, Yeotmal, to enforce the mortgage dated 21-5-1929. Paikaji had died and his sons were impleaded as defendants 1 to 7 and his grandsons were impleaded as defendants 8 to 13. The grandsons were born subsequent to the execution of the mortgage. The plaintiff exercised the option which he had under the mortgage and claimed a decree for foreclosure in default of the payment of the amount due on the mortgage.

[4] Separate written statements were filed on behalf of the different defendants. The trial Court passed a preliminary decree for foreclosure on 30-1-1940. The date fixed for payment was 30-7-1940 and the amount payable inclusive of interest and costs was Rs. 31,524-8-8.

[5] Madhorao, defendant 5, alone filed First Appeal No. 4 of 1941 on 24-6-1940 against the preliminary decree and impleaded the mortgagee and Gunwant and Mukunda, two of the brothers of the appellant, who were co-mortgagors with him. The other defendants did not file an appeal against the preliminary decree for foreclosure, nor have they been made parties in this appeal.

[6] The decree holder made an application on 11-9-1940 for a final decree for foreclosure. The appellant made an application in this Court on 7-11-1940 for stay of proceedings in the trial Court for making the decree final, but before this application could be disposed of, the trial Court passed a final decree for foreclosure on 23-11-1940. This Court rejected the application for stay on 3-1-1941.

[7] The learned counsel for the mortgagee (respondent 1) raised a preliminary objection as regards the competency of the appeal. The first ground urged by him was that as no appeal had been filed by the mortgagors against the final decree for foreclosure, the appeal against the preliminary decree for foreclosure had become infructuous. The learned counsel did not cite any authorities in support of his contention. Presumably, his contention was based on Calcutta cases which had been overruled in 57 Cal. 1013[1] and had not been followed in 27 N. L. R 197.[2]

[8] Under S. 97, Civil P. C. where any party aggrieved by a preliminary decree does not appeal from such decree, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. There is no provision in the Code making an appeal filed against the preliminary decree infructuous if an appeal against the final decree is not filed. The function of a final decree is merely to restate and apply with precision what the preliminary decree has ordained and the decree being in the same suit the Court in appeal from the preliminary decree, as it has power to reverse or vary the preliminary decree, has also power to affect the final decree.

[9] All the High Courts in India are agreed that a passing of a final decree subsequent to the institution of the appeal will not affect the maintainability of the appeal against the preliminary decree : *see* 36 ALL. 532,[3] A. I. R. 1938 Bom 222;[4] 57 Cal. 1013;[1] 17 Lah. 53,[5] 37 Mad. 29;[6] 37 Mad. 455[7] ; 27 N. L. R 197[2] and A. I. R. 1916 Pat. 370.[8] The first ground, therefore, fails.

[10] The second ground urged was that as all the mortgagors have not been impleaded as parties in this appeal, the appeal is not maintainable. The learned counsel relied on I. L. R. 1938 Nag. 370[9] at p. 372. That was a case where the respondent-mortgagees had obtained a preliminary decree for foreclosure and one of them died during the pendency of the appeal filed by the mortgagors. No legal representative of the deceased mortgagee was brought on the record. The question for decision was whether the appeal abated in its entirety. The decision was based on S. 45, Contract Act and on the principle that as the mortgage was one and indivisible and as the legal representative of the mortgagee had not been brought on record, the appeal abated as a whole. This case has no application.

[11] Under S. 43, Contract Act, when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise. This is not a case where a promise is made by two or more persons.

[12] Under S. 45 of the Act when a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly. The mortgagee filed a suit against all the mortgagors and obtained a preliminary decree for foreclosure and subsequently a final decree for foreclosure. The defendants other than the ap-

pellant did not file any appeal against either of the decrees and are bound by it. The appellant has a right of redemption and if he succeeds in this appeal, he will be entitled to redeem the property on payment of the amount which may be found binding on him.

[13] Order 34, R. 1, Civil P. C., is in these terms :

"Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

The explanation has not been reproduced as not necessary for the purpose of the disposal of the appeal. This rule is a rule of procedure and is subject, among other things, to R. 9 of O. 1 of the Code which enacts that no suit shall be defeated by reason of the non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. That O. 34, R. 1 is subject to O. 1, R. 9 of the Code has been well-established by judicial authorities : *see* 52 ALL. 134,[10] 10 Luck. 70,[11] 15 Luck. 399,[12] 60 Cal. 87,[13] 10 Pat. 341,[14] A. I. R. 1937 Pat. 414[15] and 18 Pat. 141.[16] It is possible to work out the right of the appellant in this appeal even though some of the mortgagors are not parties to this appeal. The appeal, therefore, does not fail for non-joinder of the other mortgagors.

[14] The last point urged was that in the absence of the other mortgagors, it was not permissible for the appellant to ask for change of the decree from one for foreclosure to one for sale. This point is based on a misapprehension. The competency of appeal is one thing and the question whether the appellant is disentitled to any relief by reason of absence of necessary parties is a different matter. The appeal is competent, though the point urged may be a valid ground for disallowing the appellant relief claimed, even though he may otherwise be entitled to it, as he has not made the other persons affected by the decree parties to this appeal. The third ground has also no substance. The preliminary objection as regards the maintainability of the appeal is overruled.

* * * *

[15] The last point urged was that even if the appeal failed on merits, a fresh preliminary decree for foreclosure be passed. The learned counsel argued that as a matter of law he is entitled to a fresh decree for foreclosure notwithstanding the dismissal of the appeal. The learned counsel relied on three Privy Council cases, 29 N. L. R. 130[17] and A. I. R. 1934 Mad. 65[18] in support of his contention.

[16] The first Privy Council case relied on was 53 I. A. 197 : 6 Pat. 24.[19] In that case the decree-holder had applied for a final decree for sale. The application was made more than three years after the expiry of the date fixed for payment in the preliminary decree for sale but within three years from the date of the decree of the appellate Court dismissing the appeal filed by the decree-holder against the preliminary decree. Article 181, Limitation Act governed the case. Under that article an application has to be made within three years from the date when the right to apply accrues. The point for decision was whether the time ran from the expiry of the time fixed by the original preliminary decree or from the date when on appeal against that decree the appeal was dismissed. Their Lordships of the Judicial Committee approved of the decision in 39 ALL. 641,[20] affirmed the decree of the Patna High Court reported in 1 Pat. 444[21] and held that an application for a final decree under O. 34, R. 5 (2), Civil P. C., has to be made within three years from the date of the decree of the appellate Court and not from the expiry of the time for payment fixed by the preliminary decree and that the application of the decree-holder for a final decree was within limitation. This view of the law was re-affirmed by the Privy Council in the subsequent case 54 I. A. 52 : 8 Lah. 253.[22]

[17] The question whether the mere filing of an appeal against the preliminary decree without an order for stay from the appellate Court ousts the jurisdiction of the trial Court to pass a final decree was not raised and decided in either of these two cases. Their Lordships of the Judicial Committee did not lay down the proposition that even where a final decree had been passed by the trial Court during the pendency of an appeal against a preliminary decree, a fresh preliminary decree after the dismissal of the appeal should invariably be drawn up, fixing a fresh date for payment after making calculation of the amount payable under the decree.

[18] In 18 Lah. 245[23] a fresh decree was drawn up as the appeal had been allowed. As stated by Rankin C. J., in 57 Cal. 1013[1] at page 1039, when a preliminary decree is set aside, the final decree is superseded, whether the appeal was brought before or after the passing of the final decree and that, an appellate Court, when setting aside or varying a preliminary decree, can, and indeed should give directions for the setting aside or varying of the final decree, if the existence of the final decree is brought to its notice.

[19] Under O. 41, R. 5, Civil P. C., an appeal does not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order. In the present case, no order for stay had been granted by the appellate Court. Under O. 34, R. 2 (2) in the

case of a preliminary decree for foreclosure and under R. 4 (2) in the case of a preliminary decree for sale, the Court may on sufficient cause extend time for payment. The Court, however, has no jurisdiction to extend time for payment unless good cause is shown : *see* 24 N. L. R. 182.[24] Where a payment is not made in accordance with the preliminary decree and time for payment has not been extended, the Court shall, on an application made by the decree-holder, pass a final decree for foreclosure under O. 34, R. 3 of the Code, or a final decree for sale under O. 34, R. 5, as the case may be. The trial Court has jurisdiction to make a final decree notwithstanding that an appeal against a preliminary decree is pending in a higher Court: *see* 51 ALL. 640,[25] 53 ALL. 283,[26] I. L. R. (1939) 1 Cal. 477,[27] 10 Lah. 132,[28] A. I. R. 1937 Mad. 421,[29] I. L. R. 1939 Mad. 828[30] at p. 832, 6 Pat. 780[31] and 13 Pat. 379.[32]

[20] Where an appeal is filed against a preliminary decree and the appeal is subsequently dismissed, the question of limitation becomes material in two cases: (1) when the decree-holder applies for a final decree and (2) when he applies for execution of the final decree. As regards the first case, it is governed by Art. 181, Limitation Act, and a decree-holder has to apply within three years from the date when the right to apply arises. There was a divergence of judicial opinion as regards the starting point of limitation for an application for a final decree in a mortgage suit. It is now settled law after the decisions of their Lordships of the Privy Council in 6 Pat. 24[19] and 8 Lah. 253[22] that the decree-holder has a right to apply for a final decree after the appeal is decided. In cases where he has already obtained a final decree for foreclosure, the question of limitation will not arise. In the present case the mortgagee has already obtained a final decree for foreclosure and it is not necessary for him to apply for a final decree. In the case of an application for execution of a decree, Art. 182 is clear and the several clauses in col. 3 of the article give separate starting point for limitation and if the application for execution is made within any of these dates mentioned therein, the application for execution will be within limitation. Where an appeal has been filed against the preliminary decree or final decree in a mortgage suit, the starting point for limitation is the date of the decree or order of the appellate Court: *see* cl. 2, col. 3 of Art. 182.

[21] In 29 N. L. R. 130,[17] Macnair J. C. laid down that notwithstanding the dismissal of an appeal from a preliminary mortgage decree, it is necessary for the appellate Court to pass a fresh decree fixing a fresh date for payment and making a fresh calculation of the amount which will be due on that date. The decision purports to be based on 6 Pat. 24.[19] We respectfully disagree with the decision of Macnair J. C. as, in our opinion, their Lordships of the Judicial Committee did not lay down any such proposition in 6 Pat. 24.[19]

[22] The decision in A. I. R. 1934 Mad. 65[18] is inconsistent with the later cases in A. I. R. 1937 Mad. 421[29] and I. L. R. (1939) Mad. 828,[30] and cannot be supported on principle. In A. I. R. 1934 Mad. 65[18] it was held that in cases where there has been a final decree in pursuance of the preliminary decree of the lower Court pending the appeal, that final decree is valid and binding to the extent but only to the extent to which it is not altered by the appellate decree, and a decree of the appellate Court confirming after judicial consideration the preliminary decree of a lower Court is for this purpose one altering it. We accept the first part of the proposition as correct, but we respectfully dissent from the second part.

[23] As a final decree for foreclosure has already been passed in this case, we do not consider it necessary to pass a fresh preliminary decree for foreclosure.

[24] The appeal fails and is dismissed. Ordinarily costs shall follow the event. As frivolous objection regarding the maintainability of the appeal was raised on behalf of respondent 1, we disallow respondent 1 his costs of the appeal. Parties to bear the costs in this Court as incurred.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 60 *[C. N. 21.]*

NIYOGI C. J. AND HIDAYATULLAH J.

Mt. Hasinabai w/o Fakarduddin and another — Defendants — Appellants v. *Shrikisandas Tikamdas—Plaintiff—Respondent.*

Second Appeal No. 93 of 1940, Decided on 8-8-1946, from appellate decree of Addl. Dist. Judge, Nimar, D/- 17-11-1939.

(a) Civil P. C. (1908), O. 22, Rr. 3 and 4—Suit by trustee — Legal representative of trustee, who is—Civil P. C., (1908), S. 2 (11) — Trusts Act (1882), Ss. 73 and 75.

There is no need to read the definition of "legal representative" from Civil Procedure Code into the Trusts Act. The words "legal representative of the trustee" in S. 73, Trusts Act, mean *his* legal representative in his personal capacity, and not *qua* trustee. On the other hand, for the purposes of a suit the words "legal representative" mean the successor in office on whom the trust property devolves. In S. 2 (11), Civil P. C., the legal representative is the successor to the trusteeship and the trust property under S. 75, Trusts Act. In S. 73 the person who makes the appointment is the legal representative of the trustee in his individual and personal capacity. Therefore, a person who is nominated as a trustee by the legal representatives of the sole surviving trustee is a legal representative of such trustee for the purposes of O. 22 and can be substituted as a respondent on the death of such trustee.

[Paras 3 and 5]

Annotation : ('44-Com.) Civil P. C., O. 22, R. 3, N. 10 and O. 22, R. 10, N. 9.

(b) Negotiable Instruments Act (1881), S. 7—Promissory note—Trustee named as payee—Trust for community—Right of suit.

A sale deed which created a trust in favour of a certain community was executed in favour of three persons as *wahiwatdars* and *karindas* of that community. Two of the *wahiwatdars* acting for and on behalf of the community were payees under a promissory note the consideration for which came out of the trust. In a suit upon the promissory note by the sole living *wahiwatdar* :

Held that the plaintiff was a trustee of the trust and not an agent of the community; that a trustee can be a payee and since the plaintiff was named in the promissory note he was a payee within the meaning of S. 7 and there was no uncertainty in the matter and that, therefore, the plaintiff had a right of suit. [Para 10]

(c) Interpretation of statutes—Construction making statute logical is to be preferred. [Para 5]

(d) Negotiable Instruments Act (1881), S. 78 — Promissory note—Payment to third person—Validity of discharge.

A payment to any person other than the person mentioned in S. 78 would not give a valid discharge to the promisor unless the payee or the holder (as the case may be) accepts the payment as valid and to himself. Where the payee serves a notice on the promisor before the payment to the third person and shortly afterwards files a suit on the promissory note it cannot be said that the payee has accepted the payment and consequently there is no valid discharge in respect of that payment. [Para 13]

Cases referred :—

1. Miscellaneous Appeal No. 70 of 1935, D/- 27-12-1937, Habibulla v. Thakurdas.
2. ('18) 41 Mad. 353 : 5 A. I. R. 1918 Mad. 482 : 42 I. C. 934, Ramanandhan Chetty v. Katha Velan.
3. (1865) 1 Q. B. 376 : 35 L. J. Q. B. 130 : 14 L. T. 252 : 14 W. R. 584, Holmes v. Jaques.
4. ('09) 4 I. C. 293 : 5 L. B. R. 102 (F. B.), Yeo Eng Pwa v. Chetty Firm.
5. (1863) 32 L. J. Ex. 137, Watson v. Evans.
6. ('30) 59 M. L. J. 548 : 17 A. I. R. 1930 Mad. 1004 : 53 Mad. 968 : 128 I. C. 870, Venkatarami Reddi v. Bhupal Rao.
7. ('35) 22 A. I. R. 1935 Nag. 43 : 31 N. L. R. 147 : 155 I. C. 1032, Sukhlal Modhi v. Damroo Ganesh.

Fida Hussain — for Appellants.

K. B. Tare — for Respondent.

Judgment.—This is a second appeal from the judgment and decree passed by Mr. J. N. Haksar, Additional District Judge, Nimar on 17-11-1939 in Civil Appeal No. 10B of 1939, reversing the decision of the trial Court. The suit was based upon a promissory note, dated 11-5-1932 (Ex. P-1) and the plaintiff brought the suit as the sole surviving trustee of a trust. In the plaint the plaintiff is described as

"trustee, by virtue of a sale-deed dated 6th June 1921, executed by Mt Radhabai, wife of Kishan Das, and others, *Panch* and *Wahiwatdar* of Gujrathi Mod Community, Burhanpur."

[2] The defendants denied the right of the plaintiff to bring the suit and the trial Court dismissed the suit. The first appellate Court reversed the decree of the trial Court. Hence the defendants filed this appeal.

[3] The only question upon merits is whether the plaintiff has a right of suit as the defendants do not deny execution or consideration. Before this part of the case is taken up, there is one other point in connection with the death of the plaintiff and the substitution of Seth Shrikishandas, son of Tikamdas of Burhanpur as the respondent which needs decision. It is argued that Seth Shrikishandas who is nominated by the legal representatives of the late Seth Thakurdas (plaintiff) as a trustee is not the legal representative of Seth Thakurdas for the purposes of O. 22, Civil P. C.

[4] Section 73, Trusts Act (2 [II] of 1882) provides for the appointment of a trustee, when the last surviving trustee either dies, or is unfit or refuses to act. In such circumstances (*inter alia*) the legal representatives of the last surviving and continuing trustee can nominate the successor. Mr. Fida Hussain refers to S. 2 (11), Civil P. C., which reads :

" 'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued"

and argues that because a trustee sues in a representative capacity we have first to find out the person on whom the trust property has devolved and it is that person who is the legal representative and who alone can make the nomination of the successor under S. 73, Trusts Act. He says that the law is defective because it is obvious that the devolution of the trust property cannot take place till a successor is appointed.

[5] There is no need to read the definition from the Civil Procedure Code into the Trusts Act. The trust property has devolved upon the present respondent (Seth Shrikishandas) under S. 75, Trusts Act as he has been legally appointed by the legal representatives of the sole surviving and continuing trustee. The words "legal representative of the trustee" in S. 73, Trusts Act, mean his legal representative in his personal capacity, and not *qua* trustee. On the other hand for the purposes of a suit the words 'legal representative' mean the successor in office on whom the trust property devolves. Sir Dinshaw Mulla's comment under S. 2 (11), Civil P. C., at p. 12 of his Edn. 11 is quite clear :

"Thus on the death of a trustee or of a shebait of a *mutt*, his successor in office and not his executor or heir is the legal representative, and the suit would be continued by or against the successor under O. XXII, R. 3 or 4."

In S. 2 (11), Civil P. C. the legal representative is the successor to the trusteeship and the trust property under S. 75, Trusts Act. In S. 73 the person who makes the appointment is the

legal representative of the trustee in his individual and personal capacity. It is a well known rule of interpretation of statutes that if one construction leads to absurdity and another makes the statute logical, the latter construction is to be preferred, for every effort should be made to make sense and not nonsense of legislation. In our opinion, therefore, the meaning of the two provisions is quite clear and we hold that Seth Shrikisandas has been properly brought on record.

[6] The next point is whether the plaintiff Thakurdas had a right of suit on the promissory note. The defendants' argument is that the payee in the pronote is 'the Sakal Panchas Gujrati Mod' and as there cannot be a '*wahiwatdar*' (agent) of the Sakal Panchas Gujrati Mod, the present plaintiff is neither a payee nor a holder of the promissory note. He contends that inasmuch as the pronote is in the name of a community with a fluctuating membership, a suit could only be brought if the plaintiff had been authorised by the whole community or under the provisions of O. 1, R. 8, Civil P C.

[7] This matter was even previously the subject of some controversy and the High Court by its order in Misc. Appeal No. 70 of 1935[1] had upheld the order of the District Judge who had remanded the case for a rehearing after the trial Court had dismissed the suit. In upholding the order of the District Judge Stone C. J., and Bose J. held :

"The learned District Judge came to the conclusion, we think rightly, that a community cannot have an agent and that the truth was that this community in respect of this transaction was represented by Seth Thakurdas as trustee. He also expressed the view that Ex. P-1 was a promissory note the payee in which was the community. As to this latter question, we leave the matter open, the matter not having been argued before us, though we observe that *prima facie* it would seem obvious that Seth Thakurdas is the payee, though when paid he would hold the proceeds as trustee. The proposed amendment which the plaintiff has declined to make, is we think, one that cannot be required and we incline to the view that as the plaint stands at present, so far as its entitling is concerned, it is right."

[8] The matter, therefore, is one of construction of the document and if the present plaintiff is one of the payees then he has a right of suit. The words of the pro-note are :

"Promissory note *likhwalene walle Sakal Panch Gujrati Mod Ki taraf se wahewatdar Sethjee Thakurdas Goverdhandass wa Khemchand Bisandass etc.*"

The payees under the promissory note are obviously the two *wahiwatdars* who were acting for and on behalf of the Sakal Panch Gujarti Mod. The promissory note makes the two persons named there as the payees and it is not denied that Thakurdas alone is now alive. A great deal of dispute has arisen in this case due to the use of the word '*wahiwatdar*' because a community like the Sakal Panch Gujrathi Mod cannot have an agent. Reference in this matter is made by both sides to a 'sale' deed which is the basis of a trust out of which this money had come. That sale deed was executed on 6-6 1921 by six persons in favour of (a) Shree Bechar Mata temple, (b) Shree Gujrathi Mod Wadi, (c) (i) Seth Thakurdas Gordhandas (ii) Seth Ghanshyamdas Javerchand (iii) Seth Khemchand Bisan Das (iv) Mulchand son of Lalchand Gujrathi Mod *wahiwatdars* and *Karindas* of Sakal Panch Gujrathi Mod community.

[9] The property sold consisted of two houses and the vendors by the same deed stipulated that out of the consideration of Rs. 10,000 the vendees would pay off the debts mentioned in the sale-deed and meet the marriage expenses of the one Mt. Sunder Bai and the expenses of maintaining some infants. The balance was to be disposed of as follows :

"The caste people will be invited and fed, each year on *Miti Baisakh Vadi* 8, in the names of Javerchand and Mobanchand (and) Naraindas (unintelligible) Bhagwatwallas, with the amount of interest, whatsoever accrues on the balance which will be left after paying off the debts of the creditors and kept in deposit as principal. Every member of Gujrathi Mod community is authorised to make efforts himself for the arrangement of feeding the people of the community and get (the same) done. Every member of our community is also entitled to examine the accounts thereof."

It is said that a point emerges from this : that the vendees being six, even excluding the Gujrathi Mod, at least two other trustees are named viz. the Bechar Mata temple and the Shri Gujrathi Mod Wadi. But we are not concerned with whether these are also trustees or not; what we are concerned with is the payee under the pro-note. A trustee can be a payee. It has been held in 41 Mad. 353[2] that a trustee can sustain a suit in his name when a promissory-note is taken in his name as a trustee. In this ruling even the successor of the trustee was allowed to sue. The reason given was that the Negotiable Instruments Act does not affect devolution of rights by operation of law. A trustee can certainly be the payee and if authority is needed we cite (1865) 1 Q. B. 376.[3] In 4 I. C. 293[4] there was a promissory-note made payable to 'the members for the time being of the firm of R. M. A. R. R. M.' This was held not to indicate a certain person within the meaning of the Negotiable Instruments Act. Bell J. who pronounced the judgment of the Full Bench, however, went on to say :

"If it were merely the inclusion of 'representatives' in the expression 'the creditor' that had to be considered, I do not think any difficulty would arise, for then I think on the true construction of the instrument the money would be payable in the first instance to the members of the firm, and their representatives would be merely their agents to receive payment on their behalf.

This clearly would be the case under the English Common Law, as appears from *inter alia* (1865) 1 Q.B. 376[3] and (1863) 32 L. J. Ex. 137[5] and it seems to me that the paragraph quoted above from S. 5, Negotiable Instruments Act merely reproduces English Common Law with respect to the certainty of person required in the case of the payee of a note or bill. I have the less hesitation in so regarding this paragraph, as the same view of its effect is taken by the learned draftsman of the English Bills of Exchange Act. (Chalmer's Negotiable Instruments Act, page 42, 3rd Edition.)"

It is to be noticed that the promissory note in (1865) 1 Q. B. 376[3] ran as follows :

"On demand I promise to pay to the trustees of the W. Chapal or their treasurer for the time being etc."

The plaintiffs in the action were the surviving trustees, there being in the first instance four other persons besides the plaintiffs as the original trustees. Cockburn C. J., said that 'the treasurer would have no authority to sue in his own name but only to receive the money on behalf of the trustees'. This did not introduce any uncertainty as to the payees and the surviving trustees could sue. See also 59 M. L. J. 548.[6]

[10] Since the plaintiff is named in the promissory note he is a payee within the meaning given by the definition of a payee in S. 7, Negotiable Instruments Act, and there is no uncertainty in the matter. We are further of the opinion that Seth Thakordas was a trustee of the trust out of which this money came. This was in effect also the finding of Stone C. J., and Bose J. and we are fortified in our conclusions by the earlier finding though it was then tentatively given. The case is, therefore, covered by the decision in 41 Mad. 353.[2] We accordingly hold that the plaintiff had a right of suit.

[11] There are two small matters which, it was said, call for interference. The Court of appeal below, decreed the claim of the plaintiff for Rs. 3300 with interest from 11th May 1931 at 9 per cent. per annum till 20th July 1938 and thereafter at 4 per cent per annum. The learned Judge of the Court below lost sight of the fact that credit for Rs. 594 towards interest was given in the plaint. The decree of the lower appellate Court will be modified by making this allowance.

[12] The defendants (appellants) claim credit for Rs. 297 which were paid to the Sakal Panch Gujrathi Mod on or about 18th May 1934 through Chhotelal Gulabchand, Manakchand Bhookandas, and Moti Munshi for holding the annual feast. The plaintiff denied the payment as it was not paid to the promisees named in the promissory note or another person at their instance.

[13] Defendants rely on receipt dated 22nd July 1934 (Ex. 1 D-8) and have examined Manakchand (D. W. 1) and Chhotelal (D. W. 2). The defendants further rely on the copies of account books (Ex. 1 D-9). The matter falls to be considered under S. 78, Negotiable Instruments Act. This section provides that :

"Subject to the provisions of S. 82, Cl. (c) payment of the amount due on a promissory note, bill of exchange or cheque must in order to discharge the maker or acceptor be made to the holder of the instrument."

A payment to any other person would not give a valid discharge to the promisor unless the payee or the holder (as the case may be) accepts the payment as valid and to himself. The plaintiff had already served notices on the defendants before the date of this payment and the suit was also filed on 15th June 1934. It cannot, therefore, be said that the plaintiff accepted the payment. Technically, the defendants cannot be said to be discharged though it is apparent that the money reached the Sakal Panch Gujrathi Mod. We accordingly hold that there is no valid discharge in respect of this sum of Rs. 297. The appeal subject to modification indicated above is dismissed.

[14] As a certificate under S. 15 (1), Debt Conciliation Act has been issued, the parties shall bear their own costs and the decree shall not be executed unless agreement (if any) under S. 12 of the Act is satisfied or ceases to subsist.

[15] It remains only to discuss the cross-objection. This is filed in respect of the costs which have been disallowed because of a certificate issued by the Debt Conciliation Board. It is argued that the suit was already pending before the defendants applied to the Debt Conciliation Board and a distinction is sought to be made between suits already begun and suits which are filed later. This matter was considered by one of us in A. I. R. 1935 Nag. 43[7] and nothing has been shown to us which would induce us to depart from the view there expressed. The cross-objection is dismissed. Parties will bear their own costs of the cross-objection.

V.R. *Appeal and cross-objection dismissed.*

A. I. R. (35) 1948 Nagpur 63 *[C. N. 22.]*

HIDAYATULLAH J.

Umedsingh Baliram Raghubanshi—Applicant v. *Shankerlal Jhanaklal and others — Non-applicants.*

Civil Revn. No. 139 of 1945, Decided on 15th October 1946, from order of Addl. Dist. Judge, Seoni, D/- 27th January 1945.

(a) Limitation Act (1908), S. 4 and Art. 166 — Court closed when period expires — Extension of time.

Where the period of limitation prescribed for an application under O. 21, R. 89, Civil P. C., expires on a day when the Court is away on casual leave, it is imperative on the applicant to file his application and make the necessary deposit on the very next day on which the Court is opened. He is not entitled to add the

days on which the Court is closed to the statutory period : 22 A. I. R. 1935 P. C. 85, *Rel. on.* [Para 6]

Annotation : ('42-Com.) Lim. Act, S. 4, N. 15, Art. 166, N. 17, Pt. 11.

(b) Civil P. C. (1908), O. 21, R. 89 — Deposit in Court.

The making of a deposit is a condition precedent to the making of an application under O. 21, R. 89 : 4 A. I. R. 1917 Mad. 176; 31 A. I. R 1944 Bom. 233 ; 31 A.I.R. 1944 Mad. 565 and 12 A.I.R. 1925 Nag. 30. *Rel. on.* [Para 6]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 89, N. 16.

Cases referred :—

1. ('11) 13 C. L. J. 467: 10 I. C. 51, Md. Akbar Zaman Khan v. Sukhdeo Pande.
2. ('12) 15 C. L. J. 83 : 10 I. C. 880, Dulhin Mathura Koer v. Bansidhar Singh.
3. ('34) 15 Lah. 308 : 21 A. I. R. 1934 Lah 622 : 152 I. C. 618, Nur Muhammad v. Ghulaman.
4. ('26) 9 N. L. J. 57 : 13 A. I. R. 1926 Nag. 331 : 96 I. C. 376, Raotmal v. Amarsingh.
5. ('35) 57 All. 242 : 22 A. I. R. 1935 P. C. 85 : 155 I. C. 205: 62 I.A. 80 (P.C.), Maqbul Ahmad v. Pratap Narain Singh.
6. ('17) 4 A. I. R. 1917 Mad. 176: 33 I. C. 996, Vannisami Thevar v. Periayaswami Thevar.
7. ('44) 31 A. I. R. 1944 Bom. 233, Amritlal Narsilal v. Sadashiv.
8. ('44) 1944-2 M. L. J. 124 : 31 A. I. R. 1944 Mad. 565: 218 I. C. 414, Arumughathammal v. Mangoomal Lunida Singh Firm.
9. ('25) 12 A.I.R. 1925 Nag. 30: 78 I. C. 705, Narayan v. Ramkrishnaji.

H. N. Chaudhuri — for Applicant.

V. R. Sen and R. J. Bhave — for Non-applicant 1.

Order.—This is a revision against the order of Mr. G. V. Ayachit, Additional District Judge, Seoni in Misc. Appeal No. 5 of 1944, dated 27th January 1945.

[2] The applicant, Umed Singh, is a private purchaser of property which was the subject of a Court sale in execution of a decree in Civil Suit No. 45-B of 1939, and was purchased by Shankerlal Kalar. The decree-holder in the suit was Bhairo Sao and the judgment-debtor Birat Singh. The court sale took place on 23rd August 1944. On 25th September 1944 two applications were put in to set aside the sale. One was by Birat Singh and the other by the present applicant. The trial Court by its order D/- 2nd October 1944 dismissed Birat Singh's application as the necessary deposit was not made on 22nd September 1944 and the application was beyond the period of 30 days.

[3] With regard to Umed Singh's application the learned Court took a different view and ordered him to make the necessary deposit till 3rd October 1944 and on 20th October 1944 the Court set aside the sale. The learned Judge said:

"The explanation offered by the counsel on behalf of Umed Singh is that he could not present such an application within one month and specially on the last day as this Court was away on casual leave."

The application being late by three days the learned Judge condoned the delay and extended the time for the making of the application and the deposit.

[4] The learned Additional District Judge reversed this decision. It is difficult to see how the learned trial Judge could distinguish the case of the two applicants before him as he did.

[5] In the case of Umed Singh also the limitation of 30 days applied and the making of a deposit is a condition precedent to the application. Learned counsel in support of his application relies on 13 C. L. J. 467,[1] 15 C. L. J. 83,[2] 15 Lah. 308[3] and 9 N. L. J. 57[4] and argues that when the Court was on casual leave on 22nd September 1944 the Court must be deemed to be closed on that date. He claims, therefore, to deduct one day from the days spent till 22nd September 1944 and as 23rd September 1944 was a Saturday he claims to be in time on 25th September 1944.

[6] It has been held in 57 ALL. 242[5] that Ss. 4 and 14, Limitation Act, are not similar in their effect. Whereas under S. 14 of the Act the time spent can be excluded, S. 4 does not entitle a person to add the days on which the Court is closed to the statutory period. He must do the act on the very next day on which the Court is open. Applying these rulings in the light of the Privy Council case just referred to here, it was imperative for Umed Singh to file his application and make the necessary deposit on 23rd September 1944 when presumably the Court was present. The applicant has been unable to show why he should be excused for not filing his application on 23rd September 1944 and for not making the deposit also on the same date. The application which was ultimately filed was prepared on 25th September 1944 and the stamps for it were also bought on the 25th *idem*. It is obvious that the applicant took no action till that date and is now using the Court's absence to get a longer period of limitation. Further even on 25th September 1944 he did not make the deposit and as held in A. I. R. 1917 Mad. 176,[6] A.I.R. 1944 Bom. 233,[7] 1944-2 M. L. J. 124[8] and A. I. R. 1925 Nag. 30[9] the making of a deposit is a condition precedent to the making of an application under O. 21, R. 89, Civil P. C. This was not done on the same day on which the application was made. The order of the learned Additional District Judge, Seoni, is upheld. The application for revision is dismissed with costs. Counsel's fee Rs. 20.

V.B.B. *Revision dismissed.*

A. I. R. (35) 1948 Nagpur 65 *[C. N. 23.]*

PADHYE J.

Jusaf and Ismail Co., Saoner — Plaintiff-Applicant v. *Governor-General in Council through the Secretary, Central Government, representing G. I. P. Ry. Co. and B. N. Ry. Co., New Delhi—Defendant—Non-Applicant.*

Civil Revn. No. 229 of 1945, Decided on 5-9-1946, from decree of Small Cause Court Judge, Saoner, D/- 6-4-1945.

(a) Railways Act (1890), S. 72 — Goods damaged by unruly and furious mob—Liability of Railway—Contract Act (1872), Ss. 151 and 152.

After the Act was enacted the Railways in India are merely bailees in respect of goods entrusted to them for carriage and are governed by the provisions of the Contract Act on bailment: (1926) 1 K.B. 102;31 A.I.R. 1944 Cal. 50 and 33 A. I. R. 1946 Cal. 249, *Rel. on.* and 3 Bom. 109 (F. B.), *Approved.* [Para 5]

Even as bailee, the liability of the Railway is not unqualified. It is expected to take only that care of goods which a prudent owner would take of the goods owned by him. Where a riotous mob of about 1000 people attacked the Railway Station, burnt and destroyed all records, the station building and the goods-shed, and damaged everything it could lay its hands on, and no amount of care by the Railway Company could have possibly protected the goods against the unruly and furious mob, the Railway, as a bailee, cannot be held liable for the damage done to the goods as a result of unforeseen and unavoidable eventuality. [Para 10]

(b) Railways Act (1890), S. 72— Consignee if can refuse to take delivery except on endorsement by Railway Officer regarding damage and shortage — Contract Act (1872), S. 161.

The consignee should take delivery of the consignment in the condition in which it is found after giving notice to the officer giving delivery as to its condition and then sue the Railway Company for damage or shortage, if any. He has no right in law to insist that either the Railway Officer should make or he himself should be permitted to make an endorsement as to the damaged condition of the consignment in railway registers before taking delivery: 18 A. I. R. 1931 Nag. 29, *Rel. on*; 16 A. I. R. 1929 All 960, *Disting*; 13 A. I. R 1926 Lah. 575; 9 A. I. R. 1922 All. 514 and 23 A. I. R. 1936 Mad. 878, *Ref.* [Para 8]

(c) Railways Act (1890), S. 72— Consignee refusing to take delivery — Liability of Railway for loss or damage — Contract Act (1872), S. 161.

Even if the consignee refuses to take delivery of the goods duly offered to him the railway still continues to be the bailee and remains liable as such. But the consignee is liable to compensate the railway for any necessary expenses incidental to the safe custody of goods: 13 I. C. 509 (Cal.), *Ref.* [Para 9]

Cases referred:—

1. ('78) 3 Bom. 109 (F. B.), Kuverji Tulsidar v. G. I. P. Ry. Co.
2. (1926) 1 K. B. 102 : 95 L. J. K. B. 363 : 134 L. T. 191, Fagan v. Green and Edwards Ltd.
3. ('43) I. L. R. (1943) 1 Cal. 397 : 31 A. I. R. 1944 Cal. 50 : 211 I. C. 270, B. N. Ry. Co., Ltd. v. Sobrati Miya.
4. ('46) 33 A. I. R. 1946 Cal. 249 : I. L. R. (1944) 2 Cal. 437, Ralliaram v. Governor-General of India in Council.
5. ('29) 16 A. I. R. 1929 All. 960:52 All. 126:122 I. C. 888, Bhullan Mal v. Secretary of State.
6. ('26) 7 Lah. 370 : 13 A. I. R. 1926 Lah. 575 : 96 I. C. 323, Secretary of State v. Har Kishan Das Kura Mal.
7. ('22) 44 All. 763: 9 A. I. R. 1922 All. 514 : 68 I. C. 961, Shri Gangaji Cotton Mills Co., Ltd. v. East Indian Ry. Co.
8. ('36) 71 M. L. J. 325 : 23 A. I. R. 1936 Mad. 878 : 164 I. C. 903, S. I. Rly. Co., Ltd. v. Krishnaswami Naidu.
9. ('31) 18 A. I. R. 1931 Nag. 29 : 27 N. L. R. 230: 130 I. C. 82, G. I. P. Rly. Co. v. Firm Manik Chand Premji.
10. ('12) 13 I. C. 509 (Cal.), Janki Das v. B. N. Ry. Co.

G. P. Zade—for Applicant.

B. N. Rudra—for Non-Applicant.

Order.—This revision is filed by the plaintiff against the dismissal of his suit for damages filed against the Governor-General in Council (owning the G. I. P. Railway) and the B. N. Railway Company, Limited, which, during the pendency of the suit, also came to be owned by the Government. The relevant facts are as follows.

[2] On 20-7-1942, bags of gram-dal (pulse) were delivered by the consignor to the defendant at its Railway Station, Cawnpur Central, to be carried to and delivered to the plaintiff at Saoner Railway Station of the B. N. Railway Company within the district of Nagpur. The goods reached their destination of Saoner on or about 2-8-1942 but, according to the plaintiff, in a damaged condition due to moisture and unfit for human consumption. The plaintiff insisted on the goods being delivered to him after weighing and after ascertaining the extent of damage and noting the same. This was refused by the Railway Officer in charge with the result that the goods remained undelivered till 19-11-1942, when the goods were taken delivery of by the plaintiff after the Railway Officer estimated and noted the damage and shortage at 60 per cent. The plaintiff thereafter served notices of his claim and ultimately instituted a suit claiming Rs. 395-8 as damages.

[3] The defendant denied liability on the grounds *inter alia* that the goods were not damaged during transit, that the plaintiff acted illegally and without jurisdiction in refusing to take delivery and in insisting on what is said to be open-delivery after noting the extent of damage and shortage and that the damage was in fact caused on 15-8-1942 by a riotous mob in the course of 1942 disturbances which it was beyond the control of the defendant to avoid.

[4] The learned Judge of the lower Court held that the plaintiff was at fault in refusing to take delivery on 2-8-1942 and the goods were thereafter lying with the defendant as unclaimed property. It was during this period that the goods were damaged by riotous mob

which was beyond the reasonable apprehension of the defendant and in spite of the exercise of a reasonable care which the defendant as bailee was expected to take in those circumstances.

[5] Before S. 72, Railways Act 9 [IX] of 1890 was framed there was much divergence as to the liability of the Railway Companies in India and it was held in a series of cases by the Calcutta High Court that the Railway Companies, just as common carriers, were not only liable for negligence but also as insurers of goods delivered to them. The Bombay High Court in its Full Bench case reported in 3 Bom. 109[1] had however held that the English Common law rule under which common carriers are held liable as insurers of goods had no application to the Railways in India and subject to special provisions and contracts the liability of the Railways in respect of goods entrusted to them is governed by Ss. 151 and 152, Contract Act. It is now well settled that after the Act 9 [IX] of 1890 was enacted the Railways in India are merely bailees in respect of goods entrusted to them for carriage and are governed by the provisions of the Indian Contract Act on bailment: (1926) 1 K B. 102,[2] I. L. R. (1943) 1 Cal. 397[3] and A. I. R. 1946 Cal. 249.[4] Section 72 of Act 9 [IX] of 1890 declared the law in conformity with the aforesaid Bombay decision.

[6] The learned counsel for the applicant relied mainly on two points, firstly that the goods were damaged in transit and reached Saoner in damaged condition, and secondly that the Railway Officers acted illegally or at any rate improperly in refusing to give delivery after examining the contents of the consignment and endorsing the shortage in weight and damage. According to him the defendant is liable for the damage in transit and he is liable for further damage on account of wrongful refusal to give delivery.

[7] Regarding the first point, the finding of the lower Court is somewhat ambiguous. It was therefore that I permitted the applicant's counsel to take me through the evidence on record. I find on going through the evidence that while the plaintiff has exaggerated the condition of goods on 2-8-1942, the station staff has on the other hand tried to minimise it. It is clear from the evidence on record that the goods were all along under cover, during transit, and also at Saoner, and there is little possibility of the entire quantity being damaged by moisture. After all, goods were carried from Cawnpore to Saoner during rainy season and there was at least one transhipment and it is not unlikely that some damage may have been caused. I do not believe the defendant's witnesses who deposed that the plaintiff refused to take delivery only because a very negligible quantity *i. e.*, two or three seers of pulse was damaged by moisture. It is not unlikely that the plaintiff may have been entitled to some amount by way of damages if he had placed on record reliable evidence as to the extent of damage during transit and furnished a good basis for assessing damages he was entitled to on that account. The plaintiff has completely failed to do this and his claim for damage done to the consigned goods on or before 2-8-1942 must therefore fail.

[8] The learned counsel for the applicant was unable to point out any provision in the Railways Act or any rule thereunder justifying his refusal to take delivery except on examination of goods and endorsement by the railway officer regarding damage, and shortage if any. He no doubt relied on a case reported in A. I. R. 1929 ALL. 960,[5] but that case is clearly distinguishable. That was a claim against the E. I. Railway Co. and it was decided on the strength of a rule framed by that Company enjoining on its Officers the duty of examination and weighment of goods if required by the consignee before taking delivery. No such rule was brought to my notice so far as the G. I. P. Railway or the B. N. Railway Companies are concerned. The learned counsel for the non-applicant on the other hand relied on 7 Lah. 370,[6] 44 ALL. 763[7] and 71 Mad. L. J. 325,[8] in support of the proposition that the consignor has no right in law to insist that the railway officer should weigh the goods and should make an endorsement as was required by the plaintiff in the present case. It was pointed out in A. I. R. 1931 Nag. 29,[9] that the consignee should take delivery of the consignment in the condition in which it is found after giving notice to the officer giving delivery as to its condition and then sue the railway company for damage or shortage, if any; he has no right in law to insist that either the officer of the Railway Company should make an endorsement or that the consignee should be permitted to make an endorsement as to the damaged condition of the consignment in railway registers. I therefore find that the plaintiff was not justified in refusing to take delivery on 2-8-1942.

[9] The learned counsel for the non-applicant contended that as a result of the plaintiff's refusal to take delivery duly offered to him the goods were lying in the railway goods-shed at the plaintiff's risk and the defendant was not liable for loss and damage to the goods after 2-8-1942 and he relied on a case reported in 13 I. C. 509.[10] In my opinion the proposition is not correct. The defendant still continued to be the bailee and remained liable as such. The plaintiff was however liable to compensate the defendant for any necessary expenses incidental to the safe

custody of goods: *vide* Commentary on the Contract Act by Mulla and Pollock, under S. 161.

[10] Even as bailee, the liability of the defendant is not however unqualified. The defendant is expected to take only that care of the goods which a prudent owner would take of the goods owned by him. The evidence on record shows that on 15-8 1942 a riotous mob of about 1000 people attacked Saoner railway station, and it burnt and destroyed all records, the station building and the goods-shed, and damaged everything it could lay its hands on. The mob damaged other public buildings at Saoner as well. No amount of care by the railway company could have possibly protected the goods against this unruly and furious mob. It is well-known that Government and private property was ruthlessly damaged and destroyed in the 1942 disturbances at several places in this province and outside. The defendant, as a bailee, cannot, therefore, be held liable in these circumstances for the damage done to the plaintiff's goods as a result of unforeseen and unavoidable eventuality. The plaintiff's claim for the damage done to the consigned goods on 15-8-1942 cannot therefore be decreed. The applicant's claim was therefore rightly dismissed by the lower Court. The revision is dismissed with costs. Counsel's fee Rs. 25.

G.N. *Revision dismissed.*

A. I. R. (35) 1948 Nàgpur 67 *[C. N. 24.]*

POLLOCK J.

Ajabsing and another—Appellants v. *Jhabbulal and others—Respondents.*

Second Appeal No. 27 of 1943, Decided on 12-9-1946, from appellate decree of Addl. Dist. Judge, Hoshangabad. D/-10-12-1942.

T. P. Act (1882), S. 53-A—Mistake in sale deed—Wrong field number given—Delivery of possession of correct property — Vendee does not get title thereby.

A sale deed described the field sold as No. 265/1. The contention of the vendees was that what was sold was field No. 267/1 and not No. 265/1 which was entered in the sale deed by mistake. They alleged that they were put in possession of No. 267/1 in April 1937 and remained in undisturbed possession until June 1940, when the vendor began to assert his claim to it. The field was worth more than Rs. 100. In a suit by the vendee for a declaration of his title to No. 267/1 and also for an injunction restraining the vendor from disturbing his possession or for possession, according as it might be found that the vendee was in or out of possession, the plaintiff relied on the agreement to transfer and on the delivery of possession in pursuance of that agreement:

***Held* that the English doctrine of part performance could not be applied so as to create, without writing, an interest, where according to S. 54, T P. Act, it can be created only by a registered instrument. Hence in the absence of a registered instrument transferring No. 267/1 the vendee acquired no title to it, and in the absence of title he could not have the declaration sought.** He could have sued within three years for rectification of the instrument or for specific performance of the agreement to sell; but having failed to do so he could not enforce the claim for possession: 18 A. I. R. 1931 P. C. 79, *Rel. on; Case law referred.* [Paras 9 & 11]

Held further that S. 53A did not help the plaintiff since there was no written agreement to transfer field N. 267/1. [Para 6]

Annotation: ('45-Com.) T. P. Act, S. 53A, Note 3.

Cases referred:—

1. ('43) 30 A. I. R. 1943 P. C. 208: 70 I. A. 225: I.L.R. (1944) Kar. (P. C.) 40 : 210 I. C. 507 (P. C.), Rahmat Ilahi v. Md. Hayat Khan.
2. ('31) 58 Cal. 1235 : 18 A. I. R. 1931 P. C. 79 : 58 I. A. 91 : 131 I. C. 762 (P. C.), G. H. C. Ariff v. Jadunath Majumdar.
3. ('38) 25 A. I. R. 1938 Mad. 589 : 176 I. C. 875 Sooramma v. Venkayya.
4. ('18) 5 A. I. R. 1918 Cal. 809 :41 I. C. 747, Asitulla v. Sadatullah.
5. ('30) 17 A. I. R. 1930 All. 387 : 127 I. C. 577, Sukhdeo v. Ramnarain Rai.
6. ('27) 14 A. I. R. 1927 All. 355 : 100 I. C. 568, Kesho Singh v. Roopan Singh.
7. ('15) 42 Cal. 801 : 1 A. I. R. 1914 P. C. 27: 42 I. A. 1 : 28 I. C. 930 (P. C.), Mahomed Musa v. Aghore Kumar Ganguli.
8. ('11) 34 Mad. 51 : 8 I. C. 390, Mahadeva Aiyar v Gopala Aiyar.
9. ('16) 3 A. I. R 1916 Mad. 795 : 31 I. C. 671, China Mellayya v. Kannekanti Veeriah.

R. S. Dabir—for Appellants.

B. L. Gupta and V. R. Sen — for Respondents 1 and 2.

Judgment.—In 1925 Imrat, the father of the defendants, borrowed Rs. 1000 from the plaintiffs and as security mortgaged 28.95 acres of absolute occupancy land in *mauza* Jhalone. In 1932 the plaintiffs brought a suit on this mortgage, and Imrat thereafter applied to the Debt Conciliation Board. On 25-9-1936 the plaintiffs and Imrat informed the Board that they had agreed that the plaintiffs should take a sale deed of absolute occupancy fields No. 265, area 4.25 acres, and No. 80, area 12.61 acres, out of the mortgaged land in settlement of their claim and leave the rest of the mortgaged land to Imrat. The Board considered this a very fair settlement and directed them to get a sale deed executed and registered: *see* Ex. D-6. A sale deed (Ex. P-1) was accordingly executed on 23-10-1936 by which Imrat purported to sell two of his mortgaged fields for Rs. 1700, which was apparently the sum that the Board decided should be payable on the mortgage. The fields sold were described as No. 265/1, area 4. 25 acres, rent Rs. 9, and No. 80/2, area 12. 61 acres, rent Rs. 18; and there was this condition in the sale deed that Imrat should retain possession until the crops were cut and the plaintiffs should be put in possession in April 1937. Shortly afterwards a decree was passed in the mortgage suit in accordance with this compromise, though that decree is not before me.

[2] The plaintiffs' case is that they agreed to

take 2 fields known as Kachhar and Gobari in settlement of their claim, that these fields are 267/1, area 2.60 acres, rent Rs. 6, and No. 80/2, and that by mistake No. 265/1 known as Sotawala was entered in the various documents instead of 267/1. They alleged, however, that in execution of the decree they were placed in possession of No. 267/1 in April 1937 and remained in undisturbed possession until June 1940 when the defendants began to assert a claim to it. The plaintiffs accordingly filed this suit for a declaration of their title to No. 267/1 and also for an injunction restraining the defendants from disturbing their possession or for possession, according as it might be found that the plaintiffs were in or out of possession.

[3] The plaintiffs were admittedly in possession of No. 267/1 from April or May 1937 to about June, 1940 but the defendants contend that there was no mistake in the sale-deed, that it was No. 265/1 and not No. 267/1 that was sold, and that possession of No. 267/1 was given to the plaintiffs in May 1937 in settlement of a debt. The defendants said that they had borrowed 4 *manis* of grain shortly after the execution of the sale-deed on 23rd October 1936 with a promise to repay 5 *manis* in the following May, and that as they were unable to make this repayment they let out No. 267/1 to the plaintiffs for three years in settlement of this debt.

[4] The lower appellate Court, differing from the trial Court, held that the compromise between the parties was to sell Nos. 267/1 and 80/2 and that No. 265/1 was entered by mistake for 267/1. That, of course, is a finding of fact, but Mr. Dabir in the course of an able and exhaustive argument contended that that finding is not binding on me in second appeal on the ground that the lower appellate Court failed to appreciate and determine questions of fact which vitally affected the issue, in the words of Lord Clauson in A. I. R. 1943 P. C. 208.[1] The points said to have been overlooked by the lower appellate Court are that the defendants paid the rent for No. 267/1 throughout as evidenced by Ex. D-1, that the plaintiffs were in possession of No. 265/1, throughout, and that the plaintiffs admittedly knew 8 days before the sale that the rent of Kachhar field (No. 267/1) was Rs. 9. Exhibit D-1, which has not been translated and is not in the paper-book, does not appear to contain the numbers of the fields for which rent was paid. No. 265/1 was admittedly under grass and uncultivated, and the evidence of possession is slender and contradictory; the trial Court held that the plaintiffs were in possession, and the lower appellate Court did not specifically deal with that point. The admission of the plaintiff Gajraj Singh in the course of his evidence that the patwari told him that the rent of Kachhar field was Rs. 9, which is in fact the rent of Sotawala field (No. 265/1) does not seem to me very important, as it is quite probable that he was unaware of the rents of these two fields.

[5] The lower appellate Court held that the story of the lease of No. 267/1 was entirely false, and it certainly seems an unlikely story. It, therefore, went on, in effect, to say that in the absence of any other explanation of the plaintiffs' possession they must have been given possession in pursuance of the compromise. That seems to me a legitimate argument. The other points are minor points, and the lower appellate Court was justified, in my opinion, in holding on that basis that No. 265/1 in the sale-deed was a mistake for 267/1.

[6] The question then remains whether on those facts the plaintiffs are entitled to a decree declaring their title to No. 267/1. They admittedly knew in December 1936 or January 1937 that this mistake had occurred, but they did nothing about it; the explanation offered on their behalf is that they were in undisturbed possession and saw no reason to expect trouble. By a suit brought within three years they could have asked for rectification of the sale-deed or for specific performance of the agreement to sell No. 267/1, but they allowed more than three years to pass without doing this. Eventually they brought the present suit on 14th July 1941 for a declaration of their title to No. 267/1. The field is admittedly worth more than Rs. 100, and by reason of S. 54, T. P. Act, the title in it cannot be transferred except by a registered instrument. The plaintiffs rely on the agreement to transfer and on the delivery of possession in pursuance of that agreement. That, in my opinion, cannot affect a transfer of title, as seems clear from the decision of the Privy Council in 58 Cal. 1235.[2] The law has since been modified by the enactment of S. 53-A, T. P. Act, but that does not help the plaintiffs in the present case, because there is no written agreement to transfer this property, and the plaintiffs do not rely on that section.

[7] The lower appellate Court relied on A. I. R. 1938 Mad. 589,[3] where the facts were very similar. There the learned Judges held, relying on A. I. R. 1918 Cal. 809[4]:

"So long as it is open to the parties to adduce oral evidence on the ground of mutual mistake in regard to misdescription of property, and a Court can give effect to the real intentions of the parties, we do not see why any question of limitation should arise at all when the substantial relief prayed for by the plaintiff is not rectification of the deed but some other relief which he is entitled to claim under the law on the

basis of the transaction which he seeks to enforce . . . Even though the right of the plaintiff to sue for the rectification of the mortgage-deed is barred by limitation, still he is entitled to the relief for sale of the property which was agreed to be mortgaged."

The learned Judges, however, did not discuss the question whether title in property can be transferred without a registered sale-deed.

[8] The decision in A. I. R. 1918 Cal. 809[4] is clearly distinguishable, for it was decided on an entirely different basis. The plaintiff in that case claimed that he was a co-vendee of land along with the defendants and that his name had been omitted from the conveyance by the fraud of the defendants who were entrusted with the preparation and execution of the document; the Court held that the plaintiffs were beneficial owners under the transaction and that it was open to them to establish their case by oral evidence. There was no question there of a transfer of title without a registered document. The question was who were the transferees.

[9] In A. I. R. 1930 ALL. 387,[5] where the facts were similar, the learned Judge, relying on the decision in A. I. R. 1927 ALL. 355,[6] held that the plaintiffs were entitled to be put in possession of what they had purchased and that they could prove the mistake made in the document of sale, and that it was not necessary that the mistake should be corrected in the document within the period of limitation allowed. No reasons were given for the decision except the previous decision mentioned above. In A. I. R. 1927 ALL. 355[6] the facts and the decision again were similar, and the decision was based on the decision of the Privy Council in 42 Cal. 801.[7] The learned Judge relying on that decision held that as the vendor got the consideration for the plot which he intended to sell and the vendee was placed in possession of that plot and the transaction had thus been acted upon, equity would support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. Since then, however, the decision of their Lordships in 42 Cal. 801[7] has been explained by them in 58 Cal. 1235[2] where they made it clear that:

"Even if an English equitable doctrine should be applied in any case so as to modify the effect of an Indian Act, which may well be doubted, the English equitable doctrine of part performance . . . . cannot be applied, so as to create, without writing, an interest, which S. 107, T. P. Act enacts can be created only by a registered instrument."

The same argument would apply to the creation of an interest under S. 54, T. P. Act.

[10] The plaintiffs have relied on two other decisions, 34 Mad. 51[8] and A. I. R. 1916 Mad. 795.[9] In the first of these cases it is not clear whether a claim for rectification would have been in time, for the Court remarked: 'The omission of a prayer for rectification is, at most, a matter of form.' I agree that extrinsic evidence is admissible to show the mistake, but the question is whether on the strength of a registered instrument which contains no reference to the property claimed the plaintiff is entitled to a declaration of his title. This decision was followed in A. I. R. 1916 Mad. 795,[9] but no reasons were given in either case.

[11] My conclusion, therefore, is that in the absence of a registered instrument transferring No. 267/1 the plaintiffs have acquired no title to it, and in the absence of title they cannot have the declaration they seek. They could have sued within three years for rectification of the instrument or for specific performance of the agreement to sell; but having failed to do so they are in the same position as the defendant in 58 Cal. 1235.[2] They have no title, and they cannot enforce a claim for possession. It has not been pleaded or suggested that they have acquired a title by adverse possession. The appeal is allowed, and the plaintiffs' suit will stand dismissed with costs throughout. Counsel's fee Rs. 25. I grant leave to appeal.

R.G.D. *Appeal allowed.*

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*A. I. R. (35) 1948 Nagpur 69 [C. N. 25.]

HIDAYATULLAH J.

Emperor v. *Daulat Raibhan and another —Accused—Complainants—Non-Applicants.*

Criminal Revn. No. 631 of 1946, Decided on 12-4-1947, from order of Sessions Judge, Akola, D/-14-9-1946.

*Criminal P. C. (1898), S. 488—Grounds of wife's refusal to live with her husband — Impotency of husband.

Circumstances may arise when the Court may consider that it would not be proper for the wife to live with her husband and then the wife may be permitted to live separate and yet claim maintenance. All such grounds have reference to the comfort and safety of the wife. Conjugal relations are hardly relevant to the order for maintenance under S. 488. A wife is not entitled to live apart from her husband and claim maintenance on the ground that her husband is impotent and unable to perform his marital duties: 20 A. I. R. 1933 Mad. 688, *Rel. on.* [Paras 4, 6 and 7]

Annotation: ('46-Com.) Cr. P. C., S. 488, N. 21.

Cases referred:—

1. ('22) 9 A. I. R. 1922 Mad. 399 : 45 Mad. 812 : 69 I. C. 25, Sheenappayya v. Rajamma.
2. ('36) 23 A. I. R. 1936 Mad. 609 : 165 I. C. 314 Venkatapathi v. Puttumma.
3. ('36) 23 A. I. R. 1936 Bom. 138 : 60 Bom. 455 : 162 I. C. 188, Appibai v. Khimji Cooverji.
4. ('33) 56 Mad. 913 : 20 A. I. R. 1933 Mad. 688 : 145 I. C. 378 : 34 Cr. L. J. 950, Arunachala v. Anandayammal.

W. K. Sheorey (for No. 1.) *and G. R. Mudholkar* (for No. 2)—for Non-applicants.

Order. — This is a reference by Mr. J. R. Mudholkar, Sessions Judge, West Berar Division Akola, in Cri. Revn. No. 108 of 1946 on his file.

[2] The order which the learned Sessions Judge recommends should be set asid concerns an award of a maintenance allowance of Rs. 20 per month granted to the non-applicant 2 under S. 488, Criminal P. C.

[3] The wife was living separate from her husband and the question was whether she had sufficient reason for refusing to live with her husband. The wife urged two grounds for refusing to live with her husband. The first was cruelty. The learned Magistrate did not consider that ground sufficient inasmuch as he says nothing about it in his order. He bases his order on the second ground. This ground was that the husband was impotent and unable to perform his marital duties. The learned Magistrate thought this to be a sufficient ground for the wife to live separate from her husband.

[4] No authority has been cited before me in support of the case of the wife that she is entitled to live separate from her husband on account of his impotence. Reliance was placed on some old texts of Hindu law and the analogy of some civil cases was cited. Reliance was placed on A. I. R. 1922 Mad. 399,[1] A. I. R. 1936 Mad. 609[2] and A. I. R. 1936 Bom. 138.[3]

[5] As against these learned counsel for the husband contended that the present law on the subject does not take this into account. He referred to Act 19 [XIX] of 1946, and refers to Ss. 444 and 555 of Mulla's Hindu Law (1946 Edn.). He also contends that this is the first case in which such a claim has been urged.

[6] I have been unable to find a single case in which such a claim was put forward by the wife. There is nothing to prove that under the circumstances mentioned in this case a wife is entitled to live apart from her husband and claim maintenance under S. 488, Criminal P. C. It is open to me to take this fact into account. Courts in India have not been called upon to examine this question at any time and it is fair to assume that had such a ground been thought good it would have been urged ere this.

[7] In my opinion the real reason why such a ground was never urged before this, is that S. 488, Criminal P. C., is a summary proceeding. A husband must *prima facie* support his wife. This he can do by making her share his board and house. If he does not, then the wife has right to be maintained by him. Ordinarily the husband's *bona fide* willingness to maintain his wife would be a sufficient answer to the petition. Circumstances may arise when the Court may consider that it would not be proper for the wife live with her husband and then the wife may be permitted to live separate and yet claim maintenance. All such grounds have reference to the comfort and safety of the wife. They have no bearing upon conjugal relations except in so far as such relations are rendered unsafe for the wife. In my opinion the failure to discharge the marital obligations by reason of impotence is not a good ground. Conjugal relations are hardly relevant to the order for maintenance under S. 488, Criminal P. C. I am fortified in this view by the observations of Burn J., in 56 Mad. 913,[4] at p. 914 :

"I cannot see that S. 488, Criminal P. C., has anything to do with ordinary conjugal rights; it deals with 'maintenance' only ....."

In that case the wife insisted that she should be treated as a member of the family with a right to live in the family house. It was held that she was not entitled to be treated as a 'wife' but only to be maintained. Separate maintenance was accordingly refused.

[8] I, therefore, accept the reference and set aside the order of maintenance passed by the trial Court.

D.S. *Reference accepted.*

A. I. R. (35) 1948 Nagpur 70 *[C. N. 26.]*

POLLOCK J.

Lal Nagendra Shah — Judgment-debtor— Appellant v. *Bachharaj Nathani and others —Decree-holders — Respondents.*

Misc. First Appeal No. 115 of 1941, Decided on 16-9-1946, from order of Addl. Dist. Judge, Raipur, D/- 23-12-1940.

C. P. Court of Wards Act (1899), S. 12 — After filing of suit Court of Wards assuming superintendence of defendant's property — Plaintiff submitting claim to Court of Wards after 6 months—Suit compromised—Decree directing payment of interest in case of default — Direction if can be challenged in execution — Civil P. C. (1908), S. 38.

After a suit had been filed, the Court of Wards assumed suprintendence of the estate of the defendant and was shown as guardian ad litem of the defendant. A notification under S. 12 (1), was issued calling upon persons having claims against the ward to submit their claims. In course of the suit, the defendant made a statement that the claim should be deemed to have been discharged under S. 12 (2), on the ground that the claim had not been submitted within 6 months as required by S. 12 (1). The parties however compromised and a decree was passed in terms of the compromise providing payment of the decretal amount by the defendant, with interest in case of default. In execution proceedings it was contended by the defendant that the direction in the decree to pay interest was illegal and unenforceable:

Held, that the defendant having abandoned his contention, *viz.*, that the claim must be deemed to have been discharged under S. 12 (2) and the parties having consented to the decree, the Court had jurisdiction to pass the decree it did. [Para 3]

Held further, that whether the Court had jurisdiction to pass the decree or not, the decree could not be challenged in execution proceedings. It was not open to the Court executing the decree to embark on an enquiry

into facts which, if established, would tend to show that the Court passing it had no jurisdiction to do so : 30 A. I. R. 1943 Nag. 325, *Foll.* [Para 4]

Annotation:— ('44-Com.) Civil P. C., S 38 N 8.

Cases referred :—

1. ('12) 8 Nag. L. R. 169 : 17 I. C. 621, Ganeshlal v. Dhondiba.
2. ('43) I. L. R. (1943) Nag. 757 : 30 A. I. R. 1943 Nag. 325 : 213 I. C. 378, Bhagsingh v. Govindram.

R. Kaushalendra Rao and G. R. Deo — for Appellant.

M. Adhikari and V. R. Sen — for Respondents.

Judgment.—On 10-4-1931, the predecessor-in-title of the respondents in this Court, hereinafter referred to as the decree-holder, instituted a suit against Lal Nagendra Shah, Zamindar, Bindra Nawagarh, for the recovery of Rs. 5453-15-0. In November of that year the Court of Wards assumed superintendence of Lal Nagendra Shah's estate, and a notification under S. 10 (1), Central Provinces Court of Wards Act, announcing the assumption of superintendence was published in the Central Provinces Gazette of 7-11-1931. A notification under S. 12 (1) of this Act calling upon all persons having claims against the ward or his immovable property to submit them in writing within 6 months was published in the Central Provinces Gazette on 21st November. On 2nd December the Court was informed by the Deputy Commissioner that the Court of Wards had assumed superintendence of the defendant's estate, and an application was made to allow the defendant to be sued through the Court of Wards. The plaint was amended accordingly and the Court of Wards was shown as the guardian ad litem of the defendant. Subsequently on 3-8-1932 the defendant made an oral statement contending that the claim should be deemed to have been discharged under S. 12 (2) of the Act on the ground that the claim had not been submitted within 6 months as required by S. 12 (1). On 30-8-1932, however, the parties agreed that the claim should be compromised, and a decree was passed in accordance with the terms of that compromise directing the defendant to pay Rs. 3406-3-0 by 15-12-1932, with interest at 7 per cent. per annum in case of default from the date of suit till satisfaction, costs to be borne as incurred.

[2] When the decree-holder took out execution the defendant, still represented by the Court of Wards, contended that the direction in the decree to pay interest was illegal and unenforceable. It was admitted that the decree-holder submitted his claim to the Court of Wards on 4-8-1932 after the lapse of more than 6 months from the date of the publication of the notification under S. 12 (1) and that this delay was condoned by the Court of Wards under the proviso to S. 12 (2). The argument was that under that proviso any claim received after the lapse of 6 months shall cease to carry interest and that the Court acted illegally in awarding interest, even though the parties consented to this. It is somewhat surprising that the Deputy Commissioner of Raipur, acting on behalf of the Court of Wards, should try to go back in this way on a compromise that was a very reasonable one.

[3] It was held in 8 N. L. R. 169[1] that S. 12, Central Provinces Court of Wards Act, has no application if a civil suit has been filed before the Court of Wards assumes superintendence of the estate. Even if that is not so and a claim has to be submitted in writing under S. 12 (1), then it appears to me that there was a sufficient compliance with the requirements of that section when the Court of Wards was made guardian ad litem to the defendant in this suit on 2-12-1931. Apart from that, however, it is not disputed that the civil Court had power to decide the suit. It might have been open to the defendant in that suit to raise the contention, as in fact he did, that the claim must be deemed to have been discharged under S. 12 (2) on the ground that the claim had not been submitted in time, and it would then have been for the Court to decide that point. That contention, however, was abandoned, and the Court therefore had jurisdiction, in my opinion, to pass the decree that it passed on the consent of the parties.

[4] Whether the Court had jurisdiction to pass that decree or not, it seems to me clear that the validity of the decree cannot be challenged in execution proceedings. It may be that in cases where the decree is on the face of it contrary to law its validity can be challenged in execution proceedings but I entirely agree with the view expressed by Niyogi J. in I. L. R. (1943) Nag. 757[2] that it is not open to a Court executing a decree to embark on an inquiry into facts which, if established, will tend to show that the Court passing it had no jurisdiction to do so. That proposition is, I think, beyond challenge. The appeal is dismissed with costs. Counsel's fee Rs. 50.

N.S.D. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 71 *[C. N. 27.]*

HEMEON AND HIDAYATULLAH JJ.

Omprakash Lalchand v. *Emperor.*

Criminal Appeal No. 84 of 1947, Decided on 18-7 1947, from order of Addl. Dist. Magistrate, Nagpur D/- 10-4-1947.

(a) Penal Code (1860), S. 124-A—Causing disaffection towards Government—Tests—Speech directed against police of city and not against whole police force — No disaffection against Government — Speech held did not fall under S. 124-A.

Whether in a particular case the condemnation of any service is sufficient to excite any feeling of hatred or contempt or disaffection towards Government by law established in British India, must depend upon the

nature of the criticism, the position of the service in the administration and all the other circumstances of that case. In determining the intention of the accused when he made the speech, the speech must be read as a whole in a fair, free and liberal spirit. Where the speech of the accused was directed not at the police administration as a whole nor even at all the police in the city but at those police officers who were enforcing a certain municipal bye-law, speech not only refraining from exciting any feeling of hatred or contempt or disaffection towards the Government established by law but specifically indicating that the accused had approached Honourable Members of it and received sympathetic treatment from them and no violence to the police or anyone else followed the speech which was essentially a bombastic and ineffectual tirade:

Held that even if the speech was directed against all the police in Nagpur, accused could not be convicted under S. 124-A: 20 A.I.R. 1933 Bom. 65 and 3 A. I. R. 1916 Bom. 9, *Ref.*; 10 A.I.R. 1923 Lah. 61, *Rel. on.* [Paras 7, 8, 9 & 10]

(b) Criminal P. C. (1898), S. 196 — Sanction for prosecution under S. 124-A, Penal Code—Accused, if can be convicted under S. 153-A.

Where sanction given by the Provincial Government under S. 196, Criminal P. C. related only to S. 124-A, Penal Code, accused cannot be convicted under S. 153-A, when it is found that he cannot be convicted under S. 124-A: 37 Cal. 467, *Rel. on.* [Para 11]

Annotation.—('46-Com.), Cr. P. C., S. 196 Note 5.

Cases referred.—

1. ('17) 19 Bom. L. R. 211 : 3 A. I. R. 1916 Bom. 9 : 39 I. C. 807 : 18 Cr. L. J. 567, Emperor v. Balgangadhar Tilak.
2. ('33) 57 Bom. 253 : 20 A. I. R. 1933 Bom. 65 : 141 I. C. 780:34 Cr. L. J. 231, Emperor v. Maniben Kara.
3. ('22) 3 Lah. 405 : 10 A. I. R. 1923 Lah. 61 : 71 I. C. 519:24 Cr. L. J. 167 (S. B.), Raj Pal v. Emperor.
4. ('10) 37 Cal. 467 : 7 I. C. 359, Barendra Kumar v. Emperor.

M. Adhikari—for Appellant.

B. L. Gupta Advocate-General—for the Crown.

Judgment. — The appellant Om Prakash Mehta, political worker, of Nagpur, was convicted and sentenced to undergo 9 months rigorous imprisonment under S. 124-A, Penal Code, by the Additional District Magistrate, Nagpur.

[2] In the beginning of October 1946, the Nagpur police had prosecuted some rickshaw-wallas for breaches of a municipal bye-law which limits the number of passengers they can take in their rickshaws. The rickshaw-wallas resented these prosecutions and on 10-10-1946 went on strike and held a meeting in the Kasturchand park. This meeting was addressed by the appellant, who was the principal speaker, and others, including H. K. Vyas (D. W. 2). The meeting was also attended by G. V. Moharir (P. W. 1), Naib-tahsildar, and L. P. Shrivastava (P. W. 2), Station Officer, Gaddigudam, of whom the latter took down longhand notes in pencil.

[3] The notes of the appellant's speech are translated as follows :

"From yesterday the police has started beating and prosecuting (rickshaw-drivers) for taking two passengers in rickshaws. The rickshawwallas (i. e. rickshaw-drivers), without consulting the union, took out a procession and observed a strike. I was standing near the Tilak statue. The rickshaw-drivers, brothers, stated to me whatever grievances they had. I put forth your demands before the Minister Mr. Gokhale Saheb and Mr. Shukla Saheb. I also told them that the police beat and committed atrocities. Mr. Shukla Saheb had assured (me) that he would stop the police atrocities. But till this day, in no way whatsoever was there a redress (of this grievance). We will stop the police atrocities with our hands. If the police beats, we too have dealt with the police previously. I am not (a man) who will retreat. No policeman whosoever dare raise (his) hand. The police commits many atrocities. The police oppression is not going to stop in this way. If a policeman raises (his) hand (on a rickshaw-driver), all the rickshaw-drivers should attack him. So long as this will not be repeated several times, the police oppression will not stop. As long as the rickshaw-drivers do not take up the question of stopping the police oppression into their hands (this) oppression cannot come to an end. If we are being put to dishonour, all should together retaliate. There are people of each and every *akhada* among the rickshaw-drivers, brothers. We will stop the police high-handedness with our hands. If a policeman raises (his) hand on any rickshaw-driver, we will reduce him to pieces. We reported the police high-handedness to Mr. Shukla Saheb. Mr Mishra Saheb also was informed (of this). He said that the full case should be submitted to him. We gave an account of the high-handed acts of the police to Mr. Gokhale Saheb also. Mr. Gokhale Saheb has said that they will order the Deputy Commissioner and the District Superintendent of Police that so long as the Provincial Government does not make new law, the old law should be allowed to be operative (i. e. in force). Today we are going to launch a big agitation against the police. These are the same (policemen) who had fired bullets on us in the year (1942). These are the same murderers whose hands are stained with blood. A time will come when being faced with our strikes they will give a (performance of) their naked dance (i. e., they will resort to extremely high-handed acts in a most arbitrary manner). No law whatsoever authorises the world to raise hand on a rickshaw-driver. Should anybody do such a thing, beat him and come to us in the office. We accept the full responsibility. We will then see (to the same). Yesterday you people observed a strike (you) acted properly : I did not stop (you) or prevent (you) in any manner whatsoever. I went to Mr. Gokhale Saheb. He said that they would issue orders that so long as the Provincial Government did not decide the matters, no case whatsoever should be started."

[4] The appellant in examination admitted that he had addressed the meeting of rickshaw-wallas on the relevant date in the Kasturchand park, but he denied that the notes taken by L. P. Shrivastava contained a true report of his speech. He also declared that he had not incited his audience to use force to the police and that he had not stated that the police officers were the same police officers as those who had fired on people in 1942 or were the same murderers with blood-stained hands. He further denied that he had charged the police with failing to prosecute the owners and drivers of buses which carried more than the prescribed number of passengers because they received bribes and free lifts from them.

[5] The evidence of Captain R. W. Fulay was not of material assistance to the defence and the learned Additional District Magistrate has given cogent reasons for disbelieving the statement of H. K. Vyas that the appellant had merely advised the rickshaw-wallas to defend themselves when attacked by the police and to refuse to carry them without payment of fares.

[6] Although the notes of the speech were taken in longhand, there is no reason to suppose that any important passage or passages which would have tempered the effect of those notes were omitted. Mr. Moharir, who admittedly arrived at the meeting after the Sub-Inspector, took no notes, but his evidence of what he heard was corroborative of most of the contents of the notes. Neither Mr. Moharir nor the Sub-Inspector was inimical to the appellant nor did the latter suggest the existence of any animus between them. There was, therefore, no reason why the evidence of two prosecution witnesses should be disbelieved and we have no doubt of its integrity.

[7] That the appellant's attack was not directed against the Hon'ble Ministers is plain and his references to them demonstrated that he regarded them as authorities who would afford the rickshaw-wallas protection from and redress for high-handedness on the part of the police. The appellant's learned counsel accordingly contended that he was not liable under S. 124-A, Penal Code. In the well-known case in 19 Bom. L. R. 211[1], however, Batchelor J., made the following observations at page 264:

"For the Government established by law acts through human agency, and admittedly the Civil Service is its principal agency for the administration of the country in times of peace. Therefore, where, as here, you criticise the Civil Service *en bloc*, the question whether you excite disaffection against the Government or not seems to me a pure question of fact. You do so if the natural effect of your words, infusing hatred of the Civil Service, is also to infuse hatred or contempt of the established Government whose accredited agent the Civil Service is. You avoid doing so if, preferring appropriate language of moderation, you use words which do not naturally excite such hatred of Government. It is, I think, a mere question of fact,"

In the same case Shah J., said at page 270:

"It may be that the various services under the control of the Government by law established in British India do not form part of the Government within the meaning of the section: and it may be that the criticism directed against any of the services is not necessarily criticism of the Government by law established in British India. But the feelings, which it is the object of S. 124A to prohibit, may be excited towards the Government in a variety of ways; and it seems to me that it is possible to excite such feelings towards the Government by an unfair condemnation of any of its services. Whether in a particular case the condemnation of any service is sufficient to excite any feeling of hatred or contempt or disaffection towards Government by law established in British India, must depend upon the nature of the criticism, the position of the service in the administration and all the other circumstances of that case. It would be a question of fact to be determined in each case with reference to its circumstances. But as a matter of law it cannot be said that the condemnation of a particular service under the Government by law established in British India can never be sufficient to excite any of the feelings prohibited by S. 124A towards such Government."

[8] In determining the intention of the appellant when he made the speech, the speech must be read as a whole "in a fair, free and liberal spirit"; and, as Beaumont C. J., pointed out in 57 Bom. 253[2], undue regard must not be paid to any particular sentence or phrase. Here, the only passage which might be said to refer to the police *en bloc* is:

"Today we are going to launch a big agitation against the police. These are the same (policemen) who had fired bullets on us in the year (19) 42. These are the same murderers whose hands are stained with blood."

When this passage, however, is read with the passages which preceded and followed it, the conclusion must be that the police referred to were the police in Nagpur who had, without any move on the part of the Municipal Committee, taken action against rickshaw-wallas for the contravention of a bye-law which had been more honoured in the breach than in the observance.

[9] The position thus is that the appellant's speech was directed not at the police administration as a whole nor even at all the police in Nagpur but at those police officers who were enforcing the bye-law. But even if it could be held that it was directed against all the police in Nagpur, it could not be said to come within the mischief of S. 124A, Penal Code. To quote Shadi Lal C. J. in 3 Lah. 405[3]:

"In the present case the persons . . . were a few police officials employed at a particular station, and it is impossible to identify them with the Government or the general body of rulers. An attack upon certain policemen at a particular place does not convey any reflection upon the governing authority."

[10] We are in respectful agreement with that view and would repeat that in the present case the appellant in his speech not only refrained from exciting any feeling of hatred or contempt or disaffection towards the Government established by law but specifically indicated that he had approached Hon'ble Members of it and received sympathetic treatment from them. No violence to the police or any one else followed the speech which was essentially a bombastic and ineffectual tirade.

[11] The appellant's conviction under S. 124A, Penal Code cannot, therefore, be maintained nor can that conviction be altered to one under S. 153A *ibid*, as the sanction given by the Provincial Government, Central Provinces and Berar, under S. 196, Criminal P. C., related only to S. 124A, Penal Code. In the well-known case in 37 Cal. 467,[4] Jenkins C. J., held that

where an order under S. 196, Criminal P. C., authorised a particular police officer to prefer a complaint of offences under Ss. 121A, 122, 123 and 124, Penal Code, "or under any other section of the said Code which may be found applicable to the case", a complaint under S. 121, Penal Code was not thereby authorised by the Local Government or in fact preferred. The case before us is stronger, inasmuch as the relevant order under S. 196, Criminal P. C., refers solely to S. 124A, Penal Code. Moreover, an offence under S. 153A differs in many respects from an offence under S. 124A; the charge which the appellant had to meet was framed under S. 124A and Shadi Lal C. J., in the Labore case, *supra*, decided that the police officials referred to in that case did not constitute a class of His Majesty's subjects. The conviction and sentence are, therefore, set aside.

R.G.D. *Conviction set aside.*

A. I. R. (35) 1948 Nagpur 74 *[C. N. 28.]*

BOSE AND HIDAYATULLAH JJ.

Maroti Mahagoo and others—Accused—Appellants v. *Emperor.*

Criminal Appeal No. 290 of 1946, Decided on 14-3-1947, from order of Sessions Judge, Nagpur, D/- 3-10-1946.

Criminal P. C. (1898), S. 162—Omission to give copies to accused — Effect.

The right which is given to the accused under S. 162, Criminal P. C., to use the previous statement made to the police for the purpose of contradicting a witness is a valuable right. Where the omission to give the copies to the accused has caused prejudice to the accused, the testimony of such witness must be received with extreme caution and the Court would be entitled in a suitable case even to ignore altogether such evidence. Every case will have to be decided in its own facts: 32 A. I. R. 1945 Nag. 1 and 33 A. I. R. 1946 Nag. 173; *Rel. on.* [Para 7]

Annotation. — ('46-Com.) Cr. P. C., S. 162 N. 20 pt. 4.

Cases referred :—

1. ('37) I. L. R. (1937) Nag. 178 : 23 A. I. R. 1936 Nag. 249 : 170 I. C. 638 : 38 Cr. L. J. 936, Emperor v. Vishwanath.
2. ('45) I. L. R. (1945) Nag. 151 : 32 A. I. R. 1945 Nag. 1 : 218 I. C. 294 : 46 Cr. L. J. 448, Baliram v. Emperor.
3. ('46) I. L. R. (1946) Nag. 126 : 33 A. I. R. 1946 Nag. 173 : 226 I. C. 245 : 47 Cr. L. J. 851, Maganlal v. Emperor.

Fida Husain—for Appellants.

W. B. Pendharkar, Addl. Government Pleader —for the Crown.

Judgment.—This is an appeal by 13 persons who have been convicted under Ss. 147, 302 and 302 read with S. 149, Penal Code, by Mr. V. B. Sarwate, Sessions Judge, Nagpur, in Sessions Trial No. 29 of 1946, decided on 3-10-1946.

[2] Originally 31 persons were prosecuted but only 13 have been convicted and some have been sentenced to transportation for life while others have been sentenced only under S. 147, Penal Code. The incident is of 12-4-1946, when the election to the Trade Union Labour seat was in progress. The rival candidates were Messrs. Ruikar and Meshram. The former was supported by the caste Hindus and the latter was a candidate set up by the Scheduled Castes Federation. The polling booth was situated at Indora. Indora, along with Laskari Bag, Bhankheda Road and Pachpaoli, is a strong-hold of the Scheduled Castes because they reside there in large numbers.

[3] On the day in question a procession supporting Mr. Ruikar started from Chitnis park at 9 A. M. and going along Pachpaoli-Indora Road went up to the polling booth. From there it returned but on its return journey instead of passing Pachpaoli-Indora Road it turned into Laskari Bag. It is said that the processionists were not armed but carried only some flags in their hands. Nothing seems to turn upon this fact and it has not to be decided whether the accused had any right of self-defence against the processionists. When the procession reached Laskari Bag the Mahars, about two-three hundred strong, came out to stop it. It is said that the Mahars were armed with spears, pointed bamboos and *lathis*. For a time the two crowds faced each other and there was some stone-throwing but it is not clear as to whether any person was hit in the stone-throwing. It is also apparent from the record that the processionists also indulged in stone-throwing. The police arrangements on the day were very strong and the police immediately intervened and allowed the procession to pass on. While the procession was going the Mahars attacked its rear and caused the procession to break up. The members of the procession ran all over the place for their lives but one boy who was in his teens, being about 15/20 years of age, was not so fortunate in getting away. He tried to pass through a barbed-wire fence and his clothes got entangled in it, he was caught and dragged by the feet and stabbed with a spear with the result that he died. Later the mob which had been attacking the processionists moved in a body to the neighbouring *mohalla* which is called Kurhalkar Peth where Kostis, who are rivals of the Mahars, reside. In this area the mob indulged in more stone-throwing upon the houses. The police in the meantime had got reinforcements and they managed to throw a cordon round the area and to start arresting persons. 44 persons were thus arrested and of these 31 were actually prosecuted with the result stated above.

[4] The incident properly falls into three phases. The first phase is when the stone-throwing stops and the procession is allowed by the police to move on. The second phase involves the murder of the boy later identified to be

one Govardhan Kirad. The third phase comprises the stone-throwing in the Koshti *mohallas*. The learned Sessions Judge has correctly remarked that the difficulty of the case lies really in finding out which of the accused formed part of the unlawful assembly and at what stage. The story as deposed to by the witnesses is clear and really admits of no denial. That such events happened cannot be gainsaid. The only question is who are responsible and whether the accused are some of those persons thus responsible.

[5] The investigation was mainly conducted by Hanuman Prasad, Sub-Inspector—Station officer, Pachpaoli—(P. W. 55) and was completed on 14-5-1946 when the diary was closed. Many witnesses were examined by the police during the course of the investigation and the statements of these witnesses recorded under S. 161, Criminal P. C., were not incorporated in the diary but were kept separate, written on plain sheets of papers. These statements were filed with the diary and at the commencement of the trial the accused applied for certified copies under S. 162 of the Code. The diary along with the statements was handed over to the Reader concerned for making necessary copies. There is an acknowledgment by the Reader showing that he had received the statements : *vide* Ex. P. 24. Later on it was discovered that the statements had disappeared. The explanation of the Reader was that he had misplaced them and could not, therefore, trace them. We are not in a position to say who was responsible for this carelessness but the fact remains that the accused did not get copies of these statements and were thus hampered in their cross-examination because they could not contradict the witnesses.

[6] The learned Sessions Judge in paras. 29 and 30 of his judgment has discussed this matter and holds that the accused were not prejudiced by the loss of these statements. His reasons are that they could not have shown anything more than the fact that the witnesses were present at the spot and in what capacity. He thinks that it was most unlikely that a description of the accused was given in them, and as there are two identification parades the accused have not been prejudiced because they can use these identification parades. The learned Sessions Judge, therefore, concludes thus:

"I do not, therefore, see what advantage the accused were likely to derive if the copies of the statements had been made available to them and how they can be said to have been prejudiced by the failure to give them copies. Since no prejudice has been caused to the accused persons, there cannot be said to have been any failure of justice in this case and the trial cannot be said to be vitiated for the reason that the accused did not have the copies of the case diary statements under S. 162, Criminal P. C."

[7] The right which is given to the accused under S. 162 Criminal P. C., to use the previous statement made to the police for the purpose of contradicting a witness is a valuable right. In a case of this type where there are considerable possibilities of mistakes the only check is the earliest version. The statements of these witnesses would have shown what was their exact position at the time they observed the riot, how they themselves behaved and how many persons they named or were able to identify. It is useless speculating as to the contents of these statements without having them before us. It is also clear that the statements would have been useful to the accused in many ways. We are not in a position to say what those statements were and the learned Sessions Judge does not say what his source of information was. Sub-Inspector Hanuman Prasad, P. W. 5, who investigated the case said that some witnesses did give some description. If these statements did not name the accused persons or give any description, there would be grave prejudice to the accused because they would lose thereby a right which in a trial of this character cannot but be described as of very great importance. This matter was discussed by one of us (Bose J.) in I. L. R. (1937) Nag. 178[1] and it was pointed out that in such cases it is difficult to gauge the extent of prejudice which might have been caused to the accused. Similarly, a Divisional Bench of this Court in I. L. R. (1945) Nag. 151[2] held that the omission to give copies of such statements to the accused is repugnant to the fundamental rules of practice necessary for the due protection of prisoners and the safe administration of justice. It was held in that case that where an accused was robbed of his statutory rights of cross-examination and thereby denied the opportunity of effectively destroying the testimony of prosecution witnesses the evidence of such witnesses was not admissible. This rule was repeated by the same Divisional Bench in I. L. R. (1946) Nag. 126[3] and the law laid down in I. L. R. (1945) Nag. 151[2] was re-affirmed. While, with due respect, we doubt whether the evidence of witnesses in Court becomes inadmissible as a result of the deprivation of the right of cross-examination inherent in S. 162, Criminal P. C., we are in agreement with the Divisional Bench that where there is prejudice to the accused the testimony of such witnesses must be received with extreme caution, and the Court would be entitled in a suitable case even to ignore altogether such evidence. Every case will have to be decided on its own facts. While in the present case we do not propose to base our conclusion on the inadmissibility of the evidence of these witnesses, we are satisfied, however, that

the evidence of witnesses whose statements were recorded by the police suffers a great deal because of the loss of the statements. We consider that we should not act upon the evidence of these witnesses. This is what was laid down in three cases of this Court and is the only reasonable course to follow. In a case where 200/300 persons are alleged to have committed a riot there is no guarantee that false names have not been introduced by partisan witnesses especially when feelings run high.

* * * * *

[8] The learned Sessions Judge has gone by a rule of thumb and he decides the guilt or otherwise of an accused according to the number of witnesses identifying him. This is a rule which, though satisfactory in ordinary cases, is fraught with considerable difficulties and dangers in a case of this type. We are, therefore, convinced that we should not act on the evidence of these *koshti* witnesses particularly as they were not questioned at the earliest stage and as probably their statements were deliberately not taken by the police. Their unanimity about the same accused itself makes their evidence worthless because it is inconceivable that they could have seen the same accused at different moments of time in a mob consisting of over two to three hundred persons. If the police had recorded proper statements on 12-4-1946, when they had known that these persons were potential witnesses there would have been some check upon subsequent concoction which is now impossible. Further these Kuralkar Peth witnesses cannot be used to corroborate the witnesses who saw the assault on Goverdhan Kirad because that assault had already taken place before the mob entered their *mohalla*. It is the membership of the unlawful assembly at the time of the assault that is vital in connection with S. 302, Penal Code, and on that point these witnesses are silent. In fact the police witnesses and these witnesses speak of two separate phases and there would be no real corroboration except as to the identity of the accused. For this purpose we regard the Kuralkar Peth witnesses as useless and consider it unsafe to act upon their evidence even though we do not reject their evidence as inadmissible on any other ground.

[9] The result is that there is no sufficient or cogent corroboration of the testimony of Ibrahim Khan P. W. 2, Rampal P. W. 48 and Daud Khan P. W. 15. We must, therefore, give the benefit of the doubt to the accused named by them as there is the evidence of but one witness against every such accused.

[10] In the end we must say that this unfortunate result has been occasioned mainly because of slack investigation and failure to record proper statements in time and the loss of such statements, as had been recorded, through the carelessness of somebody. But if such things happen it is obvious that the last person to suffer should be the accused and the Courts should in such circumstances be anxious to see that no prejudice is caused to them. We allow the appeal of the appellants before us. We set aside their convictions and the sentences passed against them and order that they be released.

G.B. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 76 *[C. N. 29.]*

HIDAYATULLAH J.

Shamrao Deorao Marathe and others — *Applicants* v. *Emperor.*

Criminal Revn. No. 569 of 1946, Decided on 12-2-1947, from order of Sessions Judge, Wardha, D/-19-7-1946.

(a) Criminal P. C. (1898), S. 145—Conversion of proceedings—Proceedings originally started under S. 145 can be converted into one under S. 107 — Converted proceedings are not without jurisdiction: 39 Cal. 150; 29 A. I. R. 1942 Pat. 331, *Foll.* [Para 2]

Annotation : — ('46 Com.) Criminal P. C., S. 145, Note 60.

(b) Criminal P. C. (1898), Ss. 107, 145 — Dispute concerning land — Proceedings converted into one under S. 107 — Inquiry into title.

In a case where there is a dispute concerning land, it is proper to take action against both sides if S. 107 is to be resorted to, because binding over one party puts the other at an advantage. But it cannot be said that the Court should not investigate the title and the facts of possession of the parties. Such an enquiry into title may be out of place in S. 145 proceedings but it falls legitimately within the purview of criminal Court acting under S. 107, because the Court has to find out who is the aggressor and who has the right on his side : 10 A. I. R. 1923 Nag. 54, *Disting.* [Para 3]

Annotation :—('46 Com.) Criminal P. C., S. 145, N. 4.

Cases referred:—

1. ('08) 35 Cal. 117 : 6 Cr. L. J. 398, Baljit Singh v. Bhoju Ghose.
2. ('12) 34 All. 449 : 15 I. C. 798 : 13 Cr. L. J. 526, Emperor v. Thakur Pande.
3. ('12) 39 Cal. 150 : 12 I. C. 833, Emperor v. Abbas.
4. ('42) 29 A. I. R. 1942 Pat. 331 : 200 I. C. 316 : 43 Cr. L. J. 637, Madho Singh v. Emperor.
5. ('23) 10 A. I. R. 1923 Nag. 54 : 68 I. C. 407 : 23 Cr. L. J. 567, Dhuma v. Emperor.

G. J. Ghate—for Applicants.

W. B. Pendharkar Addl. Government Pleader — for the Crown.

Order. — This is an application for revision against the order passed in Cri. Revn. No. 110 of 1945 of the Court of Mr. M. D. Deoras, Sessions Judge, Wardha, decided on 19-7-1946. The applicants in the case have been bound over for Rs. 200 with one surety each for a period of one year to keep the peace and be of good behaviour under S. 107, Criminal P. C. This revision application raises almost one point and that is the tenability of S. 107 proceedings in the circumstances of the case. The facts are that one

Mt. Anjir Bai died on 14-6-1945. Her husband named Zapa owned two fields Nos. 8/2 and 15/1 of *mauza* Poti in Khel B of *patti* No. 1 in the Hinganghat tahsil. After Zapa's lifetime Anjira Bai entered into possession and continued in possession of these two holdings till her death. After her death disputes broke out between the applicants on the one hand and one Suryabhan on the other. This Suryabhan is the son of Zapa's sister. Applicants 1 to 5 are some distant relatives of the deceased Zapa, and claimed to be his heirs. Suryabhan lived with Anjira Bai and after her lifetime, it is alleged by the prosecution, he entered into possession of these holdings and continued cultivation thereof. According to him the applicants were obstructing him and wanting to take forcible possession of these agricultural lands and hence on 28-8-1945 he filed an application in the criminal Court under S. 145, Criminal P. C. The trial Court sent the papers to the police for enquiry and report and the police put up a challan under S. 107, Criminal P. C., against the applicants, (non-applicants in the trial Court and two others). These two other persons have been discharged and therefore there is no need to mention them any further. The trial Court bound over the applicants as stated above, and that order was upheld by the learned Sessions Judge. Hence this application for revision.

[2] The applicants urge that the case, having been started under S. 145, Criminal P. C., could not be converted into one under S. 107 of the Code and that the proceedings were, therefore, without jurisdiction. The argument is that an application had already been made under S. 145, Criminal P. C., and that admittedly the dispute relates to immovable property. It is thus argued on the strength in 35 Cal. 117,[1] that in such cases the Court is compelled by the terms of S. 145, Criminal P. C., to go on with the trial and that the directions in that section are mandatory. It is undoubtedly true that in that case it was held by the Calcutta High Court that S. 145 proceedings cannot be converted into proceedings under S. 107, Criminal P. C. The view taken in the Calcutta High Court case was, however, dissented from in 34 ALL. 449,[2] at page 450, and later a Full Bench of the same Court in 39 Cal. 150,[3] took a view which is contrary to that stated in 35 Cal. 117.[1] Recently in A. I. R. 1942 Pat. 331,[4] the view taken in 39 Cal. 150,[3] has been approved. Following therefore, these later cases, I hold that the proceedings under S. 107, Criminal P. C., are not without jurisdiction.

[3] It was next contended that the Court should not have given any finding as to the rights of the parties, and that in any case proceedings ought to have been taken against both the sides. In a case where there is a dispute concerning land, it is proper to take action against both sides if S. 107, Criminal P. C., is to be resorted to, because binding over one party puts the other at an advantage. But it cannot be said that the Court should not investigate the title and the facts of possession of the parties. Such an enquiry falls legitimately within the purview of criminal Court acting under S. 107, Criminal P. C., because the Court has to find out who is the aggressor and who has the right on his side. Such an inquiry into the title may be out of place in S. 145 proceedings which are mainly concerned with the maintenance in possession of a person dispossessed within two months of the passing of the preliminary order but they cannot be said to be out of place where action is not taken under that section but under S. 107, Criminal P. C. The case relied on by the learned counsel appearing on behalf of the applicants from this Court, namely, A. I. R. 1923 Nag. 54,[5] is clearly distinguishable because that case proceeded upon its own special facts. In my opinion, therefore, Courts were perfectly justified in finding out the respective rights of the parties and also in giving a finding as to the fact of possession.

[4] It was next urged that some of the reports made by Suryabhan himself show that he had been dispossessed and that if the matter had been under S. 145, Criminal P. C., the possession of the applicants would have been maintained because they would have been found in possession within two months of the passing of the preliminary order if one had been passed. All that is not germane to the matter because the Court elected to act under S. 107, Criminal P. C., and if that section was applied the fact of possession comes in merely as corroborative proof of the *bona fides* of the parties concerned. Both the Courts below have given a concurrent finding that Suryabhan is *prima facie* the preferential heir and they also found that Suryabhan was in possession when the applicants took it into their heads to disturb his possession and to get it for themselves. These findings are binding upon me and I do not propose to examine the evidence on which they have been based. In fact I was not invited to go into the evidence because, as I have stated above, the learned counsel for the applicants argued the case purely as a point of law as to whether S. 107 proceedings could be entertained. In my opinion, the decision of the two Courts below is correct and the application is dismissed.

N.S.D. *Application dismissed.*

A. I. R (35) 1948 Nagpur 78 *[C. N. 30.]*

BOSE AND HIDAYATULLAH JJ.

Mangalsingh Sonelal—Accused — Appellant
v. *Emperor.*

Criminal Appeal No. 41 of 1947, Decided on 7-4-1947, from order of 1st. Addl. Sessions Judge, Jubbulpore, D/ -15-2 1947.

(a) Evidence Act (1872), S 27—Extensive statements unconnected with any fact discovered thereby should not be tendered in evidence.

The use of the words 'so much of such information' in the section clearly postulates that long and detailed statements unconnected with any fact thereby discovered are not to be proved. That information alone is provable which advances the investigation of the police in any way. It should be information of a relevant fact and there must be some fact discovered as a result of the information. It is for the investigating officer to record the words of the accused persons and it is for the Court to see what portion or portions should be allowed to be proved. These two functions have to be kept distinct. It is not for the investigating officer to make a selection. He must record the information given by the accused. It is for the Court to consider the admissibility of the information. In doing so the Court must not allow extensive statements unconnected with any fact discovered thereby to be tendered in evidence. [Para 7]

(b) Criminal trial—Circumstantial evidence.

Circumstantial evidence must prove the presence of the accused in the vicinity of the place of the offence and not at a place a long distance away. [Para 5]

Dr. T. J. Kedar—for Appellant.
B. L. Gupta—for the Crown.

Judgment. — Mangal Singh the appellant before us has been convicted under S. 302, Penal Code, and sentenced to death by Mr. Adhar Sinha, First Additional Sessions Judge, Jubbulpore, for the murder on 26th September 1946, of one Mulchand Gadari, in Sessions Trial No. 61 of 1946 decided on 15th February 1947. There was another accused by name Rambagas *alias* Ramdas but he has been acquitted.

[2] The prosecution case is that for some time previous to the deceased's murder there had been enmity between him and this prisoner over the partition of a field called gewadaha bandh (also called Bandhwa) situated in Amardar in the Murwara tahsil and belonging to the father of the accused. The deceased, who earned his livelihood partly as a milkman, had set out on the morning of Thursday the 26th September from his house to go to Katni-Murwara where he was supplying milk to Lachhmanprasad (P. W 23). According to this prosecution witness Mulchand did not arrive with milk that day. There is evidence to show that he set out in the morning from the village. See Rambisal (P. W. 6), Sonelal (P. W. 7) and Mt. Kaushalya (P. W 24) The accused has not challenged this fact. Thereafter two days later a skeleton was found in a shrub-jungle called Binjhi Zhadi (also called Binjhi Har). This was identified as that of the murdered man. The skeleton was not capable of being identified but in fact there is very little doubt on this point because near the skeleton were found a lot of things belonging to the deceased. The pot of milk with which he had set out on Thursday the 26th was found with sour milk in it. Along with this pot was a measure for measuring milk and ration-cards bearing the name of the deceased were also found nearabout. His clothes and ornaments which he had worn in his ears were also there. In fact almost all the property, except two gold ornaments, were found, and since the deceased disappeared about this time it is easy to infer that the corpse was that of Mulchand.

[3] Medical evidence in this case is inconclusive because the doctor could not give any cause of death. The doctor was, however, able to tell us that the bones belonged to an adult male who might be between 30 and 50 of age and this also fits in with the probabilities pointing to the fact that the dead body was that of Mulchand. Though the medical evidence is not clear as to the cause of the death it is again easy to conclude that Mulchand was killed. The clothes which were near the corpse were sent to the Chemical Examiner and the Imperial Serologist and the Chemical Examiner found on the dhoti (Art. A) and bandi (Art. B) stains of blood, the stains being 36″ and 20″ in sizes. The Imperial Serologist said that this blood was of human origin and this puts the matter beyond all reasonable doubt. The deceased was hale and hearty when he set out that morning In fact he was carrying a pot of milk which according to his usual daily practice was to have been delivered at the house of P. W. 23. He was in good health, and there is nothing to show that he came by his death in any other way. We have no difficulty, therefore, in holding that Mulchand was done to death.

[4] The question then arises whether the appellant was responsible for the death of the deceased. The evidence led by the prosecution against him is entirely circumstantial but for a confession leading to the discovery of a stick stained with human blood and the testimony of an eye-witness of the occurrence. (Their Lordships then discussed certain evidence and proceeded.)

[5] Further we feel that evidence of P. W. 8 does not furnish such a vital link in the prosecution case as the Crown contends. The place where P. W 8 had seen the accused was some distance away from the actual scene of occurrence and though the accused were going in the same direction as taken by Mulchand it cannot be denied that the road to Katni lay in the same direction. P. W. 8 admits that she did not know this prisoner or his name before that

date though she says that she did see him in the village prior to that day. If that was a fact it is strange that she did not disclose this to the people of the village at once because in the first information report many names have been mentioned and suspicion has been cast upon different persons. The learned Additional Sessions Judge did not rely upon this evidence as a link in the circumstantial chain against the accused. We agree with him that the matter is not free from doubt apart from the little value which can be attached to this evidence, because the distance between the scene of occurrence and the place where P. W. 8, saw this prisoner is great. Circumstantial evidence must prove the presence of the accused in the vicinity of the place of the offence and not at a place a long distance away.

[6] The next set of witnesses are Mt. Gauri (P. W. 9) and Mt. Rambai (P. W. 11). The former saw the accused Mangal Singh and the acquitted accused Rambagas going towards Katni side from Amradar on the morning of Thursday. They were going towards Binjhi Zhadi. The footpath which leads to the Katni road in fact passes through Binjhi Zhadi and anybody wishing to go to Katni has to pass Binjhi Zhadi. The place where witness saw the accused is 1½ miles away from the spot where the murder is alleged to have taken place. In our opinion this evidence is inconclusive for the reasons we have indicated above. It is significant that P. W. 9 says that there was nothing in the hands of either of the accused at the time. She also says that it was at about 8 or 9 A. M. which we have shown above would be very late. The next witness, P. W. 11, does not support the prosecution case because she says she saw the acquitted accused going alone in a direction which was opposite to the direction he should have taken if he wanted to go to Binjhi Zhadi. She says nothing about this prisoner and, therefore, her evidence as against this convict is inconclusive. The next witness Mt. Rambai (P.W. 11) speaks of having seen Mulchand on a Wednesday going with a pot of milk. This witness was not questioned which Wednesday it was, and this leaves her evidence absolutely vague. The circumstantial evidence, therefore, is exceedingly slender and of a suspicious character to boot. This evidence was rejected by the learned Additional Sessions Judge also.

[7] We next take up the question of the discovery and the statements leading to it which have been made the foundation of the conviction by the learned Additional Sessions Judge. The accused Mangal Singh is alleged to have made a statement which is recorded as Ex. P-3. It is a long statement of nearly three typed pages and the bulk of it is clearly inadmissible. The manner in which S. 27 is to be used is often not properly understood. All that the accused states is not to be tendered in evidence against him but only such portion of his statement as relates distinctly to some fact discovered as a result of the statement. The use of the 'words so much of such information' in the section clearly postulates that long and detailed statements unconnected with any fact thereby discovered are not to be proved. In our opinion that information alone is provable which advances the investigation of the police in any way. It should be information of a relevant fact and there must be some fact discovered as a result of the information. It is for the investigating officer to record the words of the accused persons and it is for the Court to see what portion or portions should be allowed to be proved. These two functions have to be kept distinct. It is not for the investigating officer to make a selection. He must record the information given by the accused. It is for the Court to consider the admissibility of the information. In doing so the Court must not allow extensive statements unconnected with any fact discovered thereby to be tendered in evidence. The learned Additional Sessions Judge has not erred in the present case. He has made a selection but the practice of putting in the whole statement en bloc needs to be strongly discouraged.

[8] Examining the matter from this point of view we find that we have to exclude almost the whole of the statement but for a few stray sentences which alone are admissible. The discovery was of a *genda* which is nothing but a rough log of wood and the statement which is relevant is a reference to the *genda* and its discovery. This is what Mangal Singh said:

"The *genda* was thrown only in bushes . . . I can come and show the axe and the *genda* where they have been kept . . . *genda* after beating with has been thrown there only which I would show . . ."

According to the prosecution this *genda* was shown by the accused in a bush, a short distance away from the dead body of Mulchand, and it was found to be stained with human blood, the blood stain being 12" in dimension. A glance at the map would show that the articles belonging to the deceased were strewn about the place and a sack was in fact lying about 10 feet away from the place where the *genda* was lying. The witnesses say that everybody was looking for the articles belonging to the deceased and that this prisoner was also assisting in this. This is deposed to by Kadhola Kotwar (P. W. 1), Baldeogir (C. W. 1), Angad (P W. 3)—the *mukaddam* of the village. In fact Lutain (P W. 15) who has reason to be most hostile to the accused inasmuch as he was Mulchand's brother, says:

"In the jungle all the people tried to find out the articles, and some persons got something and others got other things. Mangalsingh picked up the stick and gave it to the Sub-Inspector. It was found in the bushes which were about one chain from the foot-path."

[9] This statement, if true, (and we see no reason why it should be false) would seriously affect the prosecution case. It is true that the prosecution case hangs on this discovery and if the discovery is doubted, nothing remains. There was one fact which would have strengthened the prosecution case considerably and that was the statement of the accused that he had cut this *genda* from *seja* tree and he had volunteered to show the stump. This statement was made on 1-10-1946 but no effort was made to follow this up. In fact the police went to the stump on 6-10-1946 and then article P was cut out. Again no effort was made to connect the *seja* stump with the *genda* and the matter was left in doubt. It was easy to examine an expert to show that article P and the *genda* were part of the same wood and cut from the same tree. If this had been done the discovery of the *genda* would have acquired considerable evidentiary value.

[10] In the absence of all this what have we got? The accused said that the *genda* used for beating was thrown in a bush. The *genda* was found but under circumstances which, on Lutain's testimony, are suspicious. There were two witnesses to the recording of the memorandum, Ex P-3, but only one of them was examined. P. W. 1 says that Mangal Singh was one of the persons left to watch the dead body and the articles lying there. This is also the evidence of Angad, P. W. 3. P. W. 3 also says:

"Another Sub-Inspector had come. The stick Article J. was found lying near the place where the brass jar was lying Manglia—accused Mangal Singh—had handed it over to the Sub-Inspector. It was not visible to us. It was concealed in shrubs and Manglia *alias* Mangal discovered it."

This again accords more with what Lutain, P. W. 14 has said on the subject.

[11] There is yet another circumstance which creates suspicion. The memorandum, according to P. W. 7, Sonelal, was signed by Dulichand, Bhagwatdin, Lutain and P. W. 7. There is no signature of Lutain or Sonelal on this exhibit. In our opinion whenever such doubt is created it is the duty of the prosecution to examine the other persons whose signatures in fact appear on the document. If one were to accept P. W. 7's evidence, there would be evidence to show that this memorandum was not the real one. We do not say that in this case we are prepared to accept Sonelal's evidence but the fact remains that one of the prosecution witnesses casts doubts upon the authenticity of Ex. P-3.

[12] Dulichand's evidence does corroborate the Sub-Inspector as to the production of the *genda* (article J) by the accused. This *genda* was found to have a stain of 12" in length, of human blood. If the evidence of its discovery were good it would be a strong piece of evidence. We are, however, extremely reluctant to accept the discovery at its face value and to hold on that evidence alone that the appellant is guilty of murder. There is no corroboration of any kind and we do not consider that the presence of four or five minute stains of human blood on the clothes of the accused makes the case much stronger. Blood may get on the clothes of these villagers in many different ways. The stains were also minute and the Chemical Examiner could not give their dimensions.

[13] The evidence of motive is also slight. P. Ws. 1 and 3 say that the quarrel was old and took place 5/7 years ago. It is true that the son of Mulchand, Sonelal, P. W. 7 and one Lutain, P. W. 14 put the date of the quarrel only three months before the incident but they are interested witnesses. Mt. Tulsi, P. W. 13, in whose presence Mangal had uttered threats is not corroborated. She admits that when the threat was uttered there were about 60 labourers present. Why none of them was examined is not satisfactorily explained.

[14] In our opinion the evidence in the present case is exceedingly slender and we are not satisfied as to the discovery. We give the benefit of the doubt to the accused. His conviction and the sentence passed on him are set aside and he is acquitted and ordered to be released.

D.S. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 80 *[C. N. 31.]*

HEMEON J.

Laxman Shrikrishna Alegaonkar — Complainant—Applicant v. *Dayabhai Ramchandra Bhatia—Accused—Non-Applicant.*

Criminal Revn. No. 389 of 1946, Decided on 28-10-1946, from order of Sessions Judge, Akola, D/-13-3-1946.

(a) Criminal P. C. (1898), S. 179—"Consequence" —Meaning — Criminal breach of trust — Applicability of section.

The "consequence" referred to in S. 179 is confined to that which is an ingredient of the offence for which an accused person is being tried. S. 179, therefore, applies to those offences which by their very definition consist of an act and its consequence, for example, culpable homicide, but it does not apply to a criminal breach of trust : 20 A. I. R. 1933 Nag. 33, *Not approved*; *Case law referred.* [Paras 4 and 5].

Annotation:—('46-Com.) Cri. P. C., S. 179 N. 3.

(b) Criminal P. C. (1898), S. 181 (2)—Criminal breach of trust committed at Surat—Prosecution in Court at Akola—Jurisdiction.

Where the accused who instead of passing a cheque after endorsement to another person as he was bound

to do, cashed the cheque at Surat and thereby committed a criminal breach of trust, was prosecuted at Akola:

Held, that the appropriate Court at Surat and not the Court at Akola had jurisdiction to try the case as the money was not received or retained and the offence was not committed at Akola. [Para 5]

Annotation—('46-Com.) Criminal P. C., S. 179, N. 5; S. 181 N. 9.

Cases referred :—

1. ('22) 46 Bom. 641 : 9 A. I. R. 1922 Bom. 39 : 65 I. C. 637, Emperor v. Ramratan Chunilal.
2. ('33) 20 A. I. R. 1933 Nag. 33 : 145 I. C. 550, Trikamji Parmanandji v. Emperor.
3. ('24) 20 N. L. R. 72 : 11 A. I. R. 1924 Nag. 253 : 81 I. C. 538, Banerji v. Potnis.
4. ('31) 55 Bom. 59 : 17 A. I. R. 1930 Bom. 490 : 129 I. C. 385 (F. B.), In re Jivandas Savchand.
5. Criminal Revn. No. 500 of 1946, D/-21-9-1946, K. P. Ghiara v. D. P. R. Cassad.
6. ('42) I. L. R. (1942) 2 Cal. 507 : 29 A. I. R. 1942 Cal. 575 : 204 I. C. 26 : 44 Cr. L. J. 132, Daityari Tripatti v. Subodh Chandra Chaudhuri.

V. R. Deopujari—for Applicant.
V. T. Kedar—for Non-Applicant.

Order.—The non-applicant, Dayabhai, son of Ramchandra Bhatia, Gujarathi, resident of Bohari, taluq Bardoli, district Surat, was prosecuted at the instance of the applicant Laxman who is a munim of the firm of Dinkar Trimbak and Co., Akola, under Ss. 406 and 420, Penal Code in the Court of the Honorary Magistrate, first class, Akola, but the latter discharged him on the ground that the Court had no jurisdiction to try him. The Sessions Judge, West Berar Division, upheld that finding and the applicant has now come up in revision to this Court.

[2] His case briefly stated was as follows: His firm is a holder in due course of a cheque of Rs. 250 drawn on 3-7-1943 by Chhaganlal Zaverchand of Balimoria in favour of Gandabhai Gopalji on a Bombay branch of the Baroda Bank. The firm endorsed the cheque in favour of the Dhutpapeshwar Company of Panwel and despatched it to that organisation by post, but it was lost in transit and the applicant apprised the Bank of Baroda of this. He also sent notices to the drawer and drawee of the cheque as well as to all prior endorsees including the non-applicant. The drawer of the cheque thereafter informed him that he had issued a duplicate cheque in favour of the original drawee. The cheque subsequently reached the non-applicant, but instead of passing it after endorsement to Dr. Sharma, in whose favour he had endorsed the original cheque he actually presented it for, and secured payment.

[3] An offence is under S. 177, Criminal P. C., ordinarily inquired into and tried by the Court within the local limits of whose jurisdiction it was committed; and in the present case it was clear that no offence was committed in Akola. Section 179 *ibid*, however, provides that :

"When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

[4] The two Courts below held, and rightly in my view, that the "consequence" referred to in that section is confined to that which is an ingredient of the offence for which an accused person is being tried. It is true that Niyogi J. (then A. J. C.), relying on 46 Bom. 641[1] held to the contrary in A. I. R. 1933 Nag. 33,[2] but he made no reference in that case to the reported decision of Halifax A. J. C. in 20 N. L. R. 72[3] in which that Bombay case was dissented from. He also made no reference to the Full Bench case in 55 Bom. 59[4] in which the earlier Bombay case was overruled and it was held that the "consequence" in S. 179, Criminal P. C. is the consequence which must form part of the offences charged. Mitra also at page 573 of his Code of Criminal Procedure, 10th edition, notes that all the Chartered High Courts are now agreed that the "consequence" is confined to that which is an ingredient of the offence for which an accused person is being tried.

[5] In Cri. Revn. No. 500 of 1946[5] decided by me on 21-9-1946, I had expressed agreement with the view taken in I. L. R. (1942) 2 Cal. 507[6] that S. 179, Criminal P. C. applies to those offences, which by their very definition consist of an act and its consequence, for example, culpable homicide, but it does not apply to a criminal breach of trust. An offence of criminal breach of trust can, as is clear from the provisions of sub-s. (2) of S. 181, Criminal P. C., be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed. It follows from this that if the non-applicant had, as was asserted by the applicant's learned counsel, cashed the cheque in question at Surat, the appropriate Court there had jurisdiction to try the case. An Akola Court manifestly had no jurisdiction whatever as the money was not received or retained and the offence was not committed at that place. The findings of the Courts below were, therefore, correct. This application is dismissed.

V.R. *Application dismissed.*

A. I. R. (35) 1948 Nagpur 82 *[C. N. 32.]*

HEMEON J.

Gopeshwar Mandal — Accused—Applicant v. *Emperor.*

Criminal Revn. No. 549 of 1946, Decided on 18-1-1947, from order of Addl. Sessions Judge, Bhandara, D/- 5-8-1946.

Penal Code (1860), S. 161 — Offence under — Essentials of.

To constitute an offence under S. 161, it is sufficient that there is an offer of a bribe to a public servant, in the belief that he has an opportunity or power in the exercise of his official function to show the offeror a desired favour, although the public servant has in reality no such power. Performance of the act which is the consideration for the bribe is not essential. But it is essential that the bribe should be obtained 'as a motive or reward' : 15 A. I. R. 1928 All. 752; 28 Cal. 344; 31 Bom. 335 and 28 A. I. R. 1941 Lah. 276, *Rel. on.* [Para 4]

Cases referred :—

1. ('28) 51 All. 467 : 15 A.I.R. 1928 All. 752: 113 I. C. 179, Emperor v. Ajodhia.
2. ('01) 28 Cal. 344, Nazamuddin v. Queen-Empress.
3. ('07) 31 Bom. 335, Emperor v. Bhagwandas kanji.
4. ('41) 28 A. I. R. 1941 Lah. 276: I. L. R. (1942) Lah. 402 : 195 I. C. 229, Emperor v. Phul Singh.

S. B. Sen and V. R. Sen — for Applicant.

B. L. Gupta, Government Pleader — for the Crown.

Order. — The applicant, Gopeshwar Mandal was convicted and sentenced to undergo 6 months' rigorous imprisonment and to pay a fine of Rs. 500 under S. 161, Penal Code by the Sub-Divisional Magistrate, Gondia, and his appeal was dismissed by the Additional Sessions Judge, Bhandara. He has now come up in revision. The prosecution case was briefly stated as follows. The applicant was the General Clerk in the Watch and Ward Department of the Bengal Nagpur Railway at Gondia, where he worked under Raghunathsingh (P. W. 2), Circle Inspector. Appointments as B class watchmen were made by the latter and when Maniklal (P. W. 5) approached the applicant for a post of that kind he was told that he would have to pay him Rs. 60 for it. Maniklal then went away and met Mr. S. N. Ghosh (P. W. 3), Railway Section Officer, who produced him before R. D. Verma (P. W. 1), Sub-Inspector, on 27-6-1945. Maniklal told him of the applicant's demand and he was brought before N. R. Lakhkar (P. W. 4), First Class Magistrate, two days later. Maniklal also apprised Mr. Lakhkar of the applicant's demand and a trap was arranged to catch the applicant. Mr. Lakhkar noted down the numbers of the six 10 rupee notes produced by Maniklal and returned them. Maniklal and others then went away but returned again at about 6 P. M., when Mr. Lakhkar re-verified the numbers of the notes and wrapped them in a piece of newspaper which he initialled. Ramsingh (P. W. 6) and others then set out in the direction of the applicant's house. Maniklal and Ramsingh, in accordance with the orders given to them, went ahead and entered the applicant's compound while the others waited in the vicinity. Maniklal and Ramsingh emerged from the compound shortly afterwards and Mr. Lakhkar learned from Ramsingh that the applicant had asked them to wait as there was a doctor at his house. About a quarter of an hour later, the doctor and another person left the house on bicycles. Maniklal and Ramsingh then entered the applicant's compound and there was a talk between him and them at the gate. When the applicant asked Maniklal if he had brought the money, Maniklal told him that he had and handed him the packet containing the notes. Thereupon, the applicant opened the packet, counted the notes, wrapped them up again and gave them to his 7 year old daughter with the direction to place them in his house. Maniklal gave the application Ex. P-4 to the applicant. Then just at that point after Ramsingh had given a signal Mr. Lakhkar and his companions entered the applicant's house. When he was directed to produce the packet given to him by Maniklal, he denied that he had received any such thing, but when his house was searched the packet was found on a table in a room with the notes in question in it.

[2] The applicant in examination denied that he had demanded or received any gratification from Maniklal, although he admitted that the latter had interviewed him on the evening in question. He asserted that the six 10 rupee notes did not belong to him and refused to admit that they had been seized from his house. In his written statement which was filed 3 months later, his version was that while he was talking to Dr. Bharat (D. W. 1) and Dr. Bajpai (D. W. 2) on the verandah of his house, his daughter brought in a cover which, according to her, had been delivered to her by somebody. He asked her to keep it on the table and she did so. This was the cover which was subsequently seized, but he had no knowledge of its contents prior to the seizure. He attributed his incrimination to Mr. S. N. Ghosh who was prompted thereto by Mr. P. K. Roy, Raghunathsingh's assistant, who was inimical to him. The two Courts below have accepted the prosecution case and rejected the defence case; and I am in entire agreement with those findings. The prosecution irrefragably established the applicant's guilt and I have no doubt whatever of the fact that the position taken by him in defence was an afterthought. When Mr. N. R. Lakhkar, First Class Magistrate and his companions rushed into the applicant's compound, disclosed their identity and asked him to produce the packet given to him by Maniklal, he disclaimed the receipt of

anything and the packet in question was subsequently found on a table in a room of his house. That was on 29-6-1945 and when the applicant was examined on 10-1-1946 he specifically stated that the six 10 rupee notes in question did not belong to him, that he had not received them from Maniklal and that he could not say whether they had been seized from the table. On 30-4-1946, however, he admitted that the packet which had been seized from his room was the packet in the case and his explanation was that his daughter had brought it to him and that when she had told him that somebody gave it to her he told her to place it on the table. It is immediately obvious that if there had been any truth in that belated version, it would have appeared in his examination and even before that it would have been disclosed when Mr. Lakhkar and his companions raided his house.

[3] The applicant was not an ordinary rustic or a young man but was, on the other hand, General Clerk in the Watch and Ward Department of the Bengal Nagpur Railway at Gondia and 45 years of age. He was, therefore, a man who, if he had obtained the Rs. 60 by licit methods, would, when interrogated concerning them, not only have admitted it but displayed unbounded indignation at having been suspected. The suggestion that the notes had been planted on him without his knowledge because of the antagonism of Mr. P. K. Roy was palpably devoid of any substance. In the evidence the only thing which emanated concerning their enmity was that there had been a quarrel between them regarding a water tap, and it is impossible to suppose that because of a petty dispute of that kind the applicant would have been involved in a big and planned case of this kind. Moreover, Mr. P. K. Roy was not stationed at Gondia when the offence took place and it was obvious that a person of Mr. Lakhkar's standing would not have inculpated the applicant without justification. It was, on the other hand, clear beyond doubt that Maniklal had previously approached the applicant and that the latter had told him that he would have to pay Rs. 60 to secure appointment to the post of watchman. It follows that the evidence of the two doctors who were examined in the applicant's behalf was so far as it related to the version put forward by him in his written statement untrue and I am clear that they so deposed because he and they are on friendly terms.

[4] The contention that the conviction under S. 161, Penal Code was wrong as the applicant had no authority to appoint a person to the post of watchman cannot prevail. In 51 ALL. 467[1] it was held that to constitute an offence under that section read with S. 116 it was sufficient that there was an offer of a bribe to a public servant, in the belief that he had an opportunity or power in the exercise of his official functions to show the offeror a desired favour, although the public servant had in reality no such power. In 28 Cal. 344[2] a peon in the Salt Department who had taken money in respect of the issue of saltpetre licences, was adjudged liable under S. 161 on the ground that the object of the illegal gratification was the rendering of a service to the persons who paid it. In 31 Bom. 335[3] a Division Bench made the following observations:

"As the Magistrate observes, the performance of the act which is the consideration for the bribe is not essential. But it is essential that the bribe should be obtained 'as a motive or reward.' That phrase evidently means 'on the understanding that the bribe is given in consideration of some official act or conduct'."

[5] In A. I. R. 1941 Lah. 276[4] it was pointed out that S. 161 does not require that the public servant must in fact be in a position to do the official act, favour or service at the time and the Division Bench followed the rule in the Allahabad case supra. With these authorities I am in respectful agreement and it was obvious in the case before me that the applicant had promised to show favour to Maniklal in the exercise of his official functions although he had no authority to appoint him. The conviction was, therefore, in order and it is maintained. Cases of this kind should, as I have had occasion to observe in the past, be visited deterrently and I concur in the learned Additional Sessions Judge's comments regarding the sentence awarded to the applicant. That sentence was neither harsh nor excessive when regard is had to all the circumstances of the case and the necessity for discouraging bribe-takers and it is confirmed. This application is dismissed.

G.J. *Application dismissed.*

A. I. R. (35) 1948 Nagpur 83 *[C. N. 33.]*

GRILLE C. J. AND HIDAYATULLAH J.

Giansingh Baldevsingh — Applicant v. *Emperor.*

Misc. Criminal Case No. 48 of 1946, Decided on 18-10-1946.

Criminal P. C. (1898), S. 491—Illegal or improper detention—What is—Release from jail obtained on strength of bogus order—Re-arrest — Application under S. 491—Maintainability.

An accused who was undergoing a sentence of imprisonment was released before he had served his full sentence on the strength of a bogus order from the military authorities but was again re-arrested. The accused applied under S. 491 for his release on the ground that his previous release was absolute and unconditional and hence, his subsequent arrest was illegal:

Held, that the release obtained on the strength of a bogus order could not be said to be an unconditional release. It was in fact akin to escape. The accused was therefore in legal custody and the application under S. 491 could not be entertained. The fact that the

actual perpetrator of the fraud was not caught or that the accused was not shown to have been a party to this plot could not affect the question. [Para 6 & 7]

Annotation: ('46 Com.) Cr. P. C., S. 491 N. 7.

Y. P. Verma—for Applicant.

R. Kaushalendra Rao, Government Pleader — for the Crown.

Order.—This is an application by one Giansingh under S. 491, Criminal P. C. He was a Havildar Quarter Master Sergeant and was sentenced by a Court Martial to two years' imprisonment and in the middle of August 1943 was sent to the Central Jail, Jubbulpore to serve his sentence. He contends that he was unconditionally released on 27-1-1944 and was wrongfully re-arrested in the Punjab on 9-6-1946 on a requisition by the Central Provinces' Police. His contention is that his release on 27-1-1944 was an absolute and unconditional release and that he is now in illegal confinement.

[2] The Crown to whom notice was given contends that the release on 27-1-1944 was obtained by means of a forged document and that the forgery was discovered very shortly afterwards as the result of which the machinery was put in motion to arrest the accused. That arrest was not effected until more than two years had passed, and it is contended that the applicant Giansingh is now in jail lawfully serving the unexpired portion of his sentence.

[3] The Crown, on being called to answer the case, has eventually produced the relevant documents, after a warning that they must be prepared to meet the applicant's case on 15th October, the day fixed for hearing. They have produced the document on which the release was given. It runs as follows :

"Subject:— Suspension of Sentence. No. 672/Sigs/23.
H. Q. S. T. Cs. (I).
Jubbulpore, C. P.
26th January 1944.

To,
The Superintendent, Central Jail,
Jubbulpore, C. P.

9237 Ex-Hav. Mohd. Khurshid. no. 1. STC (I).
A1873 Ex-Hav. Gain Singh no. 1 STC (I).

The parents of the abovenamed had put up an appeal to the Adjt. Gen. in India G. H. Q. (I), Simla. The A. G. has thoroughly considered their case and has finally decided and remitted twelve months rigorous imprisonment of 9237 Ex-Hav. Mohd. Khurshid and Sixteen months rigorous imprisonment of A1873 Ex-Hav. Gain Singh and such punishment will reckon from 19-6-1943, that is from the date on which the individuals concerned were placed under close arrest in Military cells.

Would you please take necessary action and inform the individuals accordingly. The letter supersedes the warrant already forwarded to you by hand on 10-8-1943.

A. H. Wilson
for Lt. Colonal
Commandant. Signal-Training Centres (India)."

It will be noticed that the word 'colonel' is misspelt. On behalf of the applicant it is contended that this is a genuine document and that the release of Giansingh was inspired by a judgment of the Sessions Judge of Jubbulpore delivered on 18-1 1944 in which he acquitted two civilians who were alleged to have been concerned with Giansingh in the offence for which he was convicted by Court Martial, and it is alleged that in that judgment the learned Sessions Judge expressed some doubt on the propriety of Giansingh's conviction. It is alleged that the Army Authorities took notice of this judgment and in consequence ordered the remission of 16 months' imprisonment of Havildar Giansingh. Now the date of the Sessions Judge's judgment is 18-1-1944. It is quite inconceivable that an appeal by Giansingh's parents should have been made to the Adjutant General in respect of a conviction in the previous July and that the Adjutant General could within a week of the judgment of the Sessions Judge have thoroughly considered Giansingh's case and remitted the order to the Headquarters of the Supply and Transport Corps at Jubbulpore to have the balance of the sentence cancelled. It is also significant that in this egregious document Gainsingh's name is consistently misspelt and differs in spelling from the original commitment which was received in August 1943. It is astonishing that the Superintendent of an important jail like Jubbulpore should be deceived by this document. The Crown has also produced a letter from the Headquarters of the Supply and Transport Corps, Jubbulpore, stating that his letter did not emanate from their office and also a formal certificate to that effect.

[4] The learned counsel for Giansingh contends that there has been a suppression of the actual warrant of supersession inasmuch as the Superintendent of the Central Jail in writing to Mr. Verma, the counsel, refers to a supersession warrant having been received by his office on 27-1-1944 and that consequently he was released. Also the District Superintendent of Police in a memorandum dated 25-7-1946 to the District Magistrate of Jubbulpore, a copy of which was filed by Mr. Verma, states :

"On 27-1-1944, an unknown individual presented a bogus memo at the Central Jail gate with a bogus supersession warrant which showed the sentence of Ex-Havildar Giansingh had been reduced from 2 years to 1 year."

[5] In fact there never was a supersession warrant, and the misapprehension that there was one has arisen from the loose terms used by the Superintendent of the Central Jail in writing to Mr. Verma. He mentions one document alone and calls it the supersession warrant. The document itself as a matter of fact purports to be a supersession warrant (*vide* the last sentence of

the letter) and makes no mention of any warrant accompanying. It is elementary that any warrant of commitment or any supersession warrant is written on a prescribed form. The warrant of commitment which has been produced is in the prescribed form and S. 109, Indian Army Act, also lays down in the note to the section that there is a prescribed form of warrant when any sentence is set aside or varied. An affidavit has been sworn by the Superintendent of the Central Jail that no warrant in the due form has been received in his office from the Military Authorities. Neither is it possible to contemplate that a genuine warrant should have been accompanied by a palpably bogus letter. We are satisfied that the release was ordered on the strength of the letter alone and that no other document was brought by the person who brought the letter.

[6] It is further contended that the fraud cannot be said to have been established until the perpetrator of it has been caught and convicted for the fraud in a Court of Law. We cannot for a moment agree with this contention. It is enough that we are satisfied that the release was obtained by a bogus order. Neither can the fact that it has not been established that Giansingh himself was a party to this plot affect the issue. The accused was released before he had served his full sentence, and released as the result of a fraudulent act by someone who was interested in him. Such a release is not, as he states in his affidavit, an unconditional release. It was in fact akin to an escape. The validity of the actual order on which he was re-arrested has not in itself been challenged. The challenge rests on the basis that the letter delivered at the Jail gate on 26th January has not been proved to be a bogus document.

[7] Giansingh is accordingly legally in custody and no application under S. 491, Criminal P. C. for his production before the Court and release can be entertained.

K.S. *Application dismissed.*

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*A. I. R. (35) 1948 Nagpur 85 *[C. N. 34.]*

GRILLE C. J. AND SEN J.

Shanker Rao Malharrao and others—Appellants v. *Kalyanji Bhai Vithaldas and another—Respondents.*

Letters Patent Appeal No. 10 of 1946, Decided on 8-1-1947, from appellate order of High Court, Nagpur, in First Appeal No. 43 of 1940, D/- 6-11-1946.

***Letters Patent (Nag.), Cl. 10—"Judgment"—Dismissal of appeal under O. 43, R. 1 (0) against refusal to extend time for payment of mortgage money.**

The term "judgment" in the Letters Patent of Nagpur High Court means, in civil cases, a decree and not a judgment in the ordinary sense : 12 A. I. R. 1925 P. C. 155, *Rel. on*; 29 A. I R. 1942 Nag. 18; 30 A. I. R. 1943 Nag. 282; 31 A. I. R. 1944 Nag. 310; 32 A. I. R. 1945 Nag. 156; L. P. A. No. 3 of 1940 and L. P. A. No. 10 of 1944, *Ref.* [Para 6]

Dismissal of an appeal under O. 43, R. 1 (0) Civil P. C. against the order of the trial Court refusing to extend the time for payment of mortgage money under O. 34, R. 2(2) is not a decree as defined in S. 2 (2) but is an order as defined in S. 2 (14) and therefore not a 'judgment' within the meaning of Cl. 10, Letters Patent: 9 Cal. 482 (P.C.), *Considered*; *Case law reviewed.* [Paras 7 and 38]

Annotation—('44-Com.) Civil P. C. O. 34 R. 2, Note 23 Pt. 2, Letters Patent Cl. 15, N. 2, Pt. 26 and N. 3.

Cases referred—

1. ('25) 12 A. I. R. 1925 P. C. 155 : 87 I. C. 313 : 27 Bom. L. R. 872 (P. C.), Sevak Jeranchod Bhogilal v. Dakore Temple Committee.
2. L. P. A. No. 3 of 1940, D/-27-8-1940, Eknathrao v. Gopalrao.
3. ('42) I. L. R. (1942) Nag. 41 : 29 A. I. R. 1942 Nag. 18 : 198 I. C. 130, Kanbaiya v. Hiraji.
4. ('43) I. L. R. (1943) Nag. 453 : 30 A. I. R. 1943 Nag. 282 : 211 I. C. 237, Ganpatrao v. Gangadhar.
5. ('44) I. L. R. (1944) Nag. 827 : 32 A. I. R. 1945 Nag. 75 : 220 I. C. 41, Jagannath v. Municipal Committee, Khandwa.
6. ('45) I. L. R. (1945) Nag. 286 : 32 A. I. R. 1945 Nag. 156, Kunwarlal Singh v. Shrimati Umadevi.

6a. ('46) I. L. R. 1946 Nag. 482 : 33 A. I. R. 1946 Nag. 424, Kunwarlal Singh v. Umadevi.

7. L. P. A. No. 10 of 1944, D/-4-12-1944, Ratanlal v. Kedarmal.
8. L. P. A. No. 17 of 1942, D/-13-12-1946, Ratanlal v. Gajadhar.
9. ('83) 9 Cal. 482 : 10 I. A. 4 : 4 Sar. 407 (P. C.), Hurrish Chunder v. Kalisunderi Debi.
10. ('80) 5 I. A. 138 : 4 Cal. 23 : 3 Sar. 815 (P. C.), Bhoobun Mohini Debya v. Hurrish Chunder.
11. ('72) 8 Beng. L. R. 433, Justices of the Peace for Calcutta v. Oriental Gas Co.
12. ('81) 6 Cal. 594, In the matter of, Kallay Soonduri Debia.
13. ('16) 43 Cal. 148 : 4 A. I. R. 1917 Cal. 657 : 33 I. C. 329, Mani Mohan v. Ramtaran.
14. ('89) 11 All. 375, Banno Bibi v. Mehdi Husain.
15. ('92) 14 All. 226 (F. B.), Mahomed Naim-ul-llah Khan v. Ihsanullah Khan.
16. ('97) 20 Mad. 407, Vasudeva Upadyaya v. Visvaraja Thirthasami.
17. ('99) 22 Mad. 68 (F. B.), Chuppan v. Moidin Kutti.
18. ('02) 25 Mad. 555, Sabhapathi Chetti v. Narayansami Chetti.
19. ('99) 26 Cal. 361, Toolsee Money Dasee v. Sudevi Dassee.
20. ('21) 48 I. A. 76 : 48 Cal 481 : 8 A. I. R. 1921 P. C. 80 : 60 I. C. 274 (P. C.), Mt. Sabitri Thakurain v. Savi.
21. ('39) 43 C. W. N. 697, E. B. Nier v. G. Reinhart.
22. ('36) 40 C. W. N. 1264, Gangadhar Bagla v. Kanti Chunder.
23. ('35) 13 Rang. 457 : 22 A. I. R. 1935 Rang. 267 : 157 I. C. 1107 (F. B.), Dayabhai Jiwandas v. Murugappa Chettiar.
24. ('42) I. L. R. (1942) Lah. 491 : 29 A. I. R. 1942 Lah. 95 : 200 I. C. 652 (F. B.), Shaw Hari Dial & Sons Firm Madras v. Sobna Mul Beli Ram.
25. ('12) 35 Mad. 1 : 8 I. C. 340, Tuljaram Row v. Alagappa Chettiar.

D. T. Mangalmoorti—for Appellants.
M. R. Bobde and T. P. Naik—for Respondents.

Judgment. — Kamta Prased, predecessor-in-title of the respondent, Kalyanjibhai, obtained a preliminary decree for foreclosure on 6-8.

1928 in Civil Suit No. 19 of 1927 in the Court of the Additional District Judge, Raipur, for Rs. 1,06,227-10-0 against Malhar Rao, father of the appellants. The decree was slightly modified in appeal on 17-10-1929. The estate of Malhar Rao, zamindar of Amgaon, was taken under the superintendence of Court of Wards, Bhandara. In 1932-33 the Court of Wards sold two of the mortgagad villages and paid Rs. 41,000 towards a part satisfaction of the decree. On 3-9-1932 the parties filed a compromise petition in the trial Court in which they stated that the judgment-debtor had paid Rs. 41,000 through Court of Wards, Bhandara, and the balance of the decretal amount was agreed to be paid in 21 instalments commencing from 1-6-1933. One of the terms of the compromise between the parties was that in default of payment of any two instalments the entire amount was to be exigible and the amount was recoverable with interest at 6 per cent. per annum. Two instalments were not paid and the decree-holder made an application on 7-7-1934 for a final decree. The debtor applied to the Debt Conciliation Board, Gondia, for conciliation of his debts and the proceedings were pending till 18-5-1938 when the application was dismissed. In the meantime, Malhar Rao died on 22-8-1937 and the appellants were substituted as judgment-debtors in his place as his legal representatives.

[2] The appellants contested the right of the decree-holder to get a final decree for foreclosure because of the compromise dated 3-9-1932. This contention was rejected by the trial Court and the order of the trial Court was confirmed by the High Court on 18-7-1938. In the meantime, the appellants filed a suit in the Court of the Additional District Judge, Bhandara, for a declaration that the decree for foreclosure was not binding on them and obtained an order from that Court under O. 21, R. 29, Civil P. C., on 24-3-1938 for stay of proceedings in the suit (Civil Suit No. 19 of 1927). The decree-holder contested that order in the Court of the Additional District Judge, Raipur, which held that in spite of the stay order the Court had power to make the decree final and ordered on 29-7-1939 that the decree will be made final unless the judgment-debtors paid Rs. 10,000 in Court on or before 1-10-1939. The judgment-debtors did not pay that amount and filed an application on 7-10-1939 for review of that order, for extension of time for payment and for instalments. The application was rejected and a final decree for foreclosure was passed on 7-10-1939.

[3] The judgment-debtors filed Miscellaneous Frst Appeal No. 43 of 1940 in this Court on 1-12-1939 against the order of the trial Court refusing to extend time for payment, but they did not file an appeal against the final decree for foreclosure. The Division Bench by the order dated 5-4-1940 held that the appeal was against the order and not against the decree and that the appeal was within time. During the pendency of the appeal, the decree-holder assigned his rights to the respondent Kalyanjibhai on 16-2-1944 for Rs. 65,000. Kalyanjibhai was substituted as a decree-holder in place of Kampta Prasad on 7-3-1945. The appeal was dismissed by Hemeon J. by an order passed on 6-11-1946.

[4] The judgment-debtors filed a Letters Patent appeal on 11-11-1946 against the order passed by Hemeon J. On 20-11-1946 the decree-holder applied for dismissal of the appeal on the ground that no Letters Patent appeal was tenable against the order of Hemeon J.

[5] The question for decision is whether a Letters Patent appeal lay against the order of Hemeon J. passed on 6-11-1946. The decision turns on the determination of the point whether the order of Hemeon J. is a judgment within Cl. 10 of our Letters Patent.

[6] This Court following a dictum of their Lordships of the Judicial Committee in A. I. R. 1925 P. C. 155=27 Bom. L. R. 872[1] has consistently held in a series of cases that the term "judgment" in the Letters Patent of our High Court means, in civil cases, a decree and not a judgment in the ordinary sense : *see* L. P. A. No. 3 of 1940,[2] I. L. R. (1942) Nag. 41,[3] I. L. R. (1943) Nag. 453,[4] I.L.R. (1944) Nag. 827[5] at p. 828, I.L.R. (1945) Nag. 286,[6] I. L. R. (1946) Nag. 482,[6a] L.P.A. No. 10 of 1944[7] and L. P. A. No. 17 of 1942.[8]

[7] The appellants had made an application in the trial Court for extension of time under O. 34, R. 2 (2), Civil P. C. That application was rejected by the order dated 7-10-1939. The appellants filed miscellaneous appeal No. 43 of 1940 in this Court under O. 43, R. 1 (0) against the order of the trial Court refusing to extend the time for payment of mortgage money. Hemeon J. dismissed the appeal on 6-11-1946. His order is not a decree as defined in S. 2 (2) but is an order as defined in S. 2 (14), Civil P. C.

[8] The learned counsel for the appellants strenuously contended that the term "judgment" in Cl. 10 of our Letters Patent includes also orders which are not decrees and that the view of this Court to the contrary requires reconsideration because of the decision of their Lordships of the Judicial Committee in 9 Cal. 482[9] and submitted that if necessary the matter may be referred to a Full Bench for decision. The other cases cited by the learned counsel were considered in our decision reported in I. L. R. (1945) Nag. 286[6] and we do not propose to cover the same ground.

We shall restrict ourselves to the examination of the decision in 9 Cal. 482[9] and to the submissions which the learned counsel for the appellants made when he sought to distinguish the other Privy Council cases.

[9] In order to understand the decision of their Lordships of the Judicial Committee in 9 Cal. 482[9] it is necessary to set out briefly a few relevant facts. One Shombhu Chunder Chowdry made a grant of three villages to his sister, Kasiswari Debya. She made a will under which she bequeathed the moiety of the estate to her daughter Chundermoni, and if she adopted a son, to that adopted son, otherwise to her (Chundermoni's) daughters and the other moiety was to remain in possession of her daughter-in-law Kali Sundari till her adopted son attained majority and after he attained majority they were to receive equal shares in case there was a misunderstanding between them. On the death of Kasiswari in 1871, Hurrish Chunder, son of Shombhu Chunder, took possession of the villages which his father had granted to Kasiswari, whereupon Chundermoni and Kali Sundari on behalf of her adopted son filed a suit for possession of the estate and for mesne profits. The dispute between the parties was as regards the nature of the right which was conferred on Kasiswari, whether she had absolute estate or a mere life estate. The trial Court held that Kasiswari took an absolute estate under the grant, that she executed a will, that Chundermoni took an absolute estate under the grant on the death of her mother but that having elected to take under her mother's will and to admit Kali Sundari, the co-plaintiff, to a half share of the estate, both the plaintiffs were entitled to maintain the action against the defendant. The Court passed a decree for possession and mesne profits. The trial Court did not decide the question of adoption because, whether the adoption was proved or not, Kali Sundari had the right to immediate possession.

[10] On appeal the High Court held that Kasiswari had a mere life estate and was not competent to dispose of the property by will, reversed the decree of the trial Court and dismissed the suit of the plaintiffs. In the meantime, Chundermoni had died and her daughters appealed to the Privy Council and by an Order in Council the judgment of the High Court was reversed and the decree of the Subordinate Court was affirmed. Their Lordships of the Judicial Committee held that Kasiswari took an absolute estate and that the plaintiffs were entitled to succeed in the suit but that it was not necessary to decide what their rights may be *inter se*. The decision of the Privy Council is reported in 5 I. A. 188.[10]

[11] Kali Sundari was not a party in appeal before their Lordships of the Judicial Committee. A certified copy of the Order in Council was granted to the daughters of Chundermoni. During the pendency of the appeal before the Privy Council, Hurro Kinkurry, a daughter of Chuudermoni, purchased the right, title and interest of her sister Bhoobun Mohini and she in her turn sold her right and interest in the subject-matter of the suit to Hurrish Chunder and made over to him the certified copy of the decree which she had received from the Privy Council. On 13-5-1880, Kali Soondari on behalf of her adopted son applied to the High Court for execution of the order of the Judicial Committee under S. 610, Civil P. C. (Act 10 [X] of 1877) which corresponds to O. 45, R. 15, Civil P. C., 1908. The application came up for hearing before Pontifex J. Two objections were raised before him viz., (1) that the application was not tenable because it was not accompanied by a certified copy of the decree of Her Majesty in Council and (2) that the decree of the original Court upheld by the Privy Council could only be executed as a whole, and not by one of the two plaintiffs. Pontifex J. overruled the first contention but upheld the second and refused the application for execution. The applicant was left to a regular suit to enforce her claim to any share of the property.

[12] A Letters Patent appeal was filed against the order of Pontifex J. and a preliminary objection was taken that that order was not a judgment within the meaning of Cl. 15, Letters Patent, which corresponds to Cl. 10 of our Letters Patent. All the three Judges were of opinion that the order of Pontifex J. was wrong and that he was bound to transmit the Order in Council to the trial Court for execution. Mitter J. held that the learned Judge who disposed of the application was bound to transmit the Order in Council to the trial Court for execution and his refusal to do so was a judgment within Cl. 15, Letters Patent and was appealable. That was also the view of White J., who applied the definition of Couch C. J. in 8 Beng. L. R. 433[11] and held that the order under appeal was an order of rejection and was a judgment because it held that the applicant was not entitled to have the decree of the Privy Council executed. Garth C. J. held that Pontifex J. was bound to transmit the Order in Council to the trial Court for execution but that his refusal to transmit the Order in Council did not amount to a "judgment" as Pontifex J. was performing a mere ministerial duty. The appeal was allowed according to the opinion of the majority of the Judges, and the order of Pontifex J. was reversed. The case is reported in 6 Cal. 594.[12]

[13] Hurrish Chunder filed an appeal to the Privy Council against this order. Their Lordships of the Judicial Committee held that the provision of S. 610 requiring the filing of a certified copy of the Order in Council along with the application was directory and that as the defendant who had the copy neglected to file it, as he ought to have done, in the Court, the failure to file the certified copy of the order in the circumstances of the case was excusable.

[14] Their Lordships of the Judicial Committee stated that they were unable to subscribe to the doctrine that a decree can only be executed as a whole and not partly by one of the plaintiffs—a doctrine which, as pointed out by the High Court, would lead to the consequence that a defendant could prevent the execution of a decree by buying the interest of one of the plaintiffs. The view of their Lordships was that Kali Sundari was entitled to possession of half of the estate in question, that Chundermoni had no right in that suit to dispute the title of the plaintiff to present possession of a moiety of the land, and that the defendant, who had purchased the share of her (Chundermoni's) representatives had no better rights. The defendant was consequently a wrongdoer; and as against him she had an immediate right to possession.

[15] Their Lordships accordingly affirmed the judgment of the High Court coupled with a declaration that the decree was to be executed in respect only of the share of which Kali Sundari was entitled under and by virtue of the will and that nothing in their judgment was to affect any right which the defendant may at any time have to question the validity of the adoption

[16] The reason for holding that the order of Pontifex J. was a judgment within the meaning of S. 15 of the Royal Charter of 1865 was stated by their Lordships of the Judicial Committee at p. 16 of 10 I. A. 4[9] in these terms :

"These learned Judges held (and their Lordships think rightly) that whether the transmission of an order under S. 610 would or would not be a merely ministerial proceeding, Pontifex J. had in fact exercised a judicial discretion and *had come to a decision of great importance, which, if it remained, would entirely conclude any rights of Kali Soondari to an execution in this suit. They held, therefore, that it was a judgment* within the meaning of section 15."

We have underlined (here italicized) a few words in order to bring out the full implication of the decision of their Lordships of the Privy Council. The order of Pontifex J. was a decree within the meaning of S. 2, Civil P. C., 1877, though it was not so specifically stated. The *ratio decidendi* of the case was thus not inconsistent with the dictum laid down by their Lordships in a subsequent case, A. I. R. 1925 P. C. 155,[1] that the term "judgment" in the Letters Patent means in civil cases a decree and not a judgment in the ordinary sense.

[17] The contention of the appellant in 9 Cal. 482[9] based on S. 588, Civil P. C., 1877, that the appeal against the judgment of Pontifex J. was incompetent was negatived by their Lordships of the Judicial Committee at p. 17 of 10 I. A. 4,[9] where they stated :

"It only remains to observe that their Lordships do not think that S. 588 of Act 10 [X] of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the Full Court."

The relevant portion of S. 588 of the Code was in these terms :

"An appeal shall lie from the following orders under this Code and from no other such orders."

Clauses (a) to (w) specify the orders against which appeals were provided. After enumerating the orders, it was enacted that the orders passed in appeals under this section shall be final.

[18] Section 591 enacted that except as provided in Chap. 43, no appeal lay from any order passed by any Court in the exercise of its original or appellate jurisdiction; but if any decree was appealed against, any error, defect or irregularity in any such order, affecting the decision of the case, was to be set forth as a ground of objection in the memorandum of appeal. These sections were reproduced in identical terms in the Code of Civil Procedure, 1882. These sections have been reproduced with certain alterations in the Code of Civil Procedure, 1908, as S. 104 and O. 43, R. 1, and S. 105 respectively. The scheme of the two Codes 1877 and 1882 was that the provisions relating to appeals were collected in part VI; Chap. 41 dealt with appeals from original decrees, Chap. 42 with appeals from appellate decrees, Chap. 43 with appeals from orders, Chap. 44 with pauper appeals and Chap. 45 with appeals to the Queen in Council. Section 540 enacted that unless when otherwise expressly provided by the Code or by any other law for the time being in force, an appeal lay from the decrees, or from any part of the decrees of the Courts exercising original jurisdiction, to the Courts authorized to hear appeals from the decisions of those Courts.

[19] Sections 582 and 591 were in Chap. 43. Sections 610 and 611 were parts of Chap. 45 which dealt with appeals to the Queen in Council. Section 610 dealt with procedure to enforce orders of the Queen in Council. Section 611 stated that the orders made by the Court which enforced or executed the orders of Her Majesty in Council, relating to such enforcement or execution, were appealable in the same manner and subject to the same rules as the orders of

such Court relating to the enforcement or execution of its own decrees.

[20] Chapter 19 dealt with the execution of decrees. Section 244 thereof stated that certain questions were to be determined by the Court executing a decree and not by a separate suit. Under the Code of 1877, one of the questions which the executing Court had to determine was a question arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution of the decree. Under S. 244 (c) of the Code of 1882, the executing Court was empowered to decide any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of the execution thereof.

[21] "Decree" was defined in S. 2, Civil P. C. 1877, as the formal order of the Court in which the result of the decision of the suit or other judicial proceeding was embodied but did not include an order in appeal remanding a suit for re-trial. There was no definition of "order" in the Code.

[22] "Decree" was defined in S. 2, Civil P. C., 1882, as

"the formal expression of an adjudication upon any right claimed, or defence set up, in a civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal. An order rejecting a plaint, or directing accounts to be taken, or determining any question mentioned or referred to in S. 244, but not specified in S. 588, is within this definition : an order specified in S. 588 is not within this definition :"

"Order" was defined as the formal expression of any decision of a civil Court which is not a decree as above defined.

[23] Any order passed by an executing Court relating to execution, satisfaction, or discharge of a decree between the parties was a decree and consequently an appeal lay against that order under S. 540 of the Code. The scheme of the Code of Civil Procedure, 1908 is, however, different. The Code consists, (i) of that which is termed 'the body of the Code' and (ii) of the rules. The body of the Code is fundamental and is unalterable except by the Legislature; the rules are concerned with details and machinery and can be more readily altered. Thus, it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, and it has to be read in conjunction with the more particular provisions of the rules: *see* 48 Cal. 148[13] at p. 152.

[24] "Decree" is defined in S. 2 (2) as

"the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default. . ."

We have not reproduced the explanation which defines a preliminary and a final decree, as it is not necessary for the purpose of the disposal of this appeal. Section 47 (1) enacts that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. Section 96 states that save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

[25] The relevant portion of S. 104 is given below:

"(1) An appeal shall lie from the following orders, *and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders*: (i) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section."

The section enumerates the several orders from which an appeal lies. The words underlined (here italicized) in sub-s. (1) have been introduced in the section which were not in the corresponding section 588 of the Code of 1877 or of 1882.

[26] Section 105 (1) states that save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect, or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

[27] The procedure regarding execution of decrees and orders is contained in O. 21 of the Code. Order 41 deals with appeals from original decrees, O. 42 with appeals from appellate decrees, O. 43 with appeals from orders, O. 44 with pauper appeals and O. 45, with appeals to the King in Council. Order 45, R. 15 and R. 16 correspond respectively to Ss. 610 and 611 of the Codes of 1877 and 1882.

[28] The order of Hemeon J. was passed under S. 104 read with O. 43, R. 1 (o), Civil P. C. and was not an order passed in execution or

under O. 45, R. 16 of the Code, and was consequently not a decree.

[29] The statement of their Lordships of the Privy Council at page 17 in 10 I. A. 4[9] already quoted above led to a divergence of judicial opinion as regards its interpretation. In 11 ALL. 375[14] at pp. 375-376, Sir John Edge C. J. as he then was observed:

"I do not understand their Lordships there to have held that S. 588, Civil P. C, does not apply at all to appeals attempted to be brought to the Full Court, from an order passed by a Judge of the Court. I think they were restricting their observations to the case before them. In that case the question arose from a so-called order of Pontifex J., in respect of an order of the Privy Council for execution. Pontifex J. considered that the decree as it then stood was not susceptible of execution, and refused to transmit the decree to the Court below. An appeal was preferred under S. 15, Letters Patent of the Calcutta High Court. Two of the Judges of that Court differed from the Chief Justice; the Chief Justice thinking that Pontifex J.'s order was merely ministerial, and the other two Judges apparently thinking that his proceeding was more than ministerial. Mitter J. pointed out that Pontifex J. ought to have acted under S. 244 of Act 10 [X] of 1877. Those two Judges considered that an appeal lay under S. 15, Letters Patent.

With regard to that case my observation is this, that apparently Mitter J. considered that Pontifex J. must have taken action or ought to have acted under S. 244 or S. 245 of the then Code. If Pontifex J. was acting under those sections, it was quite obvious that an appeal would lie. If he was not acting under those execution sections of the Code, but under S. 610 of the Code, I have difficulty in seeing how S. 588, Civil P. C., could have applied to what he did."

The decision in that case was that an order refusing leave to appeal in *forma pauperis* was not a judgment. This is the view which has been taken in this Court in L. P. A. No. 3 of 1940.[2]

[30] In 14 ALL. 226,[15] it was held that the order of a Judge of a High Court amending a decree was not a judgment and that no Letters Patent appeal lay against that order. Sir John Edge C. J. adhered to his previous observation regarding 9 Cal. 482[9] and stated that Letters Patent appeal undoubtedly lay against the order of Pontifex J. because he was acting or assumed to act under S. 244, Civil P. C., 1877. After a detailed examination of the provisions of the Code of 1877, he held that S. 588, which occurred in Chap. 43, could not be applied to orders made in appeals in cases which are under appeal to Her Majesty in Council under Chap. 45 and that consequently an appeal lay from the order of Pontifex J., whether he had or had not jurisdiction to make that order.

[31] The interpretation put by Sir John Edge on the statement of the Privy Council was approved by Benson J. in 20 Mad. 407,[16] but was, however, not accepted by the Madras High Court in 22 Mad. 68[17] and in 25 Mad. 555[18] and by the Calcutta High Court in 26 Cal. 361.[19]

[32] No useful purpose will be served by referring to these cases or to numerous other cases in which the statement of their Lordships of the Privy Council has been construed. We respectfully agree with the observations of Sir John Edge C. J. and Benson J. that the statement of their Lordships of the Judicial Committee in 9 Cal. 482[9] has to be read with reference to the facts of the particular case and that S. 588, Civil P. C., 1877, did not apply to the order of Pontifex J. because it was passed by him in execution under S. 244 of the Code and that consequently a Letters Patent appeal lay against his order because it was a decree and that the statement cannot be read as laying down a wider proposition that an order, even though not a decree, was a judgment within the meaning of Cl. 15 of the Letters Patent (Cl. 10 of our Letters Patent).

[33] In 48 I. A. 76:48 Cal. 481[20] the question of the competency of a Letters Patent appeal from the order of Chowdhury J. refusing to grant letters of administration was not raised. A petition had been made to the Calcutta High Court on its original civil side in the exercise of its testamentary and intestate jurisdiction under the Probate and Administration Act, 1881, praying for the administration of the property of the husband of the petitioner with a copy of his last will annexed. This petition was opposed and a caveat was entered to her petition. The proceedings were contested and under S. 83, Probate and Administration Act, 1881, they were registered as a suit, and the proceedings ended with a decree passed by Choudhury J. rejecting the application of the petitioner. That a decree was passed by Choudhury J. in that case is clear from the statement of Panckridge J. in 43 C.W.N. 697[21] at p. 725. As there was a decree, Letters Patent appeal lay against the judgment of Choudhury J.

[34] An order had been passed in that case calling on the appellant to furnish security for costs under O. 41, R. 10, Civil P. C., 1908, and as there was no compliance with that order, the Letters Patent appeal was dismissed. The question for decision was whether O. 41, R. 10 applied to Letters Patent appeals. After consideration of the relevant provisions of the Code of Civil Procedure it was held that it did. After referring to certain cases their Lordships of the Judicial Committee observed at p. 83 of 48 I. A. 76,[20] that these are cases in which the point actually decided was that the appeal expressly given by Cl. 15 of the Letters Patent is not interfered with by S. 598 of the Code of 1882, on the principle *generalia specialibus non derogant*, following 9 Cal. 482[9] in 1882 and held that there was no reason why there should be any general difference between the procedure of the High

Court in matters coming under the Letters Patent and its procedure in other matters.

[35] At page 82 their Lordships of the Judicial Committee compared S. 588 of the Code of 1882 with S. 104, Civil P. C., 1908, and observed :

"The change in the wording of S. 104 of the Act of 1908 is significant, for it runs, 'and save as otherwise expressly provided. . . . . by any law for the time being in force, from no other orders.' Section 15 of the Letters Patent is such a law, and what it expressly provides—namely, an appeal to the High Court's appellate jurisdiction from a decree of the High Court in its original ordinary jurisdiction, is thereby saved. Thus regulations duly made by orders and rules under the Code of Civil Procedure, 1908, are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent appeal."

It appears that their Lordships of the Judicial Committee considered that the term "judgment" in the Letters Patent of the High Courts means "decree" and not "order," in the strict legal sense in which those terms are understood and defined.

[36] The learned counsel for the appellants was not strictly accurate when he stated before us that there was no reference to 9 Cal. 482 [9] in the subsequent Privy Council cases. It may be noted that Sir John Edge was a member of the Board of the Judicial Committee which decided 48 I.A. 76 [20] and A. I. R. 1925 P. C. 155.[1] The judgment in the latter case was delivered by Sir John Edge. His Lordship had dealt with the case in 9 Cal. 482 [9] at great length in 11 ALL. 375 [14] and 14 ALL. 226 [15] and it cannot be assumed that it escaped his Lordship's attention when their Lordships laid down the dictum in A. I. R. 1925 P. C. 155 [1] that the term "judgment" in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense. This dictum was applied by Costello J. in 40 C. W. N. 1264.[22] In 43 C. W. N. 697 [21] at p. 725, a case not cited before us, the question for decision was whether the order of Ameer Ali J. in a proceeding relating to revocation of patent under the Indian Patents and Designs Act was a judgment. Both the Judges held that it was a judgment. Costello J. stated that it was a judgment within the definition given by Couch C. J., in 8 Beng. L. R. 433 [11] and it had also to all intents and purposes the same effect as the making of a decree and fulfilled the test laid down by their Lordships of the Judicial Committee in A.I.R. 1925 P. C. 155.[1] Costello J. expressed his agreement with the views of Sir Arthur Page in 13 Rang. 457.[23] At p. 709 his Lordship observed :

"The question whether the dicta of their Lordships of the Judicial Committee of the Privy Council which are cited by Sir Arthur Page, expressly or impliedly ought to be taken to prevail as against the definition given by Couch C. J. and other decisions of this and of the other High Courts in India has been canvassed in this Court time and time again. It is very much to be desired that this vexed question should be authoritatively determined once and for all either by a decision of the Judicial Committee of the Privy Council or by a clarifying of the Letters Patent by an appropriate amendment or else by legislation."

Panckridge J. held that the order of Ameer Ali J. was a judgment within the meaning of Cl. 15 according to the definition formulated by Couch C. J. in 8 Beng. L. R 433 [11] and that the Letters Patent appeal was competent and gave reasons why he was not prepared to accept the dictum that the term "judgment" in Cl. 15 of the Letters Patent meant a decree in a suit and was of opinion that orders which are not decrees may yet be judgments and appealable as such.

[37] Two important decisions have been made after the case in A. I. R. 1925 P. C. 155.[1] In 13 Rang. 457,[23] it was held that it was not permissible to interpret the word "judgment" in any sense other than the one stated by their Lordships in A.I.R. 1925 P.C. 155.[1] In I L.R. (1942) Lah. 491 [24] the question was whether an order of a single Judge of a High Court reversing the order of the trial Court returning the plaint for presentation to proper Court and directing it to proceed with the suit was a "judgment" within Cl. 10 of the Letters Patent and was appealable. It was held on the basis of the test laid down in 35 Mad. 1 [25] that it was a judgment and a Letters Patent appeal was competent. With reference to the decision of the Judicial Committee, it was observed that their Lordships never intended to overrule the series of cases of the Calcutta and the Madras High Courts which defined the term "judgment" and it was stated that each case must be considered on its own facts and circumstances and while the tests propounded in Madras and in the Calcutta High Courts serve as a good guide for the Labore High Court it is not necessary to hold that those tests are comprehensive and exclude other cases.

[38] We reviewed the case-law on the point in I.L.R. (1945) Nag. 286 [6] and approved of the decision in 13 Rang. 457.[23] We have given the matter our most careful consideration and we have not been persuaded to alter our view or to refer the case to a Full Bench for a reconsideration of the question. In accordance with the view which has consistently been held in this Court, the order of Hemeon J. is not a judgment and consequently no Letters Patent appeal lay against the order. The Letters Patent appeal is consequently dismissed as not competent. The appellants will pay the costs of the respondents.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 92 *[C. N. 35.]*

PADHYE J.

K. S. Mishra — *Applicant* v. *Mahadeo Dewaji and others*—*Non-applicants.*

Civil Revn. No. 152 of 1945, Decided on 27-8-1946, from order of Dist. Judge, Nagpur, D/- 26-1-1945.

Provincial Insolvency Act (1920), S. 79 — Rules under (Nag.), R. 14 — Remuneration of receiver fixed at certain percentage on realization and distribution—No realization — Receiver, if entitled to remuneration for labour and trouble — *Quantum meruit* applicability of — Appointment under S. 37 —Compensation for labour during this period—Provincial Insolvency Act, S. 37.

Where the remuneration of the receiver in insolvency under the terms of the appointment was fixed in accordance with R. 14 of the High Court Rules (Nagpur) framed under S. 79 at a certain per cent. on realization and distribution, the receiver is not entitled to any remuneration, by way of commission, if he was not able to sell any property, no matter what amount of labour and trouble he might be put to: 21 A. I. R. 1934 Bom. 158 and (1923) 1 K. B. 110, *Rel. on.* [Paras 2 and 3]

The fact that the debtors made the payments to the creditors privately is of no avail to the receiver, when the payments were in fact made after the annulment. The fact that the receiver was made an appointee under S. 37, during that period is of no consequence ; for an order under S. 37 does not continue insolvency proceedings for all purposes and the appointee under S. 37 has no longer by the mere fact of appointment, powers which a receiver has under the Act : 7 A. I. R. 1920 Mad. 219; 22 A. I. R. 1935 Cal. 168 ; 49 C. W. N. 161 and 22 A. I. R. 1935 Mad. 826 (F. B.), *Rel. on.* [Para 4]

He cannot even claim anything by way of compensation for his labour and trouble as receiver on principle of *quantum meruit*. This principle can generally be invoked only in the absence of an express contract as it is based on an implied promise to remunerate services rendered and there can, however, be no implication when parties have entered into an express agreement governing their rights and liabilities: 11 I. C. 820 (Cal.) and 17 A. I. R. 1930 All. 545, *Rel. on.* [Para 5]

But such an implied agreement can be inferred during the period of his appointment as appointee under S. 37, after the annulment, when there was no express agreement for this period. Consequently, when the appointee (original receiver) was unable to sell the property due to obstructive tactics of the debtor, the appointee is entitled to compensation for his labour on the principle of *quantum meruit* : (1831) 8 Bing. 14, *Rel. on.* [Para 6]

Cases referred :—

1. ('34) 58 Bom. 583: 21 A. I. R. 1934 Bom. 158 : 150 I. C. 871, Liladhar Chatrabhuj v. Mathuradas Gokuldas.
2. (1923) 1 K. B. 110 : 92 L. J. K. B. 233 : 128 L. T. 347 : 28 Com. Cas. 15 : 38 T. L. R. 757, Howard Houlder and Partners Ltd. v. Manx Isles Steamship Company.
3. ('20) 43 Mad. 71 : 7 A. I. R. 1920 Mad. 219 : 52 I. C. 979, Briji Kessoor Laul v. Official Assignee, Madras.
4. ('35) 58 Mad. 908 : 22 A. I. R. 1935 Mad. 826 : 158 I. C. 1060 (F. B.), Veerayya v. Srinivasa Rao.
5. ('34) 38 C. W. N. 1031 : 22 A. I. R. 1935 Cal. 168 : 61 Cal. 1005 : 154 I. C. 781, Premsukhdas Singhynia v. N. C. Bural and Pyne.
6. ('45) 49 C. W. N. 161, Basanti Cotton Mills, Ltd. v. T. S. Gladstone.
7. ('12) 16 C. W. N. 753 : 11 I. C. 820, Krishna Prosad Singha v. Purnendu Narain Singha.
8. ('30) 17 A. I. R. 1930 All. 545 : 52 All. 688 : 124 I. C. 35, Roopji & Sons v. Dyer Meaken & Co., Ltd.
9. (1831) 8 Bing. 14 : 1 L. J. (N. S.) C. P. 7, Planche v. Colburn.

S. C. Dube—for Applicant.

G. S. Padhye—for Non-applicants.

Order. — A few facts which are relevant for the decision of the question involved in this revision are as stated below. The non applicants (who shall hereinafter be called debtors) were adjudicated insolvents on 4-10-1933 on their own application dated 16-6-1932. The order of adjudication was annulled on 3-4-1935 as a result of a composition scheme sanctioned by the insolvency Court. The debtors failed to carry out the terms of the composition scheme and consequently they were re-adjudged insolvents on 26-3-1941. On 18-3-1941, Mr. K. S. Misra, Advocate (the applicant in this Court) was appointed a receiver and his remuneration was fixed at 3 per cent. on realizations and 2 per cent. on distributions. He continued as a receiver till 31-8 1944, when his tenure as a receiver ended as a result of an order of annulment passed by the insolvency Court under S. 43, Provincial Insolvency Act. As a part of the same order dated 31-8-1944, the insolvency Court again vested the insolvents' property in Mr. K. S. Misra with direction to bring it to sale with all speed. Thus the property remained vested in him as appointee of the insolvency Court from 31-8-1944 to 21-11-1944 when the insolvency Court finally gave up its control over the insolvents' property and it vested in the debtors.

[2] The only saleable property of the debtors was their share in the absolute occupancy fields. But for the interference and delaying tactics of the debtors, this property could have been brought to sale immediately and sold away in 1941. In that event the receiver would have been undoubtedly entitled to his commission on the sale proceeds and on the amount distributed amongst the creditors. In fact, however, the receiver was not able to sell the property and the position now is that in spite of his work as a receiver he is entitled to nothing by way of commission under the terms of his appointment which were fixed within the limits permitted by R. 14 of the High Court Rules framed under S. 79, Provincial Insolvency Act.

[3] I have no doubt that the receiver is not entitled to any commission under the express terms of the contract of appointment, howsoever unfortunate this may be. In 58 Bom. 583[1] their Lordships held that where parties have entered into an express agreement under which the plaintiff was entitled to get his brokerage if he brought about the transaction

on certain terms, he can be entitled to his remuneration only in case of success, no matter what amount of labour and trouble he might be put to. That was also the view expressed in (1923) 1 K. B. 110[2] and I respectfully agree with that view.

[4] The learned counsel for the applicant urged that the payments alleged to be made by the debtors privately to their creditors should be deemed to have been realized and distributed by the receiver and the receiver's commission should be calculated on that basis; he relied on 43 Mad. 71.[3] This contention has however no force in view of the fact that at the time the debtors satisfied their debts privately they were no longer insolvents, the insolvency proceedings as such having already terminated as a result of the order of annulment. It was correctly pointed out by the Full Bench of the Madras High Court in 58 Mad. 908[4] that an order under S. 37 does not continue insolvency proceedings for all purposes and the person appointed under S. 37 has no longer, by the mere fact of his appointment, powers which a receiver has under the Act. The debtors were therefore completely free to satisfy their debts privately and to save their property from being sold away for the satisfaction of those debts. I do not also agree that the private satisfaction of debts by the debtors could be regarded as a collusive or fraudulent act on their part. The two cases cited from the Calcutta Weekly Notes, *viz.*, 38 C. W. N. 1031[5] and 49 C. W. N. 161[6] as analogous cases are not of much help in the present case.

[5] The next question for consideration is whether the receiver can claim anything by way of compensation for his labour and trouble as a receiver on the principle of *quantum meruit*. This principle can generally be invoked only in the absence of an express contract as it is based on an implied promise to remunerate services rendered. There can, however, be no implication when parties have entered into an express agreement governing their rights and liabilities: *vide* 16 C. W. N. 753[7] at p. 761 and A. I. R. 1930 ALL. 545.[8]

[6] There is, however, another principle which requires consideration. As stated above, the saleable property of the insolvents consisted only of a share in the absolute occupancy fields and ordinarily that property could have been sold away by the receiver soon after his appointment. The debtors were, however, responsible for not allowing the receiver to sell the property. They started by obstructing the receiver and did not allow him to take possession of the property. They then managed to have a suit for partition filed (Civil Suit No. 26 of 1941 in the Court of Second Sub-Judge, first class, Nagpur) and to have the proceedings in the insolvency Court stayed as per stay order dated 12-2-1942. This stay order was vacated by 28-10-1942 but the debtors managed to have the proceedings in the insolvency Court stayed again by securing a stay order from the Debt Relief Court on the strength of an infructuous application which was subsequently rejected on or about 30-6-1943. The debtors thereafter applied to the insolvency Court and urged that their property should not be sold as long as a final decree for partition was not passed and it could not be passed as the parties did not pay, and I think intentionally, the requisite stamp for engrossment of the decree. The debtors also managed to hold up all proceedings by putting in a fresh application for composition which was rejected on 31-8-1943, *i.e.*, on the same day on which the adjudication order was annulled. Thus the debtors managed successfully to prevent the receiver from bringing the property to sale until the very day of annulment. The question is, whether in cases where the debtors by their acts and conduct made it impossible for the receiver to make realizations and disbursements, they can deprive him of his reasonable remuneration on the principle of *quantum meruit*. In my opinion, they cannot and I am supported in this view by the decision in (1831) 8 Bing. 14.[9] In my opinion the terms of appointment did not apply to a situation like this and therefore it cannot deprive the Court of its equitable powers to compensate the receiver for the services rendered by him. I therefore hold that the receiver can be compensated on the principle of '*quantum meruit*' for his work done during the term of receivership. It is quite plain that he can be so compensated for the services rendered by him as an appointee, *i.e.*, after 31-8-1944 as there was no fresh agreement for his remuneration for this second period.

[7] Either as a receiver or as an appointee, Mr. K. S. Misra worked from 18-3-1941 to 21-11-1944. The order sheets in the insolvency case testify to the number of hearings he attended and the work which he had to put in. The amount of Rs. 75 awarded by the insolvency Court is in my opinion very inadequate and this was also the view, I infer, of the learned District Judge from the appellate judgment. I think that proper remuneration on the principle of *quantum meruit* should be at least Rs. 150, and I order accordingly. In view of partial success, I direct the parties to bear their own costs in this revision. The revision application is thus allowed partially without costs.

R.G.D. *Application partially allowed.*

* A. I. R. (35) 1948 Nagpur 94 [C. N. 36.]

BOSE AND MANGALMURTI JJ.

Rambhau Vithalrao Dangre — Defendant 3 — Appellant v. *Nagarmal Jitmal Potdar and others, Defendants 1 and 2 and Plaintiff — Respondents.*

Letters Patent Appeal No. 11 of 1942, Decided on 19-12-1946, from judgment of Niyogi J. in S. A. No. 423 of 1938, D/- 2-2-1942.

*(a) Civil P. C. (1908), S. 47 — "Execution, discharge or satisfaction of the decree"—Private sale of mortgaged property by judgment-debtor — Subsequent auction sale in execution of mortgage decree — Question whether private sale prevails against auction sale — Position of auction-purchaser.

The question whether in any particular case a stranger auction-purchaser is to be considered the representative of the judgment-debtor or of the decree-holder depends upon the nature of the dispute involved in the inquiry. [Para 6]

The question whether a private sale of the mortgaged property effected by the judgment-debtor in favour of a third person can prevail against the subsequent sale in execution of a final mortgage decree relates to the "execution, discharge or satisfaction of the decree", and arises between the parties to the suit even when they are arrayed on the same side and the auction-purchaser is a representative both of the judgment-debtor and the decree-holder within the meaning of S. 47. The question can, therefore, be determined only by the Court executing the decree and not by a separate suit: 19 Cal. 683 (P.C.) and 7 A. I. R. 1920 Mad. 324 (F. B.), *Rel. on*; 3 A. I. R. 1916 P. C. 238 and 5 A. I. R. 1918 Mad. 127, *Ref.* [Paras 6 and 15]

Annotation:—('44-Com.) C. P. C., S. 47, N. 19.

(b) Civil P. C. (1908), O. 21, R. 2— Adjustment certified after auction sale — Effect of, on auction-purchaser's interest.

Where the adjustment is certified after the auction sale, the interest of the auction-purchaser intervenes and that interest cannot be disregarded : 18 A. I. R. 1931 P. C. 33, *Foll.* [Para 17]

Annotation:—('44-Com.) C. P. C , O. 21, R. 2, N. 2, pt. 12.

(c) Civil P. C. (1908), S. 47 — Adjustment not certified—Breach of contract represented by uncertified adjustment—Suit for damages—Suit, if barred —Civil P. C. (1908), O. 21, R. 2.

Section 47 bars a suit only in respect of questions relating to the execution, discharge or satisfaction of the decree. In respect of matters other than these an uncertified payment can be taken into consideration. Where, therefore, the judgment-debtor sells the mortgaged property to *A* in pursuance of an agreement between them and the decree-holder receives the purchase money in full satisfaction of the final decree for sale and subsequently the property is sold in execution of the decree and the sale is confirmed, *A* can bring a suit against the decree-holder and the judgment-debtor for damages sustained by him by reason of the breach of contract represented by the uncertified adjustment or for the recovery of the money paid thereunder. [Para 18]

Annotation:—('44-Com.) C. P. C., O. 21, R. 2 N 30.

(d) Letters Patent, Cl. 10 — Two second appeals before single Judge—One Letters Patent appeal — Memorandum of appeal treated as two memoranda.

Where there were two second appeals before a single Judge of the High Court and though the main judgment was delivered in one of them the Judge also delivered judgment in the other making a reference to his judgment in the former and there was only one Letters Patent appeal against the two judgments, but full court-fee had been paid on this appeal, and not only did the memorandum of appeal mention the numbers of the two second appeals but the grounds mentioned therein were also common to both :

Held, that the memorandum of appeal could be treated as two memoranda of appeals on the same paper. [Para 20]

Annotation : — ('44-Com.) C. P. C., L. P. Cl. 15 N. 18.

Cases referred:—

1. ('30) 57 Cal. 403 : 16 A. I. R. 1929 Cal. 374 : 118 I C. 857 (F.B.), Lakshmanchandra Naskar v. Ramdas Mandal.
2. ('45) I. L. R. (1945) Mad. 827 : 32 A. I. R. 1945 Mad. 161 : 219 I. C. 402 (F. B.), Abdul Subhan v. Ramanna.
3. ('20) 43 Mad. 107 : 7 A. I. R. 1920 Mad. 324 : 54 I. C. 209 (F. B.), Veyindra Muthu Pillai v. Maya Nadan.
4. ('92) 19 Cal. 683 : 19 I. A. 166 : 6 Sar. 209 (P. C.), Prosunno Kumar v. Kali Das.
5. ('17) 44 Cal. 662 : 3 A. I. R. 1916 P. C. 238 : 44 I. A. 72 : 40 I. C. 242 (P. C.), Mina Kumari Bibi v. Bijoy Singh.
6. ('18) 41 Mad. 265 : 5 A. I. R. 1918 Mad. 127 : 43 I. C. 539 (F. B.), Annamalai Chettiar v. Palamalai Pillai.
7. ('31) 27 N. L. R. 95 : 18 A. I. R. 1931 P. C. 33 : 58 I. A. 50 : 130 I. C. 686 (P. C.), Nanhelal v. Umrao Singh.

M. D. Khandekar, B. R. Mandlekar and M. R. Mandlekar — for Appellant.

S. R. Mangrulkar, M. S. Mangrulkar (for No. 1) and V. V. Kolkar (for No. 3) — for Respondents.

Judgment.—This is a Letters Patent appeal from the decision of Niyogi J.

[2] Nagarmal Potdar (respondent 1) got the house in dispute sold on 1-9-1933 by auction in execution of a final decree for sale obtained by him on a mortgage in civil suit No. 55 of 1931. It was knocked down in favour of the appellant Rambhau for a paltry sum of Rs. 120. Prior to this sale in execution, the judgment-debtor had sold the house in dispute on 26-8-1933 to one Mt. Tulsabai (who is represented in this appeal by respondent 3 Lilabai) in pursuance of an agreement between them and the decree-holder. Out of the purchase money the decree-holder Nagarmal Potdar received Rs. 1350 from Mt. Tulsabai and obtained a bond for Rs. 150 from the judgment-debtor, and he passed a receipt on 27-8-1933 in full satisfaction of his claim on the final decree, and delivered it to Mt. Tulsabai.

[3] On 2-9-1933 Ramchandra, the agent of the decree-holder, informed the Court of this full satisfaction and filed the receipt, whereupon the executing Court set aside on 30-9-1933 the sale held in execution on 1-9-1933. That order was, however, passed without notice to the auction-purchaser, whose application for permission to deposit 75 per cent. of the sale proceeds had already been rejected and who had been asked

to take back the 25 per cent. of the purchase money which he had deposited. His formal application for confirmation of sale was also rejected on 25-9-1933. He, however, appealed to the District Judge and succeeded in getting the sale confirmed. The revision filed by the judgment-debtor in this Court proved unsuccessful.

[4] Thereupon, Mt. Tulsabai filed the civil suit, out of which this appeal has arisen, for possession of the house in dispute or in the alternative for refund of the price. That suit also included a claim for possession of the site CDEF in the plaintiff's map, the possession of which had been taken by the auction-purchaser along with the house in dispute, though it was, according to the plaintiff's allegation, not included in the mortgage. The plaintiff's claim for possession, except in respect of the site CDEF, was dismissed and she was granted a decree for possession of that site as against the auction-purchaser and for Rs. 1500 as against the judgment-debtor in the mortgage suit. Not only was this decree upheld in first appeal but the first appellate Court also ordered Nagarmal to pay Rs. 1350 with interest to Tulsabai. In second appeal to this Court that decree has been set aside and the plaintiff's suit has been decreed against the auction-purchaser Rambhau, who has been ordered to deliver possession of the house in suit along with the site CDEF to Tulsabai's legal representative Mt. Lila Bai. Leave to appeal having been granted this Letters Patent appeal has been filed.

[5] As remarked by Niyogi J. in paragraph 9 of his judgment in second appeal the question for decision in this appeal is whether the private sale effected on 26-8-1933 by the judgment debtor in favour of Mt. Tulsabai can prevail against the sale in execution of the final decree held on 1-9-1933, and that would depend upon what rights Mt. Tulsabai got by the sale in her favour. That in its turn would depend upon whether the adjustment made on 27-8-1933 by payment to the decree-holder satisfied the mortgage decree and killed it. There is no doubt that the decree would have been killed by the adjustment if it had been certified before the auction sale on 1-9-1933. The question is whether it was fully satisfied and killed even though the adjustment was not certified before that sale. Taking into consideration that adjustment, Niyogi J. came to the conclusion that the decree was satisfied and the rights of the parties under the decree were extinguished.

[6] With great respect we are of the opinion that the question whether the mortgage decree was satisfied cannot be gone into in this suit filed by Tulsabai. For the determination of this question she is the representative of the judgment-debtor (Mulla's Civil Procedure Code, 11th edition, at page 186, paragraph 4) while the auction-purchaser Rambhau is the representative of the decree-holder as the auction sale under the mortgage decree passed to him the interest of the mortgagor as well as the mortgagee and as the question whether in any particular case he is to be considered the representative of the judgment-debtor or of the decree-holder depends upon the nature of the dispute involved in the inquiry (Note 19 under S. 47 of Chitaley's Civil Procedure Code, Edn. 4, at p. 500). The question undoubtedly relates to the satisfaction of the decree and so, as provided in S. 47, Civil P. C., it could be determined only by the Court executing the decree and not by a separate suit. Had it gone before the Court executing the decree, it could not have recognized the uncertified adjustment as provided in sub-rule 3 of R. (2) of Order 21, Civil P. C., and it would have said that the decree was subsisting. This discussion will be found in 57 Cal. 403[1] and I. L. R. (1945) Mad. 827.[2]

[7] Mt. Tulsabai cannot be allowed to raise the same question regarding satisfaction of the mortgage decree simply by saying that her suit is based on the sale deed dated 26-8-1933. Section 47, Civil P. C. is a bar to it. So, the case will have to be decided on the basis that there was no adjustment of the mortgage decree, and the sale effected by the judgment-debtor in favour of Mt. Tulsabai will have to be taken as subject to the mortgage decree.

[8] The question whether a stranger auction-purchaser is a representative of the decree-holder is a vexed one which, in conjunction with the cognate question whether he is even a representative of the judgment-debtor, has given rise to much controversy. Opinion regarding this is so diverse and so hopelessly irreconcilable, and the matter has been debated at length so often, that we do not feel any useful purpose will be served by reviewing the authorities afresh. They will be found collected in Mulla's Civil Procedure Code, Edn. 11, pp. 193 to 195; and a full review of them will be found in the Madras Full Bench case reported in 43 Mad. 107.[3] It is enough for us to say that we agree with the learned Madras Officiating Chief Justice. Our reasons are in the main the same as his. We will set them out in brief.

[9] In the first place, their Lordships of the Privy Council enumerate the general policy of the law and the spirit in which S. 47 should be construed in 19 Cal. 683.[4] As to the general policy, their Lordships say:

"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible."

And as to the spirit in which the section should be construed they say:

"Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244' (now S. 47)."

[10] Next it is relevant to note that it was admitted before their Lordships that it was the practice in India to join the auction-purchaser to an application in the executing Court for setting aside the sale because he was the person most interested in the result. That practice has continued, and it would now be too late to contend that he is not a proper party. If he is a proper party then he is entitled to ask the executing Court for a decision regarding his rights under the sale. That, in our judgment, imports two conclusions.

[11] In the first place, we think it imports the result that such matters relate to the 'execution, discharge or satisfaction' of the decree. Indeed, all the Courts in India are agreed that this is so when the decree-holder himself purchases. We find it impossible to see how it could be otherwise when a stranger purchases.

[12] In the second place, we are of opinion that the question must in such a case arise 'between the parties to the suit.' Both the decree-holder and the judgment debtor are, in our opinion, interested in the result of the sale whichever way the decision goes. If the sale is upheld, the decree holder obtains satisfaction of his decree in whole or in part, and the judgment-debtor loses his property. If the sale is set aside, the decree-holder fails to obtain the satisfaction which he would otherwise have got and the judgment-debtor has to face execution to that extent afresh. Even though both may agree in the matter in any particular proceeding, that is to say, both the judgment-debtor and the decree-holder agree that the sale be upheld or set aside, they cannot escape the position that the result will and does affect a question which arises between them, namely, the satisfaction, or otherwise, in part or in whole, of the decree. Therefore, in our opinion, however the question arises, and whoever raises it, it does in the result affect one way or the other the discharge or satisfaction of the decree, and in so far as it does that the question is one which arises between the parties.

[13] Next we are of opinion that the stranger purchaser is a representative of the judgment-debtor as well as of the decree-holder. Once he purchases he is entitled to get possession in the execution proceedings and need not have recourse to a separate suit. He also has other remedies to which he can resort in execution, and here S. 146 of the Code can be called in aid. That provides that when any proceedings could be taken or application made by or against any person then it can equally be made by or against any person 'claiming under him.' As the learned officiating Chief Justice points out, this is not confined to those claiming title under him but has been extended to those who claim interests of other sorts falling short of title. Thus, not only has an assignee of the decree been held to come under S. 47 but also a person attacking the decree. If a person attacking the decree, then why not one who purchases the property and thereby extinguishes the decree in whole or in part? If the purchaser is a representative of both, then every time a question is raised as between him and one or other of the parties to the decree it is necessarily a question between him as representative of one side and the other party to the decree; and this is so even when the judgment-debtor and the decree-holder combine against him. If he holds a fraction of the interests of either side it can make no difference that the one who held that fraction before the sale chooses to abandon it after the purchaser's rights have accrued.

[14] In our judgment, the language of S. 47 is wide enough to embrace both the propositions we have set out above. That being so, we are of opinion that Courts should interpret the section in its wider form even if a narrower construction is possible. We say this because of the broad rules of policy to which their Lordships of the Privy Council refer and also because it obviates anomalies. Why should a matter between the stranger purchaser and the decree-holder be said to come under S. 47 and not one between the purchaser and the judgment-debtor? Why should it be relevant to try a matter under S. 47, when the judgment-debtor raises a question and the purchaser fights by his side, but not if the same question is raised by the purchaser alone and in the same sense?

[15] Our conclusion is : (i) that questions of the kind raised here relate to 'the execution, discharge or satisfaction of the decree'; (ii) that they arise between the parties to the suit—even when they are arrayed on the same side; and (iii) that the stranger purchaser is a representative both of the judgment-debtor and the decree-holder within the meaning of S. 47.

[16] In the view that we have taken, it is not necessary for us to discuss the cases relied upon by Niyogi J., which, we may say with great respect, do not lay down the propositions mentioned by him in his judgment. For instance, 44 Cal. 662[5] does not lay down that a sale effected by the judgment-debtor after the attachment for the purpose of satisfying the decree and with the consent of the decree-holder brings about the removal of attachment, because in that case the private sale was before the

attachment in execution of the decree in which the property was subsequently sold : 41 Mad. 265[6] also does not lay down that attachment comes to an end by the satisfaction of the decree; it only mentions that O. 21, R. 55 provides that on satisfaction of the decree, whether made through the Court or certified to the Court, the attachment shall be deemed to be withdrawn.

[17] We have discussed the matter up till now on the basis that the adjustment was not certified. As a matter of fact, however, as already mentioned above, it was certified on 2-9-1933, i. e., a day after the auction sale. By this auction sale the interest of a third party, viz., Rambhau (the auction-purchaser) intervened, and as laid down by their Lordships of the Privy Council in 27 N. L. R. 95[7] at p. 100 that interest cannot be disregarded. So, so far as the auction-purchaser is concerned the case will have to be decided on the basis of the position as it stood on the day and at the time of the execution sale, i. e. on the basis that the adjustment is not certified.

[18] Section 47, Civil P. C. however, bars a suit only in respect of questions relating to the execution, discharge or satisfaction of the decree. In respect of matters other than these an uncertified payment can be taken into consideration, and so Tulsabai could bring a suit against the decree-holder and the judgment-debtor for damages sustained by her by reason of the breach of contract represented by the adjustment or for the recovery of the money paid thereunder. She had claimed that relief also in her suit, and it was granted by the trial Court against the judgment-debtor and by the Court of first appeal both against the decree-holder and against the judgment-debtor.

[19] So far as the site CDEF is concerned Niyogi J. has upheld the concurrent finding of the trial Court and the Court of first appeal that it is included neither in the mortgage deed nor in the mortgage decree. This being a finding of fact cannot be interfered with.

[20] Mr. Mangrulkar for the decree-holder Nagarmal (respondent 1) brought to our notice that before Niyogi J. there were two second appeals, Nos. 423 and 558 of 1938, and that though the main judgment was the one delivered in Second Appeal No. 423 he also delivered judgment in Second Appeal No. 558 making a reference to his judgment in Second Appeal No. 423. Mr. Mangrulkar contended that there ought to have been two Letters Patent appeals also. As admitted however by the learned counsel full court-fee has been paid on this Letters Patent appeal, and not only does the memorandum of appeal mention the numbers of the two second appeals but the grounds mentioned therein are also common to both. We are therefore prepared to treat it as two memoranda of appeal on the same paper, and there is no force in the contention.

[21] The result is that the decree passed in the second appeal is hereby set aside except so far as the site CDEF is concerned and that passed by the Court of first appeal is restored to its full extent. As the decree-holder and the judgment-debtor both are responsible for non-certification we direct that all the respondents shall pay the costs of the Letters Patent appeal and of the second appeal to the appellant and shall bear their own. Costs in the trial Court and the Court of first appeal as ordered by the latter Court.

V.R. *Appeal partly allowed.*

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* A. I. R. (35) 1948 Nagpur 97 *[C. N. 37.]*

PADHYE J.

Sakhubai w/o Bapuji — Defendant 1—Appellant 1 v. *Eknath Bellappa and another —Plaintiffs—Respondents.*

Second Appeal No. 47 of 1943, Decided on 16-10-1946, from appellate decree of Addl. Dist. Judge, Yeotmal D/- 7-10-1942.

*Civil P. C. (1908), O. 34, R. 1—Mortgage suit—Necessary parties—Person acquiring right of redemption by adverse possession during pendency of such suit—Transfer of Property Act (1882), S. 52.

If at the date of a suit for foreclosure or sale, the right of redemption is not in the mortgagor but has been already acquired, whether by transfer or by adverse possession, by a stranger who is not a party to the mortgage suit, his right of redemption is not affected by the eventual foreclosure or sale in the mortgage suit. Hence he cannot be dispossessed of the mortgaged property by the foreclosing mortgagee or the auction purchaser in execution of the mortgage decree without giving him an opportunity to redeem: 28 A. I. R. 1941 Nag. 72 ; 20 A. I. R. 1933 Mad. 583 (F. B.) and 23 A. I. R. 1936 Mad. 70, *Rel. on.* [Para 8]

But a person who has acquired a right of redemption by transfer or by adverse possession, during the pendency of the mortgage suit is not a necessary party to the suit as the right he acquired is hit by the principle of *lis pendens*. He is bound by the result of the *lis* which had already started before he acquired title by adverse possession and cannot claim a right to redeem the mortgaged property: 23 A. I. R. 1936 Mad. 70 and 28 A. I. R. 1941 Nag. 72, *Rel. on.* [Para 9]

Annotation : ('44-Com.) C. P. C., O. 34, R. 1, N. 19, ('45-Com.), T. P. Act, S. 52, N. 18.

Cases referred:—

1. ('42) I. L. R. (1942) Nag. 145 : 28 A. I. R. 1941 Nag. 72 : 193 I. C. 306, Umar Haji Karim v. Badridas Ramrai.
2. ('33) 56 Mad. 846 : 20 A. I. R. 1933 Mad. 583 : 144 I. C. 833 (F. B.), Nagendran Chettiar v. Lakshmi Ammal.
3. ('36) 59 Mad. 312 : 23 A. I. R. 1936 Mad. 70 : 170 I. C 856, Sambasiva Ayyar v. Subramania Pillai.
4. ('22) 66 I. C. 631 : 9 A. I. R. 1922 Nag. 89 (F. B.), Jageshwar v. Moti.

A. L. Halve and K. B. Tare—for Appellant.

T. P. Naik and *N. B. Chandurkar*—for Respondents 1 and 2 respectively.

Judgment.—The civil suit from which this second appeal by the defendant (hereinafter called appellant) arises was filed by the plaintiffs (hereinafter called respondents) for a declaration and if necessary, for possession of field No. 15 situate in Karanji Izara. The suit was decreed by the first Court and the appeal preferred by the defendant against that decree was dismissed by the lower appellate Court. The defendant has therefore filed this second appeal.

[2] It is common ground that the field was originally owned along with other fields in Karanji Izara by Mt. Bayanabai w/o Vyankatrao. She mortgaged her fields in the Izara village including the field No. 15 now in dispute with the plaintiffs on 16th February 1918, and 24th March 1920 and these mortgages merged in a fresh mortgage which she executed on 6-10-1922. The mortgagees enforced this mortgage in Civil Suit No. 61 of 1930 and obtained a final decree for foreclosure on 20-3-1937. They also obtained possession through Court on 28-12 1937.

[3] Waman Santoba, the husband of appellant 1 (now deceased) sued the mortgagees (respondents) for possession of field No. 15 under S. 9, Specific Relief Act, and this suit, No. 45 of 1938, was decreed in his favour. He took possession of the field No. 15 on 13-12-1938. The mortgagees-respondents had therefore to file the present suit.

[4] The appellant 1 who is the main contesting defendant urged that in Karanji Izara some fields including the field in dispute were owned by Mt. Bayanabai and some fields including No. 2 were owned by Maroti, her sister's son. It was alleged that in 1917 by virtue of an oral exchange between them, the field in dispute was exchanged by Mt. Bayanabai for field No. 2 of Maroti and thus Maroti became the owner of the field and was in possession thereof. On 28-3-1925 Maroti sold this field No. 15 to Waman by a registered sale deed for Rs. 5200/- which amount was utilized by Maroti for partial payment of the mortgage debt due to the respondents. The defendant thus pleaded a paramount title, tracing the title of Maroti to the oral exchange in 1917 i. e., prior to the date of the first mortgage In paragraph 10 of the written statement defendant No. 1 pleaded in the alternative as under:—

"Even if the oral exchange is held invalid or is not proved still the defendant submits that the defendant is a *bona fide* purchaser for value and his predecessor-in-title Maroti Baliram had been in exclusive possession of the field in suit as owner for more than 12 years prior to the suit i e. since 1917 (the year of oral exchange) or at least since January 1922 he had in any case acquired adverse title to it."

It appears from the record that Mt. Bayanabai died in 1931 during the pendency of the mortgage suit and Maroti Baliram and his son Bapurao were brought on record as her legal representatives. The mortgage decree was passed against them.

[5] Both Courts have found that the alleged exchange of the fields in 1917 is not proved and that the oral exchange in respect of the property worth more than Rs. 100/- was also invalid in law. It was further held on the strength of Ex. P. 16 that from 1918 to 1925 Bayanabai was shown as owner and Waman was shown as a tenant. Maroti's possession over field No. 15 was found to be from 1923, i.e. after the last mortgage and never before. Thus the plea of Maroti's title was negatived and Maroti could not consequently pass any title to Waman by virtue of the sale deed dated 28-3-1925. It was further held that Waman was not protected as a *bona fide* purchaser for consideration from Maroti as Waman knew that Maroti's title was defective as based on an oral exchange and in any case any reasonable enquiry on his part would have disclosed that Maroti had no title to the field. The appellate Court has fully agreed with the first Court on all these points.

[6] In this second appeal the learned counsel for the appellant attempted to attack the finding on the point of exchange, which, as is quite apparent, is a pure finding of fact. The finding is reached on evidence on record and is unassailable in second appeal. It may be noted that what is alleged in para. 10 of the written statement reproduced above does not make any legal plea. There is no plea of *bona fide* enquiry on the part of the purchaser, Waman, which is very essential before protection under S. 41, T. P. Act, can be invoked. Even apart from this, the plea has been negatived by both the Courts below and I agree with it. Thus the defence raised in the suit is completely negatived and as a result, the claim of the plaintiffs was correctly decreed.

[7] An attempt was made by the appellant in the lower appellate Court and also in this Court to travel beyond the pleadings on record and to raise new questions which are by no means pure questions of law. It was urged on the strength of S. 43, T. P. Act, that though Maroti may have no title during Mt. Bayanabai's life-time, he acquired the title to the field in dispute on her death in 1931 and this also enured to the benefit of Waman, the transferee from Maroti. It was alleged that Waman had thus acquired an interest in the equity of redemption and the mortgage decree in favour of the respondents did not extinguish Waman's right of redemption as he was not impleaded in the mortgage suit. The learned Judge of the lower appellate Court did not permit the appellant and, in my view, correctly—to raise this ground for

the first time in appeal. It is quite obvious that this is not a pure question of law and depends on several facts which are neither pleaded nor proved. If this plea was raised at proper time the respondents would have met it by challenging several facts which are pre-requisites to the success of the plea. It is not known if Maroti was really the nearest heir of Mt. Bayanabai and the mere fact that he was brought on record as legal representative is not necessarily an admission of this fact. Moreover Bayanabai died during the pendency of the mortgage suit and if Maroti acquired title during the pendency of the suit and Waman's title was thereby perfected still the decree passed against Maroti would be binding on Waman. It was further contended for the first time in second appeal that Waman was in any case in adverse possession of the field in suit since 1925 and even on that ground he was a necessary party to the mortgage suit No. 61 of 1930. It has to be noted that Waman or his heirs at no stage offered to redeem the mortgage; on the other hand, the only plea that was raised was of a paramount title originating in 1917. The defendant cannot be permitted at any stage to turn round and take up points not only not raised in the pleadings but positively inconsistent with what was pleaded. Moreover at the date of the institution of the mortgage suit, Waman had acquired no interest in the equity of redemption and he was not a necessary party to the mortgage suit. The appellant cannot, therefore, be permitted to urge points not covered by the pleadings on record.

[8] Lastly, the learned counsel for the appellant, relying on I. L. R. (1942) Nag. 145,[1] contended that though Waman may not have acquired right of redemption at the date of suit, but as he had acquired it before the present suit of the plaintiffs and even before he was originally dispossessed by the mortgagees on 28-12-1937—the mortgagees respondents are not entitled to dispossess defendant 1, the successor in interest of Waman without affording him an opportunity to redeem the interest acquired by adverse possession on payment of proportionate portion of the mortgage amount. The principle on which the reported decision rests is found at page 152 of the report:

"When there is a mortgage the original rights to the property are split up between the mortgagor and the mortgagee, some residing in one and the rest in the other. When the mortgagee eventually forecloses (or buys in a case of sale), the two rights coalesce. But if the mortgagor no longer has that portion of the rights which reside in him at the date of the mortgagee's suit it is by no means clear that the mortgagee can obtain them by foreclosing the mortgagor (or bringing the mortgaged property to sale), and omitting from the action the person in whom these rights really reside. It is immaterial for this purpose whether the stranger has acquired the mortgagor's rights by purchase or by adverse possession."

This means that if at the date of suit for foreclosure or sale, the right of redemption is not in the mortgagor but has been already acquired by a person not a party to the mortgage suit, there is no possibility of the two rights merging into a right of ownership in favour of the mortgagee or the purchaser. The right of redemption which is vested in the stranger at the date of suit is unaffected by the eventual foreclosure or a sale in a suit to which such a prior holder of equity of redemption was not a party. There is no difference in principle whether such a right was acquired by transfer or by adverse possession so long as the same was already acquired at the date of the mortgage suit. Under O. 34, R. 1 Civil P. C., all persons having an interest either in the mortgage-security or in the right of redemption are necessary parties to the mortgage suit. Where a necessary party is not impleaded in the suit either by reason of ignorance of the fact that such right exists in someone other than the mortgagor or for any other reason, his rights cannot be concluded by a decree passed in that suit: *vide* 56 Mad. 846.[2] It therefore follows that he cannot be dispossessed of the property in which he has acquired rights by the foreclosing mortgagee or by the auction-purchaser in execution of the mortgage-decree without giving him an opportunity to retain the property acquired by him on redeeming: *vide* 59 Mad. 312[3] at p. 331.

[9] The position of one who had not acquired a right of redemption at the date of the mortgage suit but who acquired it during the pendency of the suit is, however, entirely different. He is not a necessary party to the mortgage suit as the right he acquired is hit by the principle of *lis pendens*: *vide* 59 Mad. 312[3] at p. 331. Here again, there is no difference in principle between a person who acquires title pending the suit by transfer or by adverse possession. The equity of redemption would be acquired by adverse possession only on the completion of the prescriptive period of 12 years and not a day before that. Under O. 22, R. 10, Civil P. C., he could, if he chose, apply for being impleaded as a defendant but that is not obligatory. He is bound by the result of the *lis* which had already started when he had not acquired title by prescription. The right of the mortgagee to enforce against his mortgagor is not in the least affected by voluntary or involuntary transfer of interest in the mortgaged property during the pendency of the mortgage suit.

[10] In the present case the possession of Waman under the sale deed by Maroti, who had no title in himself to his vendee, started on

24-3 1925. Even the possession of Maroti is found to be from 1923. Thus in 1930 when the mortgage suit was instituted the right of redemption was vested in Mt. Bayanabai (the mortgagor) and she was alone the necessary party. It was on her death in 1931 that Maroti and his son were brought on record. Thus at the date of suit Waman was not in the position of a prior holder of equity of redemption. He, or now his widow cannot complain that he was not joined in the mortgage suit. It is not proved that the mortgagee was aware of Waman's possession and much more of his adverse possession though, in my opinion, even the knowledge by the mortgagee of mere possession not ripened into title would be immaterial. It is quite obvious that Waman had not acquired a right of redemption at the date of the mortgage suit and he cannot in law improve his position by acquisition of that right during the pendency of the suit.

[11] The decision in I. L. R. (1942) Nag. 145[1] at p. 152 follows 59 Mad. 312,[3] in which the person sued for possession, though a prior holder of equity of redemption at the date of mortgage suit, was not impleaded in that suit due to ignorance on the part of the mortgagee of that right. The position of persons acquiring the right of redemption during the pendency of the mortgage suit and who are consequently affected by the principle of *lis pendens* is however distinguished by Stone, J. (as he then was) and it is on that ground that the case in 66 I. C. 631,[4] was not followed. This is, I believe, accepted in principle in I. L. R. (1942) Nag. 145[1] at p. 152 as appears from the extract quoted above from page 152.

[12] Viewed in this light and following what is said in I. L. R. (1942) Nag. 145[1] at p. 152, I am of opinion that Waman or his widow (appellant 1) cannot, resist the plaintiffs' claim for possession or claim a right to redeem the field No. 15 by payment of proportionate share of the mortgage amount.

[13] The claim of the plaintiffs-respondents for possession of field No. 15 was thus correctly decreed. The appeal is dismissed with costs. Counsel's fee Rs. 40/-.

D.H. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 100 *[C. N. 38.]*

NIYOGI AND SEN JJ.

Mt. Kasubai w/o Bhagwan—Defendant 1 — Appellant v. *Mt. Chandrabhaga w/o Ghanshyam, plaintiff and others Defendants 2 to 7—Respondents.*

First Appeal No. 82 of 1942, Decided on 13-4-1946, from decree of First Addl. Dist. Judge, Nagpur, D/- 30-11-1942.

(a) Hindu law — Guardianship — Co-widows—Senior widow whether guardian of minor co-widow.

Under Hindu law only the father and the mother are the natural guardians of a minor child. Any other relative cannot be a natural guardian but must be one deriving his authority from the Court : 2 A. I. R. 1915 Mad. 659, *Rel. on.* [Para 8]

In the case of a minor widow, the relations of her deceased husband are entitled to the guardianship in preference to her paternal relations. But this preference does not confer the status of natural guardians on the husband's relations. The right of any such person to act as guardian depends, not on their relationship through the husband, but on his or her being appointed by the Court to act as guardian : 16 Cal. 584, *Ref.* [Para 9]

A major co-widow cannot, therefore, have any legal status as the guardian of minor co-widow simply because she happens to be major. [Para 9]

Nor can she be regarded as the *de facto* guardian of the minor co-widow when both of them are living under the protection of their mother-in-law who is managing their estate, as no one can be a *de facto* guardian unless he looks after the property of the minor as well as takes care of the person of the minor : *Case law referred.* [Para 10]

(b) Hindu law — Widow's estate—Surrender by senior widow on behalf of herself and her minor co-widow—Validity.

A surrender by a widow does not stand on the same footing as an alienation. The idea of surrender is based on the withdrawal from worldly affairs. It is a voluntary act of the widow operating her own death and an effacement which, in other circumstances, is effected by actual or civil death which opens the estate of the deceased husband to his next heirs. Surrender is an act of purely personal nature and cannot be performed by any other person than the widow herself : *Case law relied on.* [Paras 11, 12]

Assuming, therefore, that a senior widow can act as guardian for her minor co-widow, she cannot exercise that right in the matter of surrender of the widow's estate to the next reversioners. Such a surrender effected by her for herself and for the minor co-widow is void and of no effect. [Paras 11, 12]

(c) Hindu law—Alienation — Widow's estate—Gift by one co-widow—Validity.

No coparcener can dispose of his undivided interest in the coparcenary property by gift : *Case law relied on.* [Para 14]

The same principle applies a fortiori to co-widows jointly holding a widow's estate. [Para 14]

Hence although the estate of two widows who take their husband's property by inheritance is one estate and they are, in strictest sense, coparceners that would not authorise one of the co-widows any more than a father or manager of any Hindu coparcenary to make a gift of the coparcenary property unless it be of a small part of the estate for religious purposes: 11 M. I. A. 487 (P. C.), *Ref.* [Para 13]

(d) Hindu law — Partition — Partition between co-widows one of whom is minor.

Hindu widows are entitled to obtain a partition of separate portions of their properties. But there cannot be a valid agreement of partition between two co-widows one of whom is a minor: *Case law referred.* [Para 14]

(e) Limitation Act (1908), Art. 44 — "Guardian" — Senior co-widow, whether guardian of minor widow — Relinquishment of entire widow's estate by senior widow.

Where one of the co-widows executes a deed of relinquishment of the entire widow's estate, on behalf of herself and minor co-widow, a suit by the minor co-widow for a declaration that the deed was void as

against her on the ground that the senior widow had no right to relinquish, is governed by the twelve years' rule of limitation as one for ejectment of a trespasser. The senior widow being neither a *de jure* nor a *de facto* guardian of the minor co-widow, the suit does not fall under Art. 44 : *Case law referred.* [Para 14]

Annotation : ('42-Com.) Limitation Act, Art. 44, Note 2, pt. 1a.

(f) Conversion — Wrongful conversion—Refusal to produce converted property — Liability of convertor.

A person who having wrongfully converted property refuses to produce it so that its value may be known is liable for the greatest value that such an article could have : *Case law referred.* [Para 18]

(g) Hindu law—Widow—Right to maintenance and residence — Power of Court to make provision in decree for possession against her.

The matter of making some provision in the decree for the maintenance and residence of a Hindu widow, in a suit against her for possession of property in her hands, depends upon the discretion of the Court to be exercised on principles of justice and equity. [Para 19]

[In the circumstances of the case, the Court refused to exercise the discretion in favour of the widow.] [Para 19]

Cases referred :—

1. ('15) 38 Mad. 1125 : 2 A. I. R. 1915 Mad. 659 : 26 I. C. 179, Thayammal v. Kuppanna Koundan.
2. ('31) 18 A. I. R. 1931 Mad. 597 : 133 I. C. 773, Purushotama Ratho v. Brundavana Das.
3. ('89) 16 Cal. 584, Khudiram Mookerji v. Bonwari Lal.
4. ('27) 51 Bom. 1040 : 14 A. I. R. 1927 Bom. 611 : 105 I. C. 722, Harilal Ranchhod v. Gordhan Keshav.
5. ('28) 55 M. L. J. 861 : 16 A. I. R. 1929 Mad. 110 : 117 I. C. 731, Chinna Alagumperumal v. Vinayagathammal.
6. ('38) 25 A. I. R. 1938 P. C. 181 : I L R (1938) Lah. 313 : 32 S. L. R. 760 : 65 I. A. 213 : 174 I. C. 868 (P. C.), Pratap Singh v. Sant Kaur.
7. ('26) 22 N. L. R. 5 : 13 A. I. R. 1926 Nag. 81 : 92 I. C. 121 (F. B.), Kesheo Bharati v. Jagannath.
8. ('44) I. L. R. (1944) Nag. 698 : 31 A. I. R. 1944 Nag. 232 : 219 I. C. 113, Kanhaiyalal v. Harsing.
9. ('92) 19 Cal. 236 : 19 I. A. 30 : 6 Sar. 88 (P. C.), Behari Lal v. Madho Lal.
10. ('19) 42 Mad. 523 : 5 A. I. R. 1918 P. C. 196 : 46 I. A. 72 : 50 I. C. 498 (P. C.), Rangasami Gounden v. Nachiappa Gounden.
11. ('20) 47 Cal. 466 : 6 A. I. R. 1919 P. C. 75 : 46 I. A. 259 : 53 I. C. 347 (P. C.), Bhagwat Koer v. Dhanukdhari Prashad.
12. (1856) 1 Boulnois 120, Jadomoney Dabee v. Mookerjee.
13. (1856) 12 S. D. A. 595, Hafizoonnissa Begum v. Radhabinode Missur.
14. ('84) 10 Cal. 1102 (F. B.), Nobokishore Sarma v. Harinath Sarma.
15. (1866) 11 M. I. A. 487 : 2 Sar. 327 : 2 Suther 124 (P. C.), Bhugwandeen Doobey v. Myna Baee.
16. ('11) 33 All. 443 : 9 I. C. 498, Durga Dat v. Gita.
17. ('28) 15 A. I. R. 1928 P. C. 251 : 55 I. A. 399 : 111 I. C. 485 (P. C.), Gauri Nath v. Mt. Gaya Kuar.
18. ('14) 10 N. L. R. 51 : 1 A. I. R. 1914 Nag. 21 : 24 I. C. 808, Balu Bai v. Tanu Bai.
19. ('26) 13 A. I. R. 1926 Mad. 6 : 90 I. C. 881, Appalasuri v. Kannamma.
20. ('03) 30 Cal. 738 : 30 I. A. 139 : 8 Sar. 489 (P.C.), Balkishen Das v. Ram Narain Sahu.
21 & 22. ('38) I L R (1938) Nag. 1 : 23 A. I. R. 1936 Nag. 203 : 165 I. C. 480, Deorao v. Asaram.
23. ('20) 16 N. L. R. 131 : 7 A. I. R. 1920 Nag. 150 : 56 I. C. 44, Kisanlal v. Nathu.
24. ('84) 7 Mad. 357 (F. B.), Baba v. Timma.
25. ('86) 9 Mad. 273, Ponnusami v. Thatha.
26. ('88) 11 Mad. 246, Ramanna v. Venkata.
27. ('04) 27 Mad. 162, Rottala Runganatham Chetty v. Pulicat Ramasami Chetty.
28. ('95) 19 Bom. 803, Kalu v. Barsu.
29. ('06) 2 N. L. R. 52, Mukund Ram Sukal v. Ram Ratan.
30 & 31. ('35) 58 Mad. 155 : 21 A. I. R. 1934 Mad. 469 : 150 I. C. 76, Jaddu Padhi v. Chokkapa Boddu.
32. ('31) 18 A. I. R. 1931 Mad. 592 : 54 Mad. 708 : 131 I. C. 487, Adari Sanyasi v. Nookalamma.
33. (1722) 1 Strang 505, Armory v. Delamirie.
34. (1919) 1 K. B. 443: 88 L. J. K. B. 491 : 120 L. T. 412, Coldman v. Hill.
35. (1921) 2 K. B. 237 : 90 L. J. K. B. 644 : 125 L. T. 44, Smith Ltd. v. G. W. Railway Company.
36. (1932) 1932 A.C. 452, Bonco de Portugal v. Waterloo & Sons Ltd.
37. ('83) 7 Bom. 225, Jamnabai v. Rayachand Nahalchand.
38. ('23) 19 N. L. R. 69 : 10 A. I. R. 1923 Nag. 151 : 71 I. C. 566, Nana v. Jogilal.

Dr. D. W. Kathale and S. P. Kotwal— for Appellant.

M. R. Bobde and D. B. Najbile—for Respondent 1.

Judgment. — This is defendant 1's appeal from the judgment and decree of the First Additional District Judge, Nagpur, in Civil Suit No. 9-A of 1941, decided on 30-9-1942.

[2] The case in outline is as follows. One Ghanshyam died on 1-7-1935 survived by his widows by name Mt. Chandrabhaga and Mt. Laxmi, and mother Mt. Kasubai. On 26-7-1935, that is within a month of his death, Mt. Laxmi, alleged to be 20 years old, executed a deed styled as Farkatnama (a deed of relinquishment) on her own account and as guardian for Mt. Chandrabhaga who was described as a minor aged 15 years whereby she purported to relinquish the entire moveable and immovable property which devolved on her and her co-widow on the death of Ghanshyam. In the mutation proceedings initiated by Mt. Kasubai (Ghanshyam's mother) the execution of the Farakatnama was admitted by Mt. Laxmi, but contest was raised on behalf of Mt. Chandrabhaga. The proceedings ultimately terminated in an order passed by the Honourable the Financial Commissioner on 19-12-1941 whereby Mt. Chandrabhaga's name was ordered to be recorded as a proprietor of her husband's share in mouza Dadhera. Pending those proceedings Mt. Chandrabhaga on 5-9-1936 applied for permission to prosecute a suit in *forma pauperis*. That application was dismissed as it was found that she had been in posssession of ornaments of a value which would enable her to pay court-fees. Consequently, Mt. Chandrabhaga, alleging that she was born on 13-9-1921 instituted the suit out of which this appeal arises, on 13-9-1941 on payment of full court-fees for a declaration that

Farkatnama dated 26-7-1935 was void as against her on the ground that her co-widow Mt. Laxmi acting as her guardian had no right to relinquish the widow's estate, that she was neither *de jure* nor *de facto* guardian, that she, having been born on 18-12-1919, was herself a minor at the date of the Farkatnama and a victim of fraud and undue influence exercised by her mother-in-law, Mt. Kasubai, and persons interested in her. On these premises the plaintiff claimed possession of the entire property as described in Schs. A, B and C attached to the plaint or in the alternative half share thereof with mesne profits as set out in Sch. D.

[3] As Mt. Kasubai had sold on 26-5-1939 to Ramji Tukaram Kunbi two houses described in Sch. A and on 20-4 1938 to one Doma, since deceased, some *malik mokbuza* fields Nos. 41, 50 and 51 of Mouza Agra, Tahsil Katol, Ramji and Doma's legal representatives Fakirya, Vithoba, Gangaram and Pundlik were impleaded in the suit as defendants.

[4] Mt. Kasubai and her transferees contested the suit but Mt. Laxmi, who was impleaded as defendant 2, admitted the plaintiff's claim. Mt. Kasubai, in resisting the plaintiff's claim, denied that Mt. Laxmi was a minor when she executed the Farkatnama of 26-7-1935. She denied that Mt. Laxmi was born on 18-12-1919 and stated in general terms that she was born in the year 1915. She, however, conceded that a daughter named Gouri was born to Tukaram, Mt. Laxmi's father, on 18-12-1919, but averred that she died on 23-11-1920. She further denied that Mt. Chandrabhaga was born on 13-9 1921 but averred that she was born on 29-7-18. She admitted that a daughter had been born to Namdeo on 13-9-1921 and maintained that she was not Chandrabhaga but another girl by name Kawatuki. Mt. Kasubai repudiated the allegations of fraud and undue influence in regard to the execution of the Farkatnama by Mt. Laxmi.

[5] The real nature of the defence of Mt. Kasubai can better be described in the words of her own written statement filed on 13 12 1941, *viz.*

"It was therefore thought prudent that she should continue as *de facto* manager, and *de jure* character was to be conferred on her by this document to free the girl—widows of Ghanshyam from temptation not to remarry and lead an unhealthy life. The plaintiff was minor and defendant 2 would have been the natural and *de facto* guardian of the estate, being the senior widow. The "Panchas" (to use the common language) assembled on the 13th day ceremony of the death of Ghanshyam, thus considered all the pros and cons and came to the conclusion that the title to the property should rest in defendant 1, for the proper management of the estate and its preservation and the plaintiff and Mt. Laxmi should be freed to remarry. Thus the Farkatnama is a *bona fide* surrender by the two widows and being a family arrangement is binding on all. The plaintiff and Mt. Laxmi were allowed to appropriate to themselves the ornaments worth about Rs. 5000 each."

In the written statement she contended that Mt. Laxmi had the fullest advice from her relations; namely father, brother and others and that she had understood the effect of executing the Farkatnama. She also contended that the Farkatnama was valid as having been made in lieu of ornaments worth about Rs. 5000 which were given to each of the two widows. Mt Kasubai's transferees sought to support their transfers on the ground of legal necessity and benefit and also on the ground that they were *bona fide* purchasers for value.

[6] The lower Court on a careful examination of the evidence found that Mt. Laxmi had attained the age of 18 years although the exact date of her birth was obscure and that Mt. Chandrabhaga was born on 13-9-1921 as alleged by the plaintiff and not on 29-7-1918 as alleged by Mt. Kasubai. In view of the circumstances in which the Farkatnama came to be executed it held that Mt. Kasubai was not able to discharge the burden that lay on her of proving that Mt. Laxmi was acting as a free agent in executing the Farkatnama. It further held that the Farkatnama was void as against Mt. Chandrabhaga (the plaintiff) for the reason that Mt. Laxmi was incompetent to alienate her interest and consequently that she was entitled to the whole property. On the point of limitation it held that inasmuch as the document was found to be void *ab initio* the suit was governed neither by Art. 44 nor by Art. 91, Limitation Act. Mt. Kasubai was made liable to pay the value of the money-lending business comprising mortgages, bonds, promissory notes and some decrees as she was found to have recovered some of the debts and did not render account of the money-lending business as a whole.

[7] Upon this appeal, a great deal of argument has been addressed on behalf of the appellant contesting every head of the judgment But the central point in the case is a simple one, *viz*: When husband's property devolves on two widows, one of whom is a minor, whether the major widow acting as a guardian for the minor widow can make a valid surrender of whole of widow's estate in favour of the next reversioner. While considering this question as a neat point of law we assume for the sake of argument that the recitals in the Farkatnama as to the ages of the two widows, that is Laxmi as 20 and Chandrabhaga as 15, were true. The point so arising has a two-fold aspect which requires examination : (1) Was Mt. Laxmi competent to act as a guardian for Mt. Chandrabhaga? and (2) Could Mt. Laxmi in that capacity validly surrender Mt. Chandrabhaga's share on the assumption that

Chandrabhaga had a distinct and defined share which could be separately dealt with ?

[8] Guardians recognised by law are ordinarily of three kinds : natural, testamentary or those appointed by Court. Mt. Laxmi was neither a testamentary guardian nor one appointed by any Court. Can it be said that she was a natural guardian? Under the Hindu law the guardianship of the minor vests in the sovereign as *parens patriate*. This duty is no doubt delegated to the child's relations, of whom the father and next to him the mother would be the natural guardian. Any other relative cannot be a natural guardian but must be one deriving his authority from the Court : *see* S. 231 p. 299, Mayne on Hindu Law and Usage, Ed. 10. This was pointed out by Sadasiva Ayyar J. in 38 Mad 1125[1] at p. 1126. The learned Judge on the authority of the previous decided cases held that under the Hindu law nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties, and that recourse must be had to the Court (representing the rights of the King which are paramount to even the rights of the parents) where there is no natural guardian alive In that case paternal aunt was held not to be the natural guardian of a minor. The same view was taken in A. I R. 1931 Mad. 597.[2]

[9] The learned counsel for the appellant contends that the true rule of Hindu law is that the guardianship belongs as of natural right to the nearest sapinda of the minor and that in the case of a widow, the relations of her deceased husband are entitled to be the guardian in preference to her paternal relations; and he relies on 16 Cal 584.[3] That proposition is not open to any dispute as it is supported by the original text of the Shastras. It may be pointed out that in the cited case 16 Cal. 584[3] the minor's mother-in-law was approved as the legal guardian of the minor although the certificate of administration which had been granted to her was recalled on account of her advanced age which made her unfit to manage the property. On this view Mt. Kasubai would be the *de jure* guardian and not Mt. Laxmi, her co-widow. The word "guardian" as defined in the Guardians and Wards Act means a person having the care of the person of a minor or of his property, or of both his person and property. Mt. Kasubai admitted in her pleadings that she had been managing the estate since 1926 when her father-in-law died up to the time when her son attained majority and that even at the time of the Farkatnama in 1935 she was the manager *de facto*. That means that both the widowed daughters-in-law are living under her care and protection. It could not therefore be said that Mt. Chandrabhaga was under the guardianship of Mt. Laxmi only because the latter happened to be major. The preference of the relations of the husband of a minor widow over her paternal relations does not confer the status of natural guardians on the husband's relations. The right of any of such persons to act as guardian depends not on their relationship through the husband but on his or her being appointed by the Court to act as guardian. In the absence of any natural guardian no one can be recognised as a legal guardian unless he or she is appointed by a Court. Mt. Laxmi could not therefore had any legal status as the guardian of her minor co-widow.

[10] Nor was she a guardian *de facto* as admittedly the property was being managed not by her but by Mt. Kasubai. A person is a *de facto* guardian only when he is found to intermeddle with the estate of the minor for a reasonable length of time : *see* 51 Bom. 1040[4] and 55 M. L. J. 861.[5] No one is a *de facto* guardian unless he looks after the property of the minor as well as takes care of the person of the minor. It must therefore be held that Mt. Laxmi was neither *de jure* nor *de facto* guardian of Mt Chandrabhaga and any alienation, (assuming that the surrender under consideration is analogous to alienation), made by her would be void and of no effect even under the Hindu law. In A. I. R. 1938 P. C. 181[6] a compromise made by a guardian, who was neither *de jure* nor *de facto*, was set aside as void against the minor See also 22 N. L. R. 5[7] and I L. R (1944) Nag. 698.[8]

[11] Granting for the nonce that Mt. Laxmi could under the Hindu law act as a guardian for Mt. Chandrabhaga, the vital question is whether she could exercise that right in the matter of surrender of the widow's estate to the next reversioner. Surrender does not stand on the same footing as alienation. In 19 Cal. 236,[9] 42 Mad. 523[10] and 47 Cal. 466[11] their Lordships of the Privy Council have had occasions to consider the legal character of surrender by a Hindu widow in favour of the next reversioners. In 19 Cal. 236,[9] it was described as a withdrawal of the widow's life estate, in 42 Mad. 523[10] as a voluntary act of the widow operating her own death and an effacement which, in other circumstances, is effected by actual death or by civil death which opened the estate of the deceased husband to his next heirs. In 47 Cal. 466[11] the surrender was described as a complete relinquishment by the widow of all her estate.

[12] As pointed out by their Lordships of the Privy Council in 42 Mad. 523,[10] surrender is not

an alienation, but a self-effacement or civil death. To understand the significance of this, one has to go back to the original conception underlying the widow's act of surrender, as reflected in certain texts of the Smrities. But for that purpose we need not go beyond certain decisions in the early period of the development of the doctrine in the Judicial Courts : In 1 Boulnois 120,[12] [*see* the Indian Decisions (old series) 3 Supreme Court Bengal Reports] Jackson J. pointed out that on the occasion of a widow becoming Byraghi the estate at once descends to the nearest heirs living at that time, and he referred to 2 Macnaghten's Hindu Law, 131, 233 and the case 12 S. D. A. 595.[13] The same idea occurs in 10 Cal. 1102[14] at p. 1103 where Garth C. J. observed as follows :

"What is usually therefore called a 'surrender' of a Hindu widow's estate is more properly a relinquishment of it in favour of her husband's heirs. If she died a natural death, those heirs would succeed; or if she were to become a byragee, or otherwise die a civil death, the result would be the same. And as I take it to be clear that when her husband died, she might, if she had so pleased, have disclaimed her estate."

Thus the idea of surrender is based on the withdrawal from worldly affairs which brings on civil death and the self-effacement of the widow from amongst the heirs of her husband. That being the true nature of surrender, it appears to us impossible that a minor co-widow's self-effacement or civil death or voluntary relinquishment could be brought about by anyone by purporting to exercise the minor's will. That would be imposing self-effacement on the minor widow when she is incapable of exercising her own will. The surrender being an act of a purely personal nature, it is inconceivable how that act can be performed by any person other than the widow herself.

[13] It is contended on behalf of the appellant that the surrender could well be considered a joint gift on the footing that the two widows constituted a coparcenary of which Mt. Laxmi was the manager. It is true, as pointed out in 11 M. I. A. 487[15] at pp. 515, 516, that the estate of two widows, who take their husband's property by inheritance is one estate and that they are in strictest sense coparceners. But that would not authorise one of the co-widows any more than a father or manager of any Hindu coparcenary to make a gift of the coparcenary property unless it be of a small part of the estate for religious purposes. The surrender treated as a gift cannot stand for a moment for the obvious reason that Mt. Laxmi could not acting as manager or a guardian, gift away her minor co-widow's share in the property; and if the surrender by Mt. Laxmi does not bind the minor widows then the surrender must fail, as it does not comprise the whole of the widow's estate.

[14] It is contended that in so far as the co-widows had a right to partition their share, Mt. Laxmi's share at least must be deemed to have been gifted to Mt. Kasubai on the footing that there was a notional partition. Strong reliance is placed on 33 ALL. 443.[16] This case on careful examination would be found to repel the appellant's contention. In theory it would be a perfectly sound proposition to say that Hindu widows are entitled to obtain a partition of separate portions of their property. That proposition is supported by 11 M. I. A. 487,[15] A. I. R. 1928 P. C. 251,[17] 10 N. L. R. 51[18] and A. I. R. 1926 Mad. 6.[19] But there is a difficulty in the application of that principle for the obvious reason that there could not be a valid agreement for partition between the two co-widows as one of them was a minor. No doubt in 30 Cal. 738[20] at p. 752, their Lordships of the Privy Council envisaged the possibility of a valid partition during the minority of one or more of the coparceners but it appears to be impossible when the coparcenary consists of only two persons one of whom is a minor. The adult coparcener who desires partition in his own interest would be wholly incompetent to act as a guardian for the minor to promote the agreement for partition in his own interest. The decision in 33 ALL. 443,[16] was in reality based on the hypothesis of a valid partition between the two co widows. In that case both the widows, who were major, had made separate gifts : one of them of her share in the property and the other of the entire property. The donees of a half share sued for a declaration of their right and prayed for partition. That prayer was granted by the High Court subject to the condition that the partition would not affect the right of the surviving widow after the death of her co-widows. The decision proceeded on the well established principle, *see* I. L. R. (1938) Nag. 1,[21 & 22] that a transferee of an undivided share of a coparcener gets the equitable right to ask for a partition of the joint property. In the present case the major co-widows never intended to make a gift, even of her own half share, and the transaction, as already shown above, was of a nature wholly distinct from an alienation, voluntary or for consideration. Laxmi purported to surrender the whole of the widow's estate and there is no trace of any intent to make a gift of her half share in the surrender deed. Granting for the nonce that this deed is susceptible of that interpretation, how can there be a gift of an undivided interest in a coparcenary ? It may be conceded that in Bombay, Madras and the Central Provinces a coparcener may sell, mort-

gage or otherwise alienate for value (*vide* 16 N. L. R. 131[23] and cases referred to therein), but not by way of gift. According to the Mitakshara law as applied in all the Provinces, no coparcener can dispose his undivided interest in the coparcenary property by gift, *see* 7 Mad. 357,[24] 9 Mad. 273,[25] 11 Mad. 246,[26] 27 Mad. 162,[37] 19 Bom. 803[28] and 2 N. L. R. 52[29] at p. 53. The same principle must *a fortiori* apply to co-widows jointy holding widows' estate. No question of limitation with reference to Art. 44, Limitation Act, can arise in the present case as Mt. Laxmi was neither a *de jure* nor a *de facto* guardian: *see* 38 Mad. 1125,[1] 58 Mad. 155[30 & 31] and A. I. R. 1931 Mad. 592.[32] The surrender as has been shown above was void *ab initio*. The suit was governed by the 12 years' rule of limitation as one for ejectment of a trespasser.

[15] Both parties have attacked the findings of the lower Court as to the age of the two co-widows. The question of their ages becomes immaterial on the view we have taken of the nature of the transaction. We however put on the record that we accept the lower Court's findings. As we heard nothing more substantial than what had been already presented in the lower Court and considered by it, we think it unnecessary to say anything beyond expressing our agreement with the lower Court's estimate of the evidence and the course of reasoning.

[16] Nor need we go into the question of undue influence and fraud Suffice it to say that the circumstances in which the deed came to be executed by Mt. Laxmi who had just come of age, her position in relation to her mother-in-law, defendant 1, who obtained the benefit, laid a heavy onus on the plaintiff to dislodge the presumption arising against her and that she totally failed to discharge it.

[17] The point raised about omission to amend the plaint in view of the remarriage of Mt. Laxmi in 1942 automatically drops out of consideration. Now we may turn to the question as to the money-lending business the aggregate value whereof was awarded as follows:

Translation.	Value.
Mortgages	Rs. 8202-6-0
Simple money bonds	" 2328-12-9
Promissory notes	" 320-0-0
Decree in Civil Suit No. 189 of 1934	" 1078-10-6
	Rs. 11,938-7-3.

The plaintiff, in her plaint, claimed possession of valuable securities consisting of mortgage deeds, bonds, and promissory notes besides a decree. The mortgage deeds are described in Sch. A, and bonds, promissory notes and decree are set out in Sch. B, appended to the plaint.

The defendant, Mt. Kasubai, in her written statement did not dispute the existence of the various valuable securities but pleaded: "As regards secured and unsecured debts, some of them have been realised and adjusted privately. Some have been conciliated through the Conciliation Board." Beyond this bald and elusive statement she kept reticent. In the witness-box, Mt. Kasubai (1. D. W. 14) could not explain why she did not take steps to recover the secured and unsecured debts. Although she admitted that the repayments had been noted in the diaries she did not produce them as she thought it unnecessary to do so. She was particularly asked about some of the debts but she gave evasive and unsatisfactory answers. It was her duty to have filed a complete and clear statement as to the outstandings in the money-lending business and the recoveries made by her but she failed to do so. She should have in any case placed the instruments of obligation in the custody of the Court but that also she failed to do. Very early in the case, the plaintiff asked for the appointment of a receiver to take charge of the whole estate and administer it and she objected to it. The lower Court, as an alternative to the appointment of a receiver, called on her to furnish security to the extent of Rs. 10,000. By persisting in her possession of the estate, Mt. Kasubai took upon herself the entire liability to account for the recoveries made by her.

[18] It is urged on behalf of the defendant-respondent that it was the plaintiff's duty to have instituted suits to recover the debts or at any rate to have asked for the relief of rendition of accounts. The plaintiff could not possibly file suits against the debtors as she was resisted even in the mutation proceedings which terminated by the Financial Commissioner's order on 19-12-1941 and it was impossible for her to do so after the lower Court passed the order refusing to appoint a receiver on 12-3-1942. So long as the plaintiff's right itself was under litigation, she could not manifestly maintain any suit and the most reasonable and lawful course for her was to have a receiver appointed. That was all that she could do under the circumstances. It was incumbent on the defendant who was in possession of the instruments of obligation to take necessary legal steps—the more so because she successfully resisted the appointment of a receiver. It was at all events imperative on her to place all the documents in the custody of the Court. The attitude she took in the case cannot be characterised otherwise than as perverse. She handed over management of the estate to her son-in-law, Govinda. The manner in which the estate was managed can well be judged from the fact that a village share came to be sold for

non-payment of arrears of land revenue. She sold away two houses and some fields without even the semblance of any necessity. In these circumstances, it would not be wrong for the Court to make her liable up to the full face value of the debts as has been done by the Court below, on the analogy of a claim for recovery of moveable property as contemplated in O. 21, R. 10, Civil P. C. As the possession of these documents by Mt. Laxmi was wrongful and she admittedly recovered some amounts due on them, she was clearly guilty of wrongful conversion. It was her duty to prove that her act did not cause loss to the plaintiff, not the plaintiff's duty to show that it did. To such a case as this the rule, *omnia presumuntur contra spoliatarem*, must apply and it must be dealt with on the principle enunciated in (1722) 1 Strang 505.[33] *See* Smith's Leading Cases, 13 Ed. Vol. 1, p. 393 under which a person who having converted property refuses to produce it so that its exact value may be known is liable for the greatest value that such an article could have. This principle has been applied in various similar cases: see (1919) 1 K. B 443[34] at p. 458; (1921) 2 K. B. 237[35] and 1932 A. C. 452[36]

[19] Lastly there survives the point raised for the first time in appeal that in the decree some provision must be made for Mt. Kasubai's residence and maintenance. Reliance is placed on 7 Bom 225[37] and 19 N. L. R. 69[38] at p. 71. That is a matter which depends on the discretion of the Court to be exercised on principle of justice and equity. In the present case it is strenuously contended by the plaintiff that inasmuch as Mt. Kasubai appropriated the profits, concealed some property in the name of her son-in-law and abused her fiduciary position vis-a-vis her minor daughter-in law as she was, the discretionary power should not be exercised particularly because any enquiry that may be ordered by this Court may be used for hampering the execution of the decree obtained by the plaintiff. Even though all these contentions may be well-founded, they would not destroy Mt. Kasubai's right of maintenance, but it appears that in the present case the conduct of Mt. Kasubai does not justify any leniency towards her. In 7 Bom. 225,[37] there was a *bona fide* dispute between the adoptive mother and the adopted son. In 19 N. L. R 69,[38] the plaintiff, who was allowed this concession, lost his claim because he was congenitally blind. The considerations which induced the Courts in those cases are not present in this case. We, therefore, do not feel pressed in this case to accede to the appellant's belated prayer.

[20] The result is that the appeal stands dismissed with costs.

N.S.D. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 106 *[C. N 39.]*

PADHYE J.

Narendranath Biswas — Plaintiff Applicant v. *Governor-General in Council—Defendant—Non-Applicant.*

Civil Revn. No. 163 of 1946. Decided on 12-3-1947, against decree of First Civil Judge, 2nd Class, Raipur, D/- 14-12 1945.

(a) Railways Act (1890), S. 113—Ticket lost during journey—Single fare recovered from passenger on way—Purchase of ticket at starting station established—Passenger can claim refund.

A ticket issued by a Railway Administration is an evidence of the contract between the railway administration and the passenger whereunder the former undertakes to carry the latter with due care for his safety from one place to the other for which the fare is paid and accepted. The rights and the liabilities under a contract do not terminate only because the evidence or one of the items of evidence of the contract is not available. The contract can be proved even otherwise than by the production of a ticket. When a valid contract between parties is established, the rights and liabilities under the contract must be governed by the general provisions of the Contract Act except to the extent they are affected by a special statute. Under the provisions of the Contract Act, the railway administration cannot retain to itself the consideration of the contract received twice though by a special statute it may be empowered to realise it and to retain it as long as the first payment of consideration is not established. Where a passenger has lost his ticket during his travel and the administration realizes the fare on one of the midway stations, thus realizing the fare for a single journey for the second time the fare thus realised is without consideration and is, on that account, liable to be refunded. The refusal to return the fare thus realized from a *bona fide* but an unfortunate passenger is so revolting to the sense of natural justice that the administration must justify such an action on a very clear authority. It is difficult to believe that legislature intended to punish an honest passenger and to permit an unjust enrichment to the railway administration.

S. 113, or any other provision or principle of law does not entitle the railway administration to appropriate to itself what was recovered as fare on another occasion for single journey, even after having been satisfied that the passenger did pay the fare and a ticket was issued to him. The section, though included in chapter headed "Penalties and offences" is not a penal provision but is evidently enacted to avoid administrative difficulties which arise in practice with reference to persons who have no tickets with them. It is clear from S. 113, Railways Act, that what is demanded and recovered from a passenger — leaving aside the excess charge—is a single railway fare for the distance the passenger has travelled. This is not recovered as a penalty or a fine and not even as an excess charge. It is recovered as a fare because the passenger has not at the time the evidence of his having paid the fare for the journey. In fact it may be said that the statutory obligation created by S. 113 in the matter of payment of fare is temporary i.e., as long as the passenger has not satisfied the railway administration that he had paid the fare and secured a ticket. That is the plain object of S. 113 and the meaning of the language used in that section. A power given for administrative convenience cannot be turned into a source of gain: 15 A. I. R. 1928 Nag. 30 and 13 A. I. R. 1926 Bom. 266, *Rel. on.* [Paras. 10, 11, 13, 14 and 16]

(b) Railways Act (1890), S. 113 (1) and (3)— Scope — Passenger intimating loss of ticket — Amount to be realised as excess.

Where a passenger has incurred a liability for excess charge under S. 113(1), the amount which can be realised from him on this account is mentioned in sub-section (3) of that section. Where the passenger has notified to the railway servant on duty the loss of his tickets voluntarily and without being detected by the railway officer the amount which can be realised from him as excess charge is 1/6 of that payable under sub-section (1) of the Act. [Para 8]

(c) Interpretation of statutes—Intention of legislature.

It is a fundamental rule of interpretation to which all others are subordinate that a statute is to be expounded according to the intent of those who made it. This intent is to be gathered, as far as possible, from the literal meaning of the language used by the legislature and where such language is plain and unambiguous, effect must be given to it apart from the notions of justice and expediency. When once the meaning is clear it is not within the province of a Court to scan the wisdom or the policy of the legislature, for it is not the duty of the Court to make the law reasonable but to expound it as it stands according to the real sense of the words. It is, on the other hand, equally well-established that in determining either the general object of the legislature or the meaning of its language in any particular part, the meaning which appears to be most in accord with convenience, reason, justice, and legal principles should in all cases of doubtful significance be accepted. Wherever the language of a statute admits of two constructions and if the construction in one way would lead to obvious injustice, Courts naturally act upon the view that such a result could not have been intended by the legislature. [Para 15]

Cases referred:—

1. ('27) 23 N. L. R. 121 : 15 A. I. R. 1928 Nag. 30 : 106 I. C. 420, G. I. P. Ry. Co. v. Mahadeo.
2. ('86) 12 Cal. 192, Hart v. Buskin.
3. ('26) 50 Bom. 215 : 13 A. I. R 1926 Bom. 266 : 94 I. C. 742, Bhimji N. Dalal v. B. B. & C. I. Ry. Co.

H. N. Chaudhuri—for Applicant.

P. N. Rudra—for Non-Applicant.

Order.—The plaintiff has filed this civil revision against the decision of the Civil Judge, Second Class, empowered under S. 18, C. P. Courts Act, dismissing his claim for refund partly, i. e, to the extent of Rs. 21-4-0

[2] To appreciate the questions involved in this revision the following facts are necessary to be stated.

(a) Desirous of travelling from Howrah to Raipur by Bengal Nagpur Railway, now owned by the non-applicant, the applicant paid at Howrah on 30 9-1943 third class single fare and the Railway Company issued to him a ticket No. 1577. The applicant also got his luggage booked at Howrah on payment and was granted a luggage ticket No. 37416. The applicant boarded the Bombay Mail, leaving Howrah in the afternoon of the 30th September and travelled in a third class compartment which, according to him, was not lighted during night and was also over-crowded.

(b) As the train was reaching Bilaspur, an intermediate station between Howrah and Raipur, the next morning, the applicant found to his regret that his purse containing inter alia the two railway tickets was stolen. The applicant thus lost the two tickets as a result of theft in a railway carriage. At Bilaspur, the applicant reported this fact voluntarily to the railway officer on duty. The officer demanded and recovered from the applicant Rs. 27-12-0 under the following heads:

Rs. 9 12-0 for single railway fare from Howrah to Bilaspur.
Rs. 9-12-0 for excess charge.
Rs. 8- 4-0 for luggage.

Rs. 27-12-0

The applicant continued the journey by the same train to Raipur where he was made to pay Rs. 3-8-0 i. e.

Rs 1-12 0 for fare from Bilaspur to Raipur.
Rs 1-12-0 for luggage.

Rs. 3- 8-0

(c) The applicant thereafter moved the railway administration for refund of the amounts realised from him at Bilaspur and Raipur on the ground that he had already paid the fare and the charge for luggage at Howrah and that the loss of tickets was due to reasons beyond his control. The railway administration did not countenance the applicant's claim and he was obliged to file the suit from which this revision arises.

[3] It is rather surprising that the facts should have been denied on behalf of the non-applicant. The payment of fare by the plaintiff and the issue of tickets to him at Howrah on 30 9-1943 are clear from the counter-foil of the ticket issued for luggage. The facts are however held established by the lower Court and the learned counsel for the non-applicant has not disputed them in this Court.

[4] On the facts found, the learned Judge of the lower Court decreed the plaintiff-applicant's claim for refund of Rs. 10-0-0 recovered from him at Bilaspur and Raipur, for luggage. The claim for the refund of Rs. 21-12-0 i.e. 11-8-0 recovered as single railway fare from Howrah to Raipur and Rs. 9-12-0 recovered as excess charge was however dismissed. The view taken by the lower Court was that the amount was legally demanded and recovered under S. 113, Railways Act, and was therefore not refundable. The decision of the Judicial Commissioner's Court in 23 N L. R. 121,[1] was relied on.

[5] Out of Rs. 21-12-0 which were recovered from the plaintiff-applicant, Rs. 9-12-0 were realised as excess charge. This is obviously an ille-

gal recovery except to the extent of Rs. 1-10-0. Where a passenger has incurred a liability for excess charge under S. 113 (1), the amount which can be realised from him on this account is mentioned in sub-s (3) of that section. The applicant notified to the railway servant on duty the loss of his tickets voluntarily and without being detected by the railway officer and the amount which can therefore be realised from him as excess charge is Rs. 1-10 0 i.e. 1/6th of Rs. 9-12-0 otherwise payable under sub-s. (1) of the Act. The amount of Rs. 8-2-0 realised in excess from the applicant was recovered illegally and that amount is liable to be refunded. Thus the applicant's claim for Rs. 8-2-0 in addition to Rs. 10-0-0 for which a decree is passed by the lower Court must succeed.

[9] The next question, i. e., about the refund of Rs. 11-8-0 which were realised from the applicant at Bilaspur and Raipur by way of a single railway fare from Howrah to Raipur stands on a different footing. It depends on the correct appreciation of the object of S. 113, Railways Act, and on its correct interpretation.

[10] According to S. 66, Railways Act, a person desirous of travelling by a railway has to offer fare according to the copy of the list of the fares which under S. 65 a railway administration is obliged to exhibit at every station. On acceptance of the fare the railway administration supplies the person with a ticket. The ticket is an evidence of the agreement between the railway administration and the passenger whereunder the former undertakes to carry the latter with due care for his saftey from one place to the other for which the fare is paid and accepted. Under S. 67 of the Act the liability of the railway administration under the contract is subject only to the condition that there is room available in the train for which the ticket is issued. In the present case there was a contract under which for consideration received at Howrah, the railway administration undertook to carry the plaintiff from Howrah to Raipur.

[11] Under S. 69, Railways Act, the passenger is to present his ticket for examination on requisition and to surrender it at or near the end of the journey. Chap IX, Railways Act, which begins with S. 87 is headed 'Penalties and Offences'. Though S. 113 is one of the sections in that Chapter, it is clear that that section is not a penal provision and it merely deals with a situation created by an accident or a mishap where a passenger who was supplied with a ticket and was travelling lawfully has not, at a particular time, the ticket with him or was unable to present it immediately for examination or to surrender it on requisition. The section no doubt empowers the railway officer-in-charge to demand and realise from such passenger money under two distinct heads: one, the excess charge mentioned in sub-s. (3) of that section and the other the ordinary single fare for the distance the passenger has travelled. The section is evidently enacted to avoid administrative difficulties which arise in practice with reference to persons who have no tickets with them. Section 113, Railways Act, of 1890 corresponds substantially to S. 31 of the former Act 4 [IV] of 1879 which in its turn was based on English bye-laws on the subject. Section 31, as it stood, was held by the Calcutta High Court inapplicable to passengers who in fact had paid the fare and were supplied with tickets: *vide* 12 Cal. 192.[2] The difficulty of proving fraud, even where it exists, was found in practice to be insuperable. The words 'with him' were therefore introduced in the section. The railway officer had no means to ascertain the truth of the passenger's representation that he had paid the fare and obtained a ticket. It was therefore found expedient to empower the officer to demand and realise the excess charge and railway fare.

[12] The question in the case is not the legality of the demand or the recovery made by the officer in compliance with S. 113 but the right of the railway administration to appropriate or to refuse to refund the amount recovered by way of fare even after being satisfied that the passenger did pay the fare and a ticket was issued to him. In other words, the question is whether S. 113 or any other provision or principle of law entitles the railway administration to appropriate to itself what was recovered as fare on two occasions for a single journey.

[13] As already stated above, a ticket issued by a railway administration is merely an evidence of a contract and the rights and the liabilities under a contract do not terminate only because the evidence or one of the items of evidence of the contract is not available. The contract can be proved even otherwise than by the production of a ticket, and in this case it was actually proved by the evidence furnished by the counter-foil of the luggage ticket. A valid contract between parties being established the rights and liabilities under the contract must be governed by the general provisions of the Contract Act except to the extent they are affected by a special statute. Under the provisions of the Contract Act the railway administration cannot retain to itself the consideration of the contract received twice though by a special statute it may be empowered to realise it and to retain it as long as the first payment of consideration is not established.

[14] Where, as in this case, for a single journey, fare is realised twice, the fare realised on one of the two occasions is without consideration and is on that account liable to be refunded. It is immaterial for the purpose of this case which payment is without consideration i. e., the one made at Howrah or at Bilaspur and Raipur, because there was no consideration from the railway administration either for the first payment or for the second. The refusal to return the fare realized twice from a *bona fide* but an unfortunate passenger is so revolting to the sense of natural justice that the non-applicant must justify such an action on a very clear authority. It is difficult to believe that Legislature intended to punish an honest passenger and to permit an unjust enrichment to the railway administration.

[15] It is a fundamental rule of interpretation to which all others are subordinate that a statute is to be expounded according to the intent of those who made it. This intent is to be gathered, as far as possible, from the literal meaning of the language used by the legislature and where such language is plain and unambiguous, effect must be given to it apart from the notions of justice and expediency. When once the meaning is clear, it is not within the province of a Court to scan the wisdom or the policy of the legislature, for it is not the duty of the Court to make the law reasonable but to expound it as it stands according to the real sense of the words. It is, on the other hand, equally well established that in determining either the general object of the legislature or the meaning of its language in any particular part, the meaning which appears to be most in accord with convenience, reason, justice, and legal principles should in all cases of doubtful significance be accepted. Wherever the language of a statute admits of two constructions and if the construction in one way would lead to obvious injustice, Courts naturally act upon the view that such a result could not have been intended by the legislature. These are well-established principles in the matter of construction of statutes and it is in the light of these principles that one has to examine S. 113, Railways Act.

[16] It is, to my mind, clear from S. 113, Railways Act, that what is demanded and recovered from a passenger—leaving aside the excess charge—is a single railway fare for the distance the passenger has travelled. This is not recovered as a penalty or a fine and not even as an excess charge. It is recovered as a fare because the passenger has not at the time the evidence of his having paid the fare for the journey. Rather than obliging the railway administration to enquire if the passenger has committed a fraud or not, and then in the case of fraud to seek out the passenger and to recover fare from him, the legislature empowered the railway administration to recover the fare leaving it to the passenger to prove his *bona fides* and to put forward his claim for refund on that ground. Section 113, Railways Act, no doubt places the passenger under an obligation to pay the fare for the time being, but it does not take away his right to claim a refund and does not create any right in the railway administration to retain fare realised twice for a single journey. In fact, it may be said that the statutory obligation created by S. 113 in the matter of payment of fare is temporary, i. e., as long as the passenger has not satisfied the railway administration that he had paid the fare and secured a ticket. That, according to me, is the plain object of S. 113, and the meaning of the language used in that section. Moreover, that in my view is the only construction which is most in accord with the sense of convenience, justice and legal principles and should therefore be given effect to. A power given for administrative convenience cannot be turned into a source of gain.

[17] In 23 N. L. R. 121,[1] Findlay J. C. observed correctly that S. 113, Railways Act, was enacted to meet inconveniences that arise in practice and it follows that it was not meant for penalising an honest passenger who had paid his fare. These inconveniences are removed by empowering the railway officer to realise fare from the passenger, leaving it to him to seek his remedy against the railway administration. I do not agree with the learned Judicial Commissioner and I say so with great respect that a passenger, though his grievance be just, has no legal remedy but the Railway Company should allow the refund '*ex gratia*'. In 50 Bom. 215[3] the learned Judges have pointed out that the liability to pay fare second time arises out of a statutory obligation under S. 113, Railways Act. That statutory obligation is, in my opinion, discharged on the passenger's making the payment; but without affecting his right to claim a refund of that payment on proof of his having already paid the fare or, in the alternative, to claim a refund of that payment which was made at the first instance on the ground that the consideration for that payment failed.

[18] There is no authority either in S. 113 or in any other provision in the Railways Act which empowers the railway administration to retain to itself the fare realised twice for a single journey and there is no legal principle on which this can be justified. In my view, the applicant had a right, on the proved facts of this case, to a refund of Rs. 11-8-0 on the ground that the rail-

way administration realised from him Rs 23-0-0 for a single journey from Howrah to Raipur. In the result, the application is allowed except for Rs 1-10-0 which the Railway administration realised as excess charge under S. 113, Railways Act. The plaintiff's claim is, therefore, decreed for Rs. 29-10-0 with full costs in both Courts. Counsel's fees Rs. 30-0-0.

R.G.D. *Application allowed.*

A. I. R. (35) 1948 Nagpur 110 *[C. N. 40.]*

POLLOCK AND SEN JJ.

Nainsukhdas Sheonarayan — Defendant 1 —Appellant v. *Gowardhandas Bindrabandas, Plaintiff and others, Defendants 2 to 4 — Respondents.*

Second Appeal No. 353 of 1940, Decided on 5-4-1946, from appellate decree of District Judge, Hoshangabad, D/- 15-3-1940.

(a) Civil P. C. (1908), O 21, Rr. 58 and 63—Order partially releasing property—Claimant suing under R. 63 Decree-holder's right to challenge findings of executing Court.

D in execution of his decree against *A*, *B* and C attached a house as belonging to them. *E* objected on the ground that at a partition between *A*, *B* and *C* the house had been allotted to *B* and he had purchased it from *B*. It was held that the sale was valid only to the extent of *B*'s 1/3rd share which was released from attachment. There were certain findings in the order releasing the share which were against *D*: (i) that *B* sold the house to *E* for consideration, and (ii) that the transaction was genuine and not bogus. *D* did not file a suit under O. 21, R. 63 to establish his right to sell *B*'s share in the house. In the suit by *E* under O. 21, R. 63 to establish his title to the remaining 2/3rd share in the house :

Held, that the order releasing *B*'s share from attachment became conclusive and D could not sell that share but he was not precluded from challenging the findings which were the basis of the order and were against him. [Para 11]

Annotation : ('44-Com.) Civil P. C., O. 21 R. 58 N. 23; O. 21 R. 63 N. 16.

(b) Registration Act (1908), S. 26—Property both within and without British India—Partition deed as to.

Where a partition deed relating to immovable property at Harda in British India and to immovable property outside British India in Bhopal was executed and registered at Bhopal but was not registered at Harda under S. 26, it would not be effective and operative so far as the property at Harda is concerned: 7 A.I.R. 1920 Mad 763. *Rel. on.* [Para 14]

Annotation : ('45-Com.) Registration Act, S. 26 N. 2 Pt. 1.

(c) Registration Act (1908), S. 17 — Partition between Hindu coparceners—Registration, need for—Hindu law—Partition.

A partition of immovable property between Hindu coparceners may be made orally and is not required by any law to be in writing. But if there is an instrument effecting a partition of immovable property, it falls under S. 17 (1) (b) and is compulsorily registrable under that clause and if it is not registered, it does not affect immovable property comprised therein and is not admissible as evidence of any transaction affecting such property under S. 49 except for certain limited purposes stated in the proviso to that section. [Para 17]

Annotation : ('45-Com) Registration Act, S. 17 N. 81 Pts. 1, 3.

(d) Evidence Act (1872), S. 91—Partition between Hindu coparceners reduced to writing—Oral evidence—Admissibility.

Where parties to a contract agree to substitute a written instrument for an oral contract, then the ultimate contract is deemed to be contained in that instrument alone and no oral evidence of the terms can be given thereafter. Hence where an oral partition between Hindu coparceners is reduced to writing no oral evidence is admissible to prove the partition: 25 A I R 1938 Nag. 434, *Rel. on.* [Paras 19, 23]

(e) Registration Act (1908), S. 17— Partition list, —Registration.

Even if a partition deed is treated as a partition list it would still require registration, 28 A. I. R. 1941 Nag. 209, *Rel. on.* [Para 23]

Annotation : ('45-Com) Registration Act, S. 17 N. 81 pt. 13.

(f) Transfer of Property Act (1882), S. 53—Fraudulent intention—Evidence as to.

The coparceners of a joint Hindu family executed a partition deed at a time when the family was heavily indebted. No provision was made in the partition deed for payment of debts. Notwithstanding partition the parties acted as members of a joint family:

Held, that the deed was not real and was fraudulent. [Para 25]

Annotation : ('45-Com) T. P. Act S. 53 N. 6 Pts. 37, 38.

(g) Registration Act (1908), S. 58—Sale deed—Sub-Registrar's endorsement of payment of consideration in his presence is *prima facie* evidence that the amount was actually paid by the vendee. [Para 27]

Annotation : ('45-Com) Registration Act, S. 58 N. 4.

(h) Civil P. C. (1908), S. 100—Finding of fact—Genuineness of sale.

A finding that the transaction of sale was genuine and for consideration is a finding of fact and is binding in second appeal when supported by legal evidence on record and not vitiated by any error of procedure. [Para 28]

Annotation : ('44-Com) Civil P. C. S. 100 N. 28 Pt. 3, N. 52.

(i) Civil P. C. (1908), S. 100—Finding of fact—Fraudulent transfer—Finding that sale was not fraudulent and was not made to defeat or delay creditors is one of fact and binding in second appeal in absence of any vitiating circumstance—T. P. Act (1882), S. 53. [Para 30]

Annotation : ('44 Com) Civil P. C. S. 100 N. 28 Pt. 3 : ('45 Com) T. P. Act S. 53, N. 22 Pt. 1.

(j) Transfer of Property Act (1882), S. 53— Bona fides of transaction — Mode of appreciation of evidence.

The rule for the appreciation of evidence in cases in which the bona fides of a transaction is involved is that the facts should be considered in relation to each other and weighed as a whole : 6 A. I. R. 1919 P. C. 6 *Rel. on.* [Para 31]

Annotation : ('45-Com.) T. P. Act, S. 53, N. 6 pt. 9.

(k) Transfer of Property Act (1882), S. 53 — Preference of one creditor to another.

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another,

but an instrument which removes property from the creditors for the benefit of the debtor. The debtor must not retain a benefit for himself. There is nothing to prevent a debtor paying some creditors in full and leaving others unpaid although the result may be that the rest of the assets will be insufficient to provide for payment of other debts: 2 A. I. R. 1915 P. C 115; 19 A. I. R. 1932 Nag. 33; 24 A. I. R. 1937 Nag. 1 and 25 A. I. R. 1938 Oudh 44, *Rel. on.* [Para 32]

Annotation.— ('45-Com.) T. P. Act, S. 53, N. 20, pts. 3, 5, 6, 7, 9.

(l) Evidence Act (1872), S. 115 — Estoppel as to matter of law — Question as to validity of unregistered deed.

In order to operate as an estoppel, the representation must be of a fact and not on a matter of law: 3 A. I. R. 1916 Nag. 61, *Rel. on.* [Para 44]

Where on the representation by *A* that at a partition between him and *B*, a certain house was allotted to *B*, *C* purchases the house, *A* would be estopped from denying the factum of partition but would not be estopped from challenging effectiveness of the partition for want of registration as the question whether the partition was effective in the absence of registration is a question of law. [Para 44]

(m) Evidence Act (1872), S. 115 — Estoppel on whom binding—Representative—Attaching decree-holder not representative of judgment-debtor.

Where one of the judgment-debtors *A* makes certain representations acting on which a person purchases property from the other judgment-debtor *B* and the decree-holder attaches that property in execution of his decree, he claims it not under the judgment-debtors but adversely to them and he cannot be said to be a representative of either of the judgment-debtors and an estoppel which would be available against the judgment-debtors cannot operate against the decree-holder: 24 A. I R. 1937 Pat. 169 and 22 A. I. R. 1935 Oudh 257, *Expl.* [Para 45]

(n) Transfer of Property Act (1882), S. 3—Attestation of deed, if notice of contents — T. P. Act (1882), S. 41.

The attestation by a person of a document ordinarily proves no more than that the signature of an executing party had been attached to a document in the presence of a witness and it does not involve the witness in any knowledge of the contents of the deed nor does it affect him with notice of its provisions. An attestation may take place in circumstances which show that the witness did in fact know of the contents of the document but no such knowledge ought to be inferred from the mere fact of attestation: 9 A. I. R. 1922 P. C. 20, *Rel. on.* [Para 49]

Annotation. — ('45-Com.) T. P. Act, S. 3, N. 31 pts. 1, 2; S. 41, N. 13 pts. 1, 2.

(o) Transfer of Property Act (1882), S. 41 — Scope.

Section 41 is an exception to the ordinary rule that a transferor cannot convey a greater title to the transferee than he himself has and has to be construed strictly. [Para 51]

Annotation.— ('45-Com.) T. P. Act, S. 41 N. 1, pt. 7.

(p) Transfer of Property Act (1882), S. 41 — Reasonable care — Question of fact.

The question whether a person has taken reasonable care to ascertain that his transferor had power to make the transfer, so as to get the protection of S. 41, is one of fact and has to be decided with reference to the circumstances of each case: 27 A. I. R. 1940 Mad. 523, *Rel. on.* [Para 56]

Annotation.— ('45-Com.) T. P. Act. S. 41 N. 23 pt. 9.

(q) Transfer of Property Act (1882), S. 41 Proviso — Failure to see title deed.

In the absence of a finding that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer had acted in good faith S. 41 can have no application. [Para 56]

The father *A* and his sons *B* and *C* were the members of a joint Hindu family. By a partition deed which related to properties at Bhopal and a house at Harda, the house at Harda was allotted to the share of *B*. The partition deed was registered at Bhopal but not at Harda and hence was inoperative with regard to the house at Harda. On the representation by *A* that the Harda house had been allotted to the share of *B* at the partition, *D* the son of *A*'s sister purchased the same from *B*. The sale deed was executed by *B* and was attested by *A* and *C*. *D* did not care to see the partition deed which would have disclosed that it was inoperative with regard to the house for want of registration.

Held, that it could not be said that *D* after taking reasonable care that *B* had power to transfer the whole house had acted in good faith and hence was not protected under S. 41. The sale deed was valid only with regard to the 1/3rd share of *B*: 24 A. I. R. 1937 Pat. 169; 22 A. I. R. 1935 Oudh 257 and 25 A. I. R. 1938 Lab. 86, *Expl.* [Para 50]

Annotation. — ('45-Com.) T. P. Act, S. 41, N. 21 pt. 1.

(r) Evidence Act (1872), S. 115 — Representation — No estoppel unless person to whom representation is made is misled to his detriment. [Para 54]

Cases referred.—

1. ('20) 43 Mad. 288: 7 A. I. R. 1920 Mad. 763 : 59 I. C. 978, Venkatappayya v. Venkataranga Row.
2. (1869) 4 Ch. A. 741, Hicks v. Powell.
3. ('38) I. L. R. (1938) Nag. 604 . 25 A. I. R. 1938 Nag. 434 : 178 I. C 293, Narayan Sakharam v. Co-oprative Central Bank, Malkapur.
4. ('42) I. L. R. (1942) Nag. 73 : 28 A. I. R. 1941 Nag. 209 : 196 I. C. 278, Ganpat Gangaji v. Namdeo.
5. ('96) 23 Cal. 950 : 23 I. A. 92 : 7 Sar. 63 (P. C.), Ali Khan Bahadur v. Indar Parshad.
6. ('36) 11 Luck 393 : 22 A. I. R. 1935 Oudh 500 : 157 I. C. 567, Parmanand Misir v. Gur Prasad.
7. ('38) 13 Luck. 455 : 24 A. I. R. 1937 Oudh. 443 : 170 I C 523, Mt. Mangala v. Mahadeo Prasad.
8. ('19) 15 N. L. R. 68 : 6 A. I. R. 1919 P. C. 6 : 50 I. C. 264 (P. C.,) Ghansham Das v. Umapershad.
9. ('16) 43 Cal. 521 : 2 A. I. R. 1915 P. C. 115 : 43 I. A. 104 : 32 I. C. 343 (P. C.,) Musahar Sahu v. Hakim Lal.
10. ('31) 27 N. L. R. 382 : 19 A. I. R. 1932 Nag. 33 : 136 I. C. 237, Uttamrao v. Gangaram.
11. ('37) I L. R. (1937) Nag. 291 : 24 A. I. R. 1937 Nag. 1 : 167 I. C 48, Kasturchand v. Wajir Begam.
12. ('38) 13 Luck. 655 : 25 A. I. R. 1938 Oudh 44 : 171 I. C. 887, Bansidhar v. Mt. Nabab Jahan Begum.
13. ('73) I. A. Sup. Vol. 40:11 Beng. L. R. 46 : 3 Sar. 160 (P. C.) Ramcoomar v. M. C. Queen.
14. ('16) 12 N. L. R. 100 : 3 A. I. R. 1916 Nag. 61 : 34 I. C. 675, Govind v. Mt. Chandrabhaga.
15. ('22) 18 N. L. R. 1 : 9 A. I. R 1922 P. C. 20 : 49 I. A. 16 : 49 Cal. 334 : 65 I. C. 954 (P. C.), Pandurang v. Markandeya Tukaram.
16. ('36) 15 Pat. 721 : 24 A. I. R 1937 Pat. 169 : 165 I. C. 98, Jankiram Sital Ram v. Chota Nagpur Banking Association Ltd.
17. ('35) 10 Luck. 652 : 22 A. I. R. 1935 Oudh 257 : 154 I. C. 563, Chandra Nath v. Dasrath.
18. ('37) I. L. R. (1937) 18 Lah. 783 : 25 A. I. R. 1938 Lah. 86 : 175 I. C. 832, Shori Lal v. Damodar.
19. ('40) 27 A. I. R. 1940 Mad 523 : 191 I. C. 428, Gopalal Chettiar v. Arasappa Pillai.

V. V. Kelkar — for Appellant.
R. N. Padhye — for Respondent No. 1.

Judgment. — This appeal arises out of a suit under O. 21, R. 63, Civil P. C., 1908, filed by respondent 1 Goverdhandas on 2-11-1934, in the Court of the First Subordinate Judge, Second Class, Harda, for a declaration that he was the owner of the house at Harda, which had been attached by the appellant, the firm of Nainsukhdas Sheonarayan of Bombay, in execution of a decree dated 25-7-1932 in Civil Suit No. 1033 of 1930 of the Bombay High Court, and that a 2/3rd share of the house was not liable to attachment and sale in execution of that decree.

[2] In order to understand the points involved in this appeal it is necessary to set out briefly a few relevant facts. The respondents are related. Respondent 2 Ballabhdas is the father of respondents 3 and 4, Vithaldas and Bindrabandas. Respondent 1 Goverdhandas is the son of Ballabhdas's sister and the first cousin of Vithaldas and Bindrabandas.

[3] Ballabhdas and his sons carried on business in the name of the firm of Ramchandra Ballabhdas at Harda and at Bhopal. They were indebted to a number of persons among whom was the Imperial Bank of India, Bhopal Branch. The bank filed a suit on 20-11-1929 in the High Court at Bhopal against the firm of Ramchandra Ballabhdas for Rs. 30,430-15-0 and obtained a decree on 7-5-1930 for that sum with interest at bank rate from 22-10-1929 till realisation; the decretal amount was payable in two instalments, the first instalment of Rs. 15,200 on 15-11-1930, and the balance together with costs on 15-5-1931. In the copy of the decree (Ex. D-2) and the order-sheet (Ex. P.-19) the suit is described as filed against Mr. Ramchand Ballabhdas, but it appears from the pleading in the present case that the suit was against the firm of Ramchandra Ballabhdas and that the respondents Ballabhdas and his sons were liable for the decretal amount: *vide* para. 6 (a) of the written statement of defendant 1, dated 12-7-1935 and of the plaintiff's written rejoinder dated 16-7-1936. Ballabhdas (P. W. 14) in his evidence stated that his sons were sureties for the debts due to the Imperial Bank and that their property was also sold for the satisfaction of the decree of the Imperial Bank. Bindrabandas (P. W. 13) stated that he paid money to the Imperial Bank in execution because he was a surety for his father.

[4] The appellant, the firm of Nainsukhdas Sheo Narayan of Bombay, filed Civil Suit No. 1033/1930 in the High Court at Bombay on 15-5-1930 against Ballabhdas and his two sons and obtained a decree on 25-7-1932 for Rs. 11,288-15-0 with interest at 6 p. c. p. a. from the date of the decree till realisation (Ex. D-3).

[5] One Gopaldas filed a suit in the Bhopal High Court on 16-11-1931 against Ballabhdas and his sons for dissolution of partnership, for rendition of accounts and for a decree for what might be found due on such account. A preliminary decree was passed on 18-3-1933. A copy of the judgment is Ex. D-1. A final decree (Ex. D-4) was passed against the defendant on 29-7-1935 for one lac of rupees and a charge was created on the joint family property which was in the possession of Ballabhdas as manager of the joint Hindu family before an alleged partition on 19-10-1929 which was declared null and void as against the plaintiff. Vithaldas and Bindrabandas were however not made personally liable for the decretal amount. Ballabhdas and his sons were also indebted to one Kesrimal to the extent of Rs. 4000. This was admitted by Vithaldas (P. W. 11) in his evidence.

[6] In execution of the decree of the Imperial Bank for the first instalment of Rs. 16,233-7-6 a house at Bhopal was sold, but the sale was set aside as Ballabhdas deposited Rs. 500 on 13-3-1931, and Rs. 4500 on 16-3-1931 and Bindrabandas deposited Rs. 11,233-7-6 on 6-7-1931. Bindrabandas had objected to the sale on the ground that the house belonged to him and that it was not liable to be sold in execution of the decree. The house was however eventually sold in execution of the decree for the second instalment which had fallen due on 15-5-1931 and it passed out of the family.

[7] The decree which the appellant had obtained in Civil Suit No. 1033 of 1930 in the Bombay High Court on 25-7-1932 was transmitted on 23-9-1932 to the District Court, Hoshangabad, for execution at Harda. In execution of that decree a house at Harda was attached as belonging to Ballabhdas and his sons.

[8] Goverdhandas, respondent 1, objected to the attachment on the ground that he was the owner of the house which had fallen to the share of Vithaldas at a partition between him and his father Ballabhdas and brother Bindrabandas and which Vithaldas had sold to him (Goverdhandas) under a sale deed dated 30-5-1931 (Ex. P-22) for Rs. 7000. The objection was partly allowed by an order dated 24-2-1934 (Ex/P-1) passed by the Court of the Subordinate Judge, First Class, Hoshangabad, in Miscellaneous Judicial Case No. 9 of 1933 in which it was held that Goverdhandas had acquired merely the 1/3rd share of Vithaldas in the house and that the said share was not liable to attachment and sale. Thereupon Goverdhandas filed a suit in the Court of the First Subordinate Judge, Second Class, Harda, on 2-11-1934, under O. 21, R. 63, Civil P. C., for a declaration that he was the owner of the entire house and that the 2/3rd share

was not liable to attachment and sale in execution of the decree which the appellant had obtained against respondents 2 to 4.

[9] A revision application was filed by Goverdhandas against the order dated 24-2-1934 and one of us (Pollock, J.) refused to interfere in revision with that order in Civil Revision No. 298 of 1934 on 4-12-1936 (Ex P-13), on the ground that the applicant had another remedy of a suit under O. 21, R. 63, Civil P. C.

[10] The Court of the Subordinate Judge, Second Class, Harda, by the decree dated 6-9-1938, dismissed the suit. This decree was set aside in Civil Appeal No. 11-A of 1938 on 15-3-1940 by the District Court, Hoshangabad, and the claim of the plaintiff was decreed. It is against this appellate decree that the present appeal has been filed by defendant 1. The appellant firm was originally represented in the lower Court by Jainarayan. On his death on 17-5-1939 his sons were substituted in the District Court in his place as proprietors of the firm and they represent the firm in this appeal.

[11] The order dated 24-2-1934 in Miscellaneous Judicial Case No. 9 of 1933 was also partly against the appellant inasmuch as the 1/3rd share of Vithaldas in the house attached was released from attachment on the ground that it had been purchased by the respondent Goverdhandas. There are certain findings in that order which are against the appellant. These findings are (i) that Vithaldas sold the house to Goverdhandas for consideration and (ii) that the transaction was genuine and not fraudulent or bogus. As the appellant did not file a suit under O. 21, R. 63, Civil P. C., to establish the right of the firm to sell the 1/3rd share of Vithaldas in the house in execution of the decree, the order releasing the share of Vithaldas from attachment has become conclusive and it is not open to the appellant to sell that share in execution. The appellants, however, are not precluded from challenging the findings which were the basis of the order but are bound to displace those findings which were against the firm.

[12] The first question for decision in this appeal is whether the house in suit was allotted to the share of Vithaldas at a partition between him and his father Ballabhdas and brother Bindrabandas. A partition deed (Ex. P-29) was executed by Ballabhdas and his sons at Bhopal on 19-10-1929 and it was registered there on 21-10-1929. Under the deed the family estate was divided into three shares : Ballabhdas was given property valued at Rs. 45,170, Vithaldas and Bindrabandas were each given property valued at Rs. 1,11,178.

[13] The family also carried on business at Harda and the stock-in-trade of the shop there was valued at Rs. 1,18,606 and was divided half and half between Vithaldas and Bindrabandas each getting property valued at Rs. 59,303. A house at Harda was valued at Rs. 13,000 and was allotted to the share of Vithaldas. No mention was made of the debts payable by the family to others nor was any provision made in the deed for their payment.

[14] The partition deed dated 19-10-1929 was registered at Bhopal on 21-10 1929 but was not registered at Harda where it could have been registered under S. 26, Registration Act, 1908. As the house in dispute was situate at Harda, it was necessary that the partition deed should have been registered there, and as it was not done, the partition deed was not effective and operative so far as the allotment of the house to Vithaldas at the partition was concerned.

[15] The law has been summarised thus in paragraph 278, p. 228 of Halsbury's Laws of England, vol. 6 (Hailsham Edition) :

'Capacity to assign or acquire an immovable is governed entirely by the *lex loci rei sitae*.

An immovable can only be assigned in the form required by the *lex loci rei sitae*, and the Court will recognise as valid in point of form every assignment which is so valid by that law, although equities may in certain cases prevent the assignee from getting a good title. Thus, every assignment of land in England must be in the form required by English law.'

[16] In 43 Mad. 288[1] at p. 302, Wallis C. J. laid down the *dictum* in these terms :

'The instruments of which registration is compulsory under the Act are enumerated in S. 17, and the effects of failure to register are to be found in S. 49. The documents which were required to be registered by the earliest Registration Acts all related to immovable property meaning of course immovable property situated in British India; and it may be taken that the legislature has sufficiently manifested its intention that none of the enumerated documents affecting immovable property situated in British India should be valid unless so registered, even if executed outside British India, as held in (1869) 4 Ch. A. 741,[2] more especially as S. 26 provides for the registration of such documents at any time within four months after their first arrival in British India.'

[17] A partition of immovable property between co-parceners may be made orally and is not required by any law to be in writing. But if there is an instrument effecting a partition of immovable property, it falls under S. 17 (1) (b), Registration Act and is compulsorily registrable under that clause and if it is not registered, it does not affect any immovable property comprised therein and is not admissible as evidence of any transaction affecting such property under S. 49, Registration Act except for certain limited purposes stated in the proviso to the section which need not be set out as they are not material for the case.

[18] We hold that the deed of partition dated 19-10-1929 did not affect the house at Harda and

was not admissible in evidence to prove that the house was allotted to the share of Vithaldas at a partition between him and his father, Ballabhdas and brother Bindrabandas.

[19] As the partition between Ballabhdas and his sons was reduced to writing, no oral evidence was admissible to prove the partition. Goverdhandas in his plaint stated that there was a partition prior to the execution of the partition deed on 19-10-1929 (Ex. P-29) but did not state the date when it was made, and it does not appear that he relied on any oral partition. Defendant 1, the firm of Nainsukhdas Sheonarayan, denied the partition and pleaded in the alternative that it was fraudulent as it was made to defeat or delay the creditors of defendants 2 to 4. The plaintiff did not state even in his rejoinder the date of the partition previous to 19-10-1929.

[20] Issues 2 and 3 (a) and (b) relate to the partition deed, dated 19-10-1929. The plaintiff did not object in the lower Court to the frame of the issues and did not contend that an issue should have been framed regarding an oral partition prior to 19-10-1929.

[21] Defendants 2 to 4 in their evidence stated that there was an oral partition between them a month previous to 19-10-1929 and lists were drawn up thus showing the allotment of property to the share of each of them. To the same effect is the evidence of Goverdhandas, (P. W. 15), an attesting witness to the partition deed dated 19-10-1929, who was then working as a cashier under Ballabhdas (defendant 2) in the firm of Ramkrishna Hemraj at Bhopal. Munshi Raghbar (P. W. 12), a pleader, was also an attesting witness and stated that he drafted the partition deed on the basis of the lists but he did not remember the date of the lists. He does not state that an oral partition between defendants 2 to 4 was made in his presence a month previous to the execution of the partition deed on 19-10-1929.

[22] There was no pleading in the suit or in the objection case to the effect that there was an oral partition a month before the execution of the partition deed on 19-10-1929. The lists which were alleged to have been drawn up at the time of the oral partition have not been filed in the case and they were not mentioned in the deed of partition dated 19-10-1929 (Ex. P-29) or in the pleadings of the plaintiff. If there had been an oral partition as stated by the witness, there would have been a recital to that effect in the partition deed. There is no such mention of a prior oral partition in the partition deed.

[23] No reason has been assigned why a partition deed was executed on 19-10-1929 if an oral partition had taken place a month before. In I. L. R. (1938) Nag. 604,[3] it was held that where parties to a contract agree to substitute a written instrument for an oral contract, then the ultimate contract is deemed to be contained in that instrument alone and no oral evidence of its terms can be given thereafter. The plaintiff in his replication suggested that the partition deed might be treated as a partition list, but even if it is so treated it would still require registration: *vide* I. L. R. (1942) Nag. 73[4].

[24] The lower appellate Court was not impressed with the oral evidence adduced by the plaintiff and found that even if oral evidence were admissible, it was insufficient to prove that the house in suit fell to the share of Vithaldas at a partition between him and his father Ballabhdas and brother Bindrabandas. No error or defect in procedure had been pointed out which might possibly have produced error or defect in the decision. In the absence of any vitiating circumstance the finding of fact arrived at by the lower appellate Court is binding in second appeal.

[25] The lower appellate Court did not give any finding whether the partition made on 19-10-1929 was fraudulent. The trial Court found that the partition was not real and was a device to embarrass the creditors of Ballabhdas and his sons. In our opinion, the finding is correct. The partition deed was executed on 19-10-1929, at a time when Ballabhdas and his sons were heavily indebted. The details of their indebtedness have already been stated in paras. 3 to 5 of our judgment and need not be restated. No provision was made in the partition deed for the payment of debts. Ballabhdas and his sons stated in their evidence that there was a private understanding at the time of partition that the two brothers were to pay the debt due by their Harda shop to defendant 1 and that their father was to pay the debt due by their Bhopal shop to the Imperial Bank, Bhopal. Ballabhdas did not pay the debt due to the Imperial Bank, as he was bound to do in accordance with the private understanding and the property at Bhopal allotted to the share of Bindrabandas was sold in execution of the decree of the Bank. In order to save the property of Bindrabandas, Vithaldas sold his house at Harda to Goverdhandas and the negotiation for the sale of the house was conducted by their father with Goverdhandas at Hyderabad. Ballabhdas also raised money on pledge of the ornaments of Bindrabandas. Notwithstanding the alleged partition, Ballabhdas and his sons acted as members of a joint family. In the suit which Gopaldas had filed against defendants 2 to 4 the partition was declared null and void as against the plaintiff: *vide* Ex. D-1, judgment, dated 18-3-1933: Our conclusions regarding partition may be thus summarised: (1) The partition

made on 19-10-1929 was not real and was fraudulent. (2) The partition deed dated 19-10-1929 was inadmissible in evidence to prove that the house at Harda fell to the share of Vithaldas at a partition between him and his father Ballabhdas and brother Bindrabandas. (3) No oral evidence was admissible to prove that the house at Harda was allotted to the share of Vithaldas at a partition. (4) The evidence adduced in the case does not prove that the house was allotted to the share of Vithaldas. (5) The house in suit remained joint property of Ballabhdas and his sons.

[26] The second question for decision is whether the transaction embodied in the sale-deed dated 30-5-1931 (Ex. P-22) was genuine and for consideration. (Their Lordships considered the evidence on this point and in the course of their judgment observed as follows) :

[27] The Sub-Registrar, Harda, made an endorsement on the sale-deed that Rs. 7000 the consideration of the sale-deed, was paid in his presence by Jasraj, the agent of the plaintiff, to Vithaldas. Under S. 58 (c), Registration Act, 1908, a Sub-Registrar has to endorse on every document presented for registration the payment of money made in his presence in reference to the execution of the document. Under S. 60 (2) of the Act, there is a presumption that the facts mentioned in the endorsements referred to in S. 59 have occurred as therein mentioned. The endorsement by the Sub-Registrar of the payment of consideration of the sale-deed in his presence is prima facie evidence that the amount was actually paid by the agent of the plaintiff to Vithaldas : *vide* 23 Cal. 950[5] at p. 954, 11 Luck. 393[6] and 13 Luck 455[7]. (After further considering the evidence their Lordships proceeded:)

[28] The finding of the appellate Court that the transaction of sale was genuine and for consideration is a finding of fact which is supported by legal evidence on record, is not vitiated by any error of procedure and is binding on us in second appeal. Accordingly it must be accepted in second appeal that the transaction embodied in the sale deed dated 30-5-1931 (Ex. P-22) was genuine and for consideration.

[29] The third question is whether the sale deed was executed in order to defraud the creditors of defendants 2 to 4. The Court of the Subordinate Judge, 1st Class, Hoshangabad, in the objection case held that the sale was not fraudulent but that the sale of the house was effected in order to raise funds for setting aside the sale of the ancestral residential house of defendants 2 to 4 at Bhopal.

[30] The trial Court held that the sale was effected in order to defraud the creditors of defendants 2 to 4. The lower appellate Court held that the sale was not fraudulent and was not made for defeating or delaying the creditors of defendants 2 to 4. This is a finding of fact and would be binding in second appeal in the absence of any vitiating circumstance.

[31] The learned counsel for the appellant challenged the finding on the ground that it had been arrived at by ignoring the rule stated by their Lordships of the Judicial Committee in 15 N. L. R. 68[8] for the appreciation of evidence in a case where the bona fides of a transaction is involved. The rule stated by their Lordships was that it is essentially necessary that the facts should be considered in relation to each other and weighed as a whole. (Their Lordships considered the facts and evidence and in the course of the discussion observed as follows :

[32] In 43 Cal. 521[9] it was held by their Lordships of the Judicial Committee :

> "The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors for the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor, and leave another unpaid."

This decision was followed and applied in a series of cases some of which may be mentioned here. In cases in which no consideration of the law of Bankruptcy applies there is nothing to prevent a debtor paying some creditors in full and leaving others unpaid although the result may be that the rest of the assets will be insufficient to provide for payment of other debts : 27 N. L. R. 382,[10]. I. L. R. 1937 Nag. 291[11] and 13 Luck. 655.[12] (Their Lordships continued the discussion on facts and proceeded).

[33] The lower appellate Court has considered the facts in relation to each other and weighed them as a whole and there has been no breach of the rule stated in the Privy Council case. There has been no error of procedure to vitiate the finding of the lower appellate Court. It must accordingly be accepted in second appeal that the sale was not executed by Vithaldas to defraud his creditors but that it was executed to raise funds to save the ancestral residential house of defendants 2 to 4 at Bhopal which had been sold in execution of the Imperial Bank, Bhopal.

[34] The last question for decision is what interest did Goverdhandas acquire under the sale deed dated 30-5-1931 (Ex. P-22). Did he acquire merely the 1/3rd share of Vithaldas or did he acquire the entire house inclusive of the interest of Ballabhdas and Bindrabandas?

[35] The sale deed was executed in favour of the plaintiff by Vithaldas and it was attested by his father Ballabhdas and brother Bindrabandas. The solution of the question turns on the effect of attestation on the rights of the parties.

[36] The Court of the Subordinate Judge, 1st Class, Hoshangabad, in the objection case held that Goverdhandas acquired the 1/3rd interest of Vithaldas in the house and released that share as not liable to attachment and sale in execution of the decree of defendant 1 against defendants 2 to 4. Goverdhandas thereupon filed a suit under O. 21, R. 63, Civil P. C. for a declaration that he was the owner of the house and that the 2/3rd share also was not liable to attachment and sale in execution of the decree.

[37] The Court of the Subordinate Judge, 2nd Class, Harda, in the title suit held that the plea of estoppel which the plaintiff might have against defendants 2 and 4 was not available against defendant 1, that S. 41, T. P. Act had no application, and that the plaintiff acquired merely the 1/3rd share of Vithaldas in the house and not the entire house and was consequently not entitled to the declaration claimed.

[38] On appeal the Court of the District Judge, Hoshangabad, held that the plea of estoppel which was available to the plaintiff against defendants 2 and 4 was also available against defendant 1, that the purchase of the plaintiff was protected under S. 41, T. P. Act, that the plaintiff was the full owner of the house, and that the 2/3rd share of Ballabhdas and Bindrabandas was also not liable to attachment and sale in execution of the decree of defendant 1 against defendants 2 to 4.

[39] The lower Courts reached opposite conclusions on estoppel and on the applicability of S. 41, T. P. Act to the case. The question in second appeal is which view is correct. In I. A. Sup. Vol. 40[13] at p. 43, their Lordships of the Judicial Committee observed :

'It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it.'

[40] The above rule is now embodied in S. 41, T. P. Act which is in these terms :

'Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it :

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.'

[41] The lower appellate Court in reaching the conclusion that S. 41 of the Act was applicable overlooked the proviso in that section. There is no reference to the proviso in the judgment of the lower appellate Court and there is no discussion of the question whether Goverdhandas, after taking reasonable care to ascertain that Vithaldas had power to make the transfer, had acted in good faith.

[42] There were two stages in the case which led to the execution of the sale-deed, firstly there was a negotiation for sale of the house by Ballabhdas with Goverdhandas at Hyderabad, and secondly there was the execution of the sale-deed at Harda. At the time of the negotiation for sale of the house, Goverdhandas was informed by Ballabhdas that the house at Harda had been allotted to the share of Vithaldas in a partition in 1929. Goverdhandas admits that he had not seen the deed of partition dated 19-10-1929 (Exhibit P-29) and did not ask Ballabhdas to show him the deed showing the allotment of the house to the share of Vithaldas. If he had seen the partition deed, he would have found that it was not registered at Harda and it was inoperative to affect immovable property situate there, or to prove that the house at Harda was allotted to the share of Vithaldas. The fact that Ballabhdas was negotiating for the sale of the house which had fallen to the share of Vithaldas was a circumstance which should have led Goverdhandas to inquire why Ballabhdas was negotiating on behalf of Vithaldas.

[43] Ballabhdas also tried to raise money from Goverdhandas on pledge of ornaments belonging to Bindrabandas. This was another additional circumstance which should have led Goverdhandas to be more circumspect in the matter. Nothing was settled at the time of the negotiation as regards the persons who were to execute the sale-deed. Goverdhandas stated in his evidence :

"I sent my munim Jasraj to Harda with Ballabhdas with instructions that he should make enquiries about the Harda house and purchase the same for the price not exceeding Rs. 7,000 and purchase the same if he was satisfied . . . . . I gave further instructions to make proper enquiries and have the document duly executed according to the law of the place and pay the amount. I further instructed him to get the document executed in the presence of defendants 2 to 4 so that there should be no trouble in the future from defendants 2 to 4."

The only representation that was made by Ballabhdas was that the house at Harda had fallen to the share of Vithaldas at a partition. That is a fact as it was so recorded in the deed of partition.

[44] The question whether the partition was effective in the absence of registration at Harda was a question of law. In order to operate as an estoppel the representation must be of a fact and not on a matter of law : 12 N. L. R. 100.[14] Ballabhdas was estopped from denying the

factum of partition but was not estopped from challenging the effectiveness of the partition for want of registration. Bindrabandas was not present at Secunderabad at the time of the negotiation and no estoppel could arise as against him for any representation that Ballabhdas might have made.

[45] Estoppels under S. 115, Evidence Act, are by the very terms of the section not confined to the parties but extend to their representatives. The appellant firm had a decree against defendants 2 to 4 and was executing it against them. It was not claiming under them but was claiming adversely to them and cannot be said to be a representative of either of the judgment-debtors and an estoppel which might be available against Ballabhdas would not operate as against the appellant firm.

[46] The sale-deed was executed at Harda. Goverdhandas was not present at the time of the execution of the sale-deed but was represented by his munim Jasraj who arranged for the execution of the sale deed. Jasraj is dead and he has not been examined as a witness. There is no evidence to prove whether he made any enquiry and why he had the sale deed executed by Ballabhdas (Vithaldas?) alone.

[47] As already found in a previous paragraph, the house at Harda remained the joint property of the defendants notwithstanding the deed of partition dated 19-10-1929 because it was not registered at Harda. Ballabhdas (Vithaldas?) had thus a 1/3rd share of the house and was entitled to sell that share.

[48] In the sale deed dated 30-5-1931 (Ex. P-22) there is a recital that the house at Harda had fallen to the share of Vithaldas under the partition deed dated 19-10-1929 between defendants 2 to 4. A perusal of the partition deed would have disclosed to Jasraj that it was registered at Bhopal and was not registered at Harda. If Jasraj had made enquiries he would have found that the deed had not been registered at Harda and that for want of registration at Harda the deed was inoperative and Vithaldas was not entitled to transfer the entire house to Goverdhandas. In his evidence Goverdhandas had not stated what enquiry Jasraj had made in order to find out whether Vithaldas had power to make the transfer.

[49] The attestation by a person of a document ordinarily proves no more than that the signature of an executing party had been attached to a document in the presence of a witness and it does not involve the witness in any knowledge of the contents of the deed nor a affect him with notice of its provisions. An attestation may take place in circumstances which show that the witness did in fact know of the contents of the document but no such knowledge ought to be inferred from the mere fact of attestation: *vide* 18 N. L. R. 1.[15]

[50] The evidence of defendants 2 to 4 shows that the attestation by Ballabhdas and Bindrabandas was with full knowledge of the contents of the sale deed dated 30-5-1931. The circumstances in the case also indicate that the attestation by Ballabhdas or Bindrabandas must have been with knowledge of the contents of the sale deed and that it was made in order to assure Jasraj that they had no objection to the execution of the sale deed by Vithaldas. That however would not clothe Vithaldas with power to transfer the entire house to Goverdhandas. It cannot be said in this case that Goverdhandas or his agent Jasraj, after taking reasonable care to ascertain that Vithaldas had power to make the transfer had acted in good faith, and therefore the condition in the proviso to S. 41, T. P. Act, was not fulfilled. The transfer was thus operative only to the extent of the 1/3rd share which Vithaldas had, notwithstanding that he purported to transfer the entire house to Goverdhandas.

[51] Section 41, T. P. Act, is an exception to the ordinary rule that a transferor cannot convey a greater title to the transferee than he himself has and has to be construed strictly. The lower appellate Court relied on 15 Pat. 721[16] and 10 Luck. 652[17] for the conclusion it reached. In neither of these cases was the question of the applicability of S. 41, T. P. Act, involved. The cases cannot also be quoted as authorities for the proposition that an estoppel which might be available to a transferee as against the transferor is also available against the attaching creditors of the transferor. In the Patna case[16] the decision was based on estoppel under S. 115, Evidence Act. There a co-sharer mortgaged certain house alleging it to be his self-acquisition and the other co-sharers stood by and, being aware of the contents, attested the document, and the mortgagee on this representation advanced the lone and in execution of a decree on the basis of the mortgages purchased the mortgaged property. He was resisted at the time of delivery of possession by persons who claimed to have purchased in execution of a money decree against the co-sharers of the mortgagor and under a sale deed executed by them. The mortgagee brought the present suit in ejectment. It was held that the attesting co-sharers and the purchasers of their interest were estopped from challenging the title of the mortgagee auction-purchaser. The dispute was between the title of the two purchasers. The principle underlying the decision is that a purchaser of the interest of a debtor whether by private aliena-

tion or by auction sale is bound by the estoppel which is available against his transferor. The position of the attaching creditor was not considered and it was not held that the attaching creditor is also bound by the estoppel which might operate as against his judgment-debtor.

[52] Goverdhandas should have instructed his munim Jasraj to get the sale deed executed by defendants 2 to 4 because he ought to have realised from the negotiation which Ballabhdas had with him regarding the sale of the house at Harda and the pledge of the ornaments, that Ballabhdas was acting as a manager on behalf of himself and his sons. Instead of giving specific instructions he left the matter to his munim Jasraj. In the absence of the evidence of Jasraj it is not possible to know the reason why he got the sale deed executed by Vithaldas alone and had the attestation made by Ballabhdas and Bindrabandas. A reasonable enquiry by a prudent person would have disclosed that Vithaldas had no power to transfer beyond his 1/3rd share and if he took the sale deed from Vithaldas for more than his share the sale deed was not binding so far as the interest of other co-sharers who had not joined in the execution of the sale deed was concerned.

[53] In the Lahore (Lucknow ?) case,[17] it was held that the persons who had attested the agreement with knowledge of the contents thereof were estopped from setting up a title adversely to the person to whom the representation was made and who had altered his position to his detriment on the faith of that representation. In that case also the question of the attaching creditor was not considered and it was not decided how far estoppel against a person is available not against the person making the representation or the person deriving a title from him but claiming adversely to the person making representation.

[54] Goverdhandas has not stated that Vithaldas was an ostensible owner in possession of the house at Harda with the consent of Ballabhdas and Bindrabandas. Nor has he stated that the consideration was paid to Vithaldas because he acted on the faith of the representation that Vithaldas was the full owner. Goverdhandas was no stranger to defendants 2 to 4 and it cannot be said that he was misled to his detriment because of the representation made by Ballabhdas to him.

[55] The learned counsel for the plaintiff-respondent, Seth Goverdhandas relied on 18 Lah. 783[18] in support of his contention that S. 41, T. P. Act, was applicable. Thakurdas, claiming to be an adoped son of one Bagh Mal, mortgaged on 23-10-1920 certain property in favour of Damodar Das for Rs. 4000. The mortgage deed was attested by his natural brother Shori Lal. The mortgagee obtained a final decree for sale on 14-8-1934. On 3-12-1934 Shori Lal filed a suit for a declaration that he was entitled to a half share of the property of Bagh Mal under the terms of a will dated 23-1-1903 and that he had attested the mortgage deed without the knowledge of the will or that he had a half interest under the will. It was held that the object of S. 41, T. P. Act, is to protect a *bona fide* transferee for good consideration who has made proper enquiries, from being prejudiced by the conduct, however innocent, of the real owner in allowing the world at large to think that someone else is the owner of the property and that it was immaterial that the attestation was made in ignorance of his rights. The suit of Shori Lal was dismissed as barred under S. 115, Evidence Act.

[56] The learned counsel for Goverdhandas relied on A. I. R. 1940 Mad. 523[19] and submitted that the question whether a person has taken reasonable care to ascertain that his transferor had power to make the transfer, so as to get the protection of S. 41, is one of fact and has to be decided with reference to the circumstances of each case. This is undoubtedly true but in this case the finding of the lower appellate Court is vitiated as it has overlooked the proviso to S. 41, T. P. Act, and has not considered the question whether Goverdhandas, after taking reasonable care to ascertain that Vithaldas had power to make the transfer, had acted in good faith. In the absence of such a finding, S. 41 of the Act had no application. Neither S. 115, Evidence Act, nor S. 41, T. P. Act, has any application to the case. We accordingly hold that Goverdhandas merely acquired 1/3rd interest of Vithaldas in the house under the sale deed dated 30-5-1931 and is not entitled to a declaration that the 2/3rd share of Ballabhdas and Bindrabandas in the house is not liable to attachment and sale in execution of a decree of defendant 1 against defendants 2 to 4.

[57] The appeal is allowed. The decree of the lower appellate Court is reversed and that of the trial Court dismissing the suit of the plaintiff is restored. Respondent 1 will bear the costs of defendant 1 in all the Courts.

G.N. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 118 *[C. N. 41.]*

MANGALMURTI, J.

Biharilal Kunjilal — Appellant v. *Mt. Anjirabai—Respondent.*

Second Appeal No. 239 of 1943, Decided on 14-3-1947, from appellate decree of Addl. Dist. Judge, Raipur, D/-12-12-1942.

Tort—Wrongful attachment of goods—Damages.

A party to a suit is liable, in damages for trespass to property though he acts innocently or mistakenly or inadvertently if by his or his agent's or attorney's order the officer of the Court takes the goods of the wrong person, a stranger, in execution. Proof of malice is not necessary when the property of a stranger not a party to a suit, is taken in execution. [Para 5]

Hence where *A* obtains a decree against *B* and in execution thereof wrongly attaches property belonging to *B*'s wife *C*, *C* has a cause of action against *A* and is entitled to recover from him damages without proving either absence of reasonable and probable cause or malice in fact : 17 Cal. 436 (P.C.); 11 A. I. R. 1924 Rang. 302 and 3 Bom. 74, *Rel. on.* [Paras 5 and 7]

Cases referred :

1. ('90) 17 Cal. 436 : 17 I. A. 17 : 5 Sar. 472 (P. C.), Kissorimohun Roy v. Hursukh Das.
2. (1862) 1 H. & C. 621 : 32 L. J. Ex. 142 : 7 L. T. (N. S.) 633 : 11 W. R. 186, Walker v. Olding.
3. ('24) 2 Rang. 181 : 11 A. I. R. 1924 Rang. 302 : 83 I. C. 433, Assan Mahomed v. S. M. Kadersa Rowther.
4. ('78) 3 Bom. 74, Goma Mahad v. Gokaldas.

R. G. Rau—for Appellant.
R. J. Bhave—for Respondent.

Judgment. — This appeal arises out of a suit for damages for wrongful attachment of the tonga and pony of the plaintiff-respondent in execution of the decree obtained against the plaintiff's husband by the defendant-appellant.

[2] There is a concurrent finding of the two lower Courts that the tonga belongs to the plaintiff and the learned counsel for the defendant-appellant has shown no good ground for interfering with that finding.

[3] The law on the question of wrongful execution of process against property is laid down by their Lordships of the Privy Council in 17 Cal. 436[1] at p. 442:

"The summary proceeding under S. 278 was taken by the respondent for the purpose of getting the release of an attachment issued in a suit to which he was not a party; and it does not appear to their Lordships that, in order to entitle him to recover full indemnity for the wrongful attachment of his goods, the respondent is bound to allege and prove that the appellants resisted his application maliciously, and without probable cause.

"The appellants mainly relied upon the English case in 1 H. & C. 621[2] which was cited as an authority for the proposition that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt. 1 H. & C. 621[2] would have been an authority of importance had the law of execution been the same in India as in England, but there is in that respect no analogy between the two systems. In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants for attachment in security are issued on the ex parte application of the creditor, who is bound to specify the property which he desires to attach, and its estimated value. In the present case, by the terms of the perwana, no discretion was allowed to the officer of Court in regard to the selection of the goods which he attached; his only function was to secure under legal fence all bales of jute in the respondent's premises which were pointed out by the appellants. The illegal attachment of the respondent's jute on 28-11-1883 was thus the direct act of the appellants, for which they became immediately responsible n law; and the litigation and delay, and consequent depreciation of the jute, being the natural and necessary consequences of their unlawful act, their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of the attachment."

[4] This Privy Council case was followed in 2 Rang. 181[3] wherein A had brought a suit against B and obtained an order for the attachment before judgment of goods belonging to C, and it was held that this was a case in which a trespass to the goods having been committed by A, C had a cause of action against A and was entitled to recover from him damages without proving either an absence of reasonable and probable cause or malice in fact.

[5] The law has been well summarized in Ratanlal and Dhirajlal's Law of Torts, Edn. 13 (1943), at pp. 207 to 209 :

"A party to a suit is liable, though he acts innocently or mistakenly or inadvertently, if by his or his agent's or attorney's order the officer of the Court takes the goods of the wrong person, a stranger, in execution; 3 Bom. 74[4] . . . . . Proof of malice is not necessary when the property of a stranger not a party to a suit, is taken in execution."

[6] It was, however, contended by the learned counsel for the appellant that the attachment was not wrongful. I am unable to agree with him. The property belonged to the plaintiff Anjeerabai, and it was attached in execution of a decree of another person, *viz.*, her husband. She had a right against all the world to possess it, and that legal right was violated by the defendant-appellant by attaching the property. Ratanlal and Dhirajlal in their Law of Torts, Edn. 13 (1943), say at pp. 4 and 5 :

"The crucial test of a legally wrongful act or omission is its prejudicial effect on the legal right of another. . . . . Every infringement of a private right denotes that an injury or wrong has been committed, which is imputable to a person by whose act, omission, or forbearance, it has resulted."

[7] Damages have therefore been rightly awarded to the plaintiff. The decision of the Court of first appeal is hereby upheld and this appeal is dismissed with costs.

G.N. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 119 *[C. N. 42.]*

PURANIK J.

Chunnialal — Plaintiff — Applicant v. *Deoram and another — Defendants — Non-applicants.*

Civil Revn. No. 86 of 1945, Decided on 9-7-1946, to revise order of Dist. Judge, Nimar, D/- 10-1-1945.

(a) Civil P. C. (1908), O. 6, R. 17—Real questions in controversy—Such questions are those on which

issues are framed—Amendment involving complete change of front in defence cannot ordinarily be allowed—Lambardar suing for possession of abadi site on ground that transferor had non-transferable licence therein — Defendant admitting this in trial Court — In appeal defendant raising new question by amendment that transferor was proprietor of site—Amendment held ought not to be allowed.

No doubt a Court has very wide powers of allowing amendment but amendments will be allowed only for the purpose of determining the real questions in controversy between the parties. The real questions in controversy are those on which issues are framed in the trial Court. [Para 9]

Ordinarily, under law, a Court will not allow an amendment which involves a complete change of front in the defence. Just as a plaint cannot be allowed to be amended so as to introduce a new and inconsistent cause of action which would change the nature of the suit, so also the defence cannot be allowed to be altered so as to introduce a different set of circumstances inconsistent with the circumstances pleaded to begin with. [Paras 5 and 9]

Where, therefore, in a suit by the lambardar for possession of an *abadi* site on the ground that the defendants-transferors had a non-transferable licence in respect of the same and the defendants could not acquire the site without the consent of the plaintiff, it was admitted in the trial Court that the transferors were mere licencees of the *abadi*, but the defendants by their amendment wanted to raise for the first time in appeal a new question of controversy, viz., that the transferors were proprietors and therefore had transferable interest in the site:

Held, that the plea that the transferors were owners was inconsistent with the plea that they were licencees and the amendment sought for being in the nature of a complete change of front in the defence ought not to be allowed: 31 A.I.R. 1944 Lah. 319 (F. B.) and 9 A.I.R. 1922 P. C. 249, *Rel. on*; 24 A. I. R. 1937 P. C. 42; 27 A. I. R. 1940 Lah. 201 ; 28 A. I. R. 1941 All. 298 and 25 A. I. R. 1938 Rang. 461, *Disting.*; 27 A. I. R. 1940 Nag. 8, *Ref.* [Paras 5 and 7]

Annotation : ('44-Com.) C. P. C., O. 6 R. 17, N. 4 pt. 1; N. 11 pt. 11; N. 13 pt. 12.

(b) Civil P. C. (1908), S. 115 — Order allowing amendment—Defendant failing in trial Court and also in appeal virtually—Appellate Court allowing defendant to make out new case by amendment — Order is revisable.

Where the order of the appellate Court gives liberty to the defendants to make out a new case by amendment after they have failed in the trial Court and after they have virtually failed in appeal, the order is revisable by the High Court in revision : 18 Nag. L. R. 30, *Foll.* [Para 10]

Annotation : (44-Com.) C. P. C., S. 115, N. 20 pt. 3; O. 6 R. 17, N. 21, pt. 1.

Cases referred :—

1. ('44) I. L. R. (1944) Lah. 443 : 31 A. I. R. 1944 Lah. 319 : 215 I. C 305 (F.B), Zahur Din v. Jalal Din.
2. ('21) 48 Cal. 832 : 9 A. I. R. 1922 P. C. 249 : 48 I. A. 214 : 63 I. C. 914 (P. C.), Ma Shwe Mya v. Maung Mo Hnaung.
3. ('37) 24 A. I. R. 1937 P. C. 42 : 16 Pat. 149 : 166 I. C. 649, Ramdhan Puri v. Lachmi Narain.
4. ('40) 27 A. I. R 1940 Lah. 201 : 188 I. C. 608, Har Dial v. Guruditta Ram.
5. ('41) 28 A. I. R. 1941 All. 298 : I. L. R. (1941) All. 558 : 195 I. C. 758, Mt. Mohri Kunwar v. Keshri Chandra.
6. ('38) 25 A. I. R. 1938 Rang. 461 : 1938 Rang. L. R. 521 : 180 I. C. 519, Niemeyer v. E. M. Mamooji.
7. ('39) 1939 N. L. J. 525 : 27 A. I. R. 1940 Nag. 8 : 188 I. C. 23, Badridas Lal Chand v. Raja Pratabgir.
8. ('22) 18 Nag. L. R. 30 : 9 A. I. R. 1922 Nag. 84 : 61 I. C. 584, Singhai Rajilal v. Kanhai.

R. S. Dabir — for Applicant.

Y. V. Jakatdar — for Non-Applicants.

Order.—The plaintiff-applicant brought a suit for possession of an abadi site on the ground that the defendants-transferors had a non-transferable licence in respect of the same and the defendants could not acquire the site without the consent of the plaintiff lambardar. The defence was that the plaintiff's consent as lambardar was obtained, and in the alternative it was pleaded that as the defendants were co-sharers in the village no consent was required and that S. 203, C. P. Land Revenue Act did not apply for a transfer in favour of a co-sharer.

[2] The trial Court negatived both the defences and decreed the plaintiff's claim. The defendants appealed and again urged the same two defences. The lower appellate Court in its decision negatived the two defences. During the hearing of the appeal an application was filed by the defendants for permission to amend the defence and to withdraw the pleas that were raised in the trial Court. The lower appellate Court permitted the defendants to withdraw the pleas taken in the trial Court and to set up a defence that the transferors were owners of the house prior to the first settlement and therefore not licencees but proprietors and as such were entitled to transfer the site without reference to the lambardar. As this involved a fresh trial the case was remanded to the trial Court. The plaintiff-applicant feeling himself aggrieved by this decision comes up in revision.

[3] His main contention is that the lower appellate Court had no jurisdiction to allow the defendants leave to amend the written statement as the amendment converted the defence into another of a different and inconsistent character. It was argued in the lower appellate Court and here also by the learned counsel appearing for the non-applicants that they pleaded in the Court below that S. 203, C. P. Land Revenue Act was not applicable to the facts of the present case, that therefore, when they are stating that the transferors were the owners before 1865 they are only pleading that S. 203, C. P. Land Revenue Act is not applicable to the facts of the case, and that they were not raising any inconsistent defence, but adding one more ground to their defence that S. 203, C. P. Land Revenue Act was not applicable.

[4] Reading the written statement of the defendants in the Court below I find that they pleaded that S. 203, Land Revenue Act was not applicable as it was a transfer in favour of co-

sharers. It was thus a very specific plea, and if they now want to say that it is not applicable because of different circumstances altogether, they are raising a new defence. It is not only a new defence but an inconsistent one. It is rightly urged before me on behalf of the applicant that at the stage of the pleadings in the trial Court the fact that the transferors were licencees in the abadi and had no interest which could be transferred without reference to the lambardar was not disputed, and that it was therefore that it was pleaded that the consent of the lambardar was obtained and the transfer made and that it was pleaded in the alternative that when a transfer was made to co-sharers no consent was required as there was an agreement to that effect between the parties at the time of the imperfect partition. What is tried to be introduced by the amendment is a statement that the transferors had a transferable interest as they owned a site before the settlement of 1865. Admittedly this plea was not raised when the defendants went to trial in the trial Court.

[5] This is a new plea, and it is stated in the application for amendment that the defendants were not aware of this circumstance when they made their pleadings in the Court below and they, therefore, wanted an opportunity to make that pleading at the stage of the appeal. The plea that the defendants-transferors were owners is inconsistent with the plea that they were licencees. Ordinarily, under a law, Court will not allow such an amendment as it involves a complete change of front in the defence. Mulla at p. 599 of his Civil Procedure Code, Edn. 11, has referred to English and Indian cases on the point and has pointed out that the Court will not allow an amendment that will involve a complete change of front in the defence: *see also* I. L. R. (1944) Lah. 443=A. I. R. 1944 Lah. 319,[1] where it was laid down that no doubt in a sense an appeal is a continuation of a suit but that this is only in a limited sense, and that it does not, however, mean that the rights which could be pleaded and enforced before a suit was finally adjudicated by the first Court, could be pleaded as of right for the first time during the pendency of the appeal.

[6] Their Lordships of the Privy Council in 48 Cal. 832[2] at p. 835, stated dealing with the case of an amendment that

"full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suits."

[7] The amendment sought for being in the nature of a complete change of front in the defence ought not to be allowed. The lower appellate Court in allowing the amendment relied upon A. I. R. 1937 P. C. 42.[3] That case has no application to the facts of the present case. That was a case in which a statement was made in the trial Court, and the case was tried on the basis of that statement, but there was no regular application for amendment, and what was stated by the High Court was that the plaintiff should be permitted to amend and proceed with the case regularly. In the present case no plea was advanced in the trial Court that the transferors were the owners of the property and therefore could transfer.

[8] Another case relied on by the lower appellate Court is A. I. R. 1940 Lah. 201[4] where there was a mere technical defect in the pleading and that was allowed to be amended. A. I. R. 1941 All. 298[5] and A. I. R. 1938 Rang. 461[6] which are the other two cases referred to by the Judge are also beside the point.

[9] In 1939 N. L. J. 525[7] an amendment which introduced a new plea, distinct and inconsistent with the original plea, was not permitted to be raised. It is true that the Court has very vide powers of allowing amendment, but amendments will be allowed only for the purpose of determining the real questions in controversy between the parties. Thereal questions in controversy between the parties are those on which issues are framed in the trial Court. It was admitted in the trial Court that the transferors were mere licencees of the *abadi*. The defendants by their amendment wanted to raise for the first time in appeal a new question of controversy, viz., that the transferors were proprietors. Just as a plaint cannot be allowed to be amended so as to introduce a new and inconsistent cause of action which would change the nature of the suit, so also the defence cannot be allowed to be altered so as to introduce a different set of circumstances inconsistent with the circumstances pleaded to begin with.

[10] It was contended on behalf of the non-applicants that in cases where amendment was allowed no revision lay and therefore there should be no interference. I have pointed out that the Court in this particular case has acted without jurisdiction in allowing the amendment of the nature indicated in the judgment. A question of jurisdiction is involved. In any case, the Court has acted illegally and irregularly in allowing amendment at this stage. In 18 Nag. L. R. 30[8] it was laid down that the object of R. 1 (2), O. 23, Civil P. C., is not to enable a plaintiff, after he has failed to conduct his suit with proper care and diligence and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his pre-

vious misconduct of the case and so to prejudice the opposite party, and that the High Court can revise an order allowing a plaintiff to withdraw from a suit with liberty to institute a fresh suit. The present case is of a similar nature. It gives liberty to the defendants to make out a new case after they had failed in the trial Court and after they had virtually failed in appeal on the case as made out in the trial Court. Such an order is certainly revisable by this Court in revision.

[11] I allow the application for revision with costs and decline to permit amendment of the pleadings by the defendants. As the appeal as filed before the lower appellate Court on the pleas raised in the trial Court failed as stated by the lower appellate Court itself, and as no argument was advanced before me to show that that decision was wrong the decree of the trial Court holding the plaintiff entitled to take possession of the site is confirmed. Counsel's fee Rs. 25.

V. R. *Revision allowed.*

A. I. R. (35) 1948 Nagpur 122 *[C. N. 43.]*

HIDAYATULLAH J.

Deoman Bhagwan—Appellant v. *Atmaram Suryabhan—Respondent.*

Second Appeal No. 12 of 1944, Decided on 11-2-1947, against the judgment and decree of 3rd Addl. Dist. Judge, Akola, D/- 19-11-1943.

(a) Civil P.C. (1908), Sch. 3, Para. 11—Sale without sanction of Collector — Validity.

A person, of whose property the Collector has assumed management under Sch. 3, is incompetent to transfer that property without the sanction of the Collector under Sch. 3, Para. 11, and hence a sale made without such sanction is invalid. [Para 4]

Annotation : ('44-Com.) C. P. C., Sch. 3, Para. 11, N. 1, pt. 2.

(b) Transfer of Property Act (1882), S. 43 — Sale without sanction under Sch. 3, Para. 11, Civil P. C.—Fact known to vendee — Vendor if estopped from pleading invalidity of sale — Evidence Act (1872), S. 115.

There can be no estoppel against a statute, nor can estoppel arise if the true facts are known to the party pleading the estoppel. Thus, where a person executes a sale deed on the fraudulent representation that he has obtained the requisite sanction of the Collector under Sch. 3, Para. 11, but the true fact that no such sanction is obtained is known to the vendee, no question of estoppel would arise either under S. 43, T. P. Act or under S. 115, Evidence Act and the vendor would be entitled to plead the invalidity of the sale: 4 A. I. R. 1917 Nag. 215 (F. B.), *Foll.*; 30 A. I. R. 1943 P. C. 29, *Disting.* [Para 5]

Annotation : ('45-Com.) T. P. Act, S. 43 N. 4, pt. 2, and N. 7, pt. 7.

(c) Civil P. C. (1908), S. 100 — Finding of fact, record of.

Since findings of fact by the lower appellate Court are to be treated as final they should be clearly stated leaving no room for doubt or difference: 30 A.I.R. 1943 P.C. 24, *Foll.* [Para 5]

Cases referred:—

1. ('43) 30 A. I. R. 1943 P. C. 29 : 18 Luck. 130 : I. L. R. (1943) Kar. P. C. 19 : 70 I. A. 1 : 206 I. C. 457 (P. C.), Raja Mohan Manucha v. Manzoor Ahmad.
2. ('17) 13 N. L. R. 130 : 4 A. I. R. 1917 Nag. 215 : 42 I. C. 200 (F. B.), Mt. Salu Bai v. Bajat Khan.
3. ('18) 14 N. L. R. 181 : 5 A. I. R. 1918 P. C. 168 : 46 Cal. 183 : 45 I. A. 219 : 48 I. C. 312 (P. C.), Gaurishankar Balmukund v. Chinnumiya.
4. ('12) 36 Bom. 510 : 16 I. C. 570, Mangniram Vithuram v. Bakubai.
5. ('43) 30 A. I. R. 1943 P. C. 24 : I. L. R. (1943) 1 Cal. 372 : I. L. R. (1943) Kar. P. C. 39 : 70 I. A. 18 : 206 I. C. 266 (P. C.), Ramlal v. Dhirendra Nath.

T. P. Naik — for Appellant.

M. D. Khandekar and M. B. Mahajan — for Respondent.

Judgment.—This is a second appeal against the judgment and decree of Mr. N. H. Mujumdar, Third Additional District Judge, Akola, in Civil Appeal No. 79-A of 1943 decided on 19-11-1943.

[2] The suit from which this appeal arises was filed by the respondent, Atmaram Maratha, for possession of field survey No. 48 having an area of 14.23 acres, situated in mouza Nandkhed, taluq and pargana Balapur in the Akola district in Berar. The case of the plaintiff (respondent in this matter) was that defendant 1, Deoman (appellant here) had fraudulently got from him a sale-deed (Ex. D.3) in respect of this field on 22-5-1935 on a promise to pay Rs. 1200 as consideration for the sale, that this Deoman did not pay the consideration and that the plaintiff-respondent was, therefore, entitled to get the holding in dispute back from him. Mesne profits were also claimed for the period of occupation by defendant 1, Deoman. The plaintiff also pleaded that at the time of the sale the property was under the management of the Collector under Sch. 3, Civil P. C., and that the transaction, therefore, was void.

[3] The trial Court found in favour of the defendant-appellant and the judgment and decree of that Court were reversed in the lower appellate Court. The learned Judge of the first appellate Court held that out of the total consideration Rs. 731 which were agreed to be paid to one Hari Tukaram, had not been paid. This finding cannot now be challenged. He also held that no question of estoppel arises nor did S. 43, T. P. Act, apply to this case.

[4] Mr. T. P. Naik, on behalf of the appellant relies upon the judgment in A. I. R. 1943 P.C. 29[1] and contends that S. 43, T. P. Act, covers this case because the plaintiff made a false representation to the vendee that permission to sell this disputed field had been obtained from the Collector. It is now admitted by both the plaintiff and the defendant that prior to the sale the permission of the Collector as required by para 11 of Sch. 3, Civil P. C., was not obtained. The sale must, therefore, be held to be

invalid because the vendor was incompetent to transfer the property without such sanction. The learned counsel for the appellant, however, wishes to make one reservation that the sale should not be entirely ignored because if there was a false representation made by the vendor then he should be estopped from setting up his own fraud to save his property. His contention is that in A. I. R. 1943 P. C. 29[1] their Lordships of the Privy Council did not say that the incompetency which arises under para. 11 is a general incompetency because in that case a personal covenant contained in the self-same document was enforced against the transferor. It is obvious that there were two separate contracts, one in relation to the property and the other quite independent of it and, their Lordships of the Privy Council held that portion of the contract enforceable which had nothing to do with the incompetency arising under the Civil Procedure Code. Under para. 11 the judgment-debtor whose property is under the Collector's management is precluded from dealing with that property without the Collector's permission. But he is free to enter into any other contract which is independent of the property. The contract which their Lordships were considering was capable of being divided into two parts one part being bad because it offended against Sch. 3 and the other perfectly valid and binding because it had nothing to do with the property in respect of which the judgment-debtor was under a disability being merely a personal covenant to discharge the debt. No such question arises in this case and the case relied upon by the learned advocate appearing on behalf of the appellant does not apply.

[5] This case is on all fours with an earlier case reported in 13 N. L. R. 130[2] in which the applicability of S. 43, T. P. Act, 1882, to similar circumstances was negatived by a Full Bench of this Court. That case was approved in 14 N.L.R. 181[3] by their Lordships of the Privy Council who expressly overruled 36 Bom. 510[4] which was cited to me and which seems to be the sheet-anchor of the appellant's case. In view of the clear statement of the law by the Full Bench and approved by their Lordships of the Privy Council, it is unnecessary to determine whether any representation was made and if so whether the appellant himself knew the true facts. Even on the ground of estoppel the appellant would have no case because the evidence clearly shows that he was not only aware that sanction of the Collector was needed but that such sanction had not been obtained. There can be no estoppel against a statute nor can an estoppel arise if the true facts were known to the appellant. The evidence and the finding of the first appellate Court is that both sides at the time of the execution of the sale-deed knew that the field specified in the plaint was under the Collector's management and that no permission had been taken. Thus if a question of estoppel whether contained in S. 43, T. P. Act or S. 115, Evidence Act be allowed to be raised the plaintiff's case would fail on the evidence in the case. The learned Judge of the Court of appeal below has not given a clear finding as to the knowledge of the appellant but that seems to be the conclusion which he reached on the evidence of the case. I may point out for his benefit that a finding of fact has to be clearly stated leaving no room for doubt or difference, and I quote with respect the observations of their Lordships of the Privy Council in A. I. R. 1943 P. C. 24.[5]

"Since findings of fact by the lower appellate Court are to be treated as final they should at least be clear and specific—not ambiguous or inferential."

On a complete examination of the evidence in this case I find that the conclusion reached by the learned Judge of the first appellate Court as to the knowledge of the appellant about want of sanction and the necessity for that sanction is correct. The appellant, therefore, was correctly adjudged as having got no title from the said sale-deed and the appeal must inevitably fail. The appeal is dismissed with costs on the appellant.

K.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 123 *[C. N. 44.]*

HIDAYATULLAH J.

Subhankhan Ramjankhan — Defendant 2 —Appellant v. *Lalkhan Haji Umarkhan Plaintiff and another, Defendant — Respondents.*

Second Appeal No. 562 of 1943, Decided on 12-12-1946, from judgment and decree of 3rd Addl. Dist. Judge, Akola, D/- 26-6-1943.

(a) Contract Act (1872), S. 128 — Liability of surety when arises.

A contract of guarantee must be construed strictly in favour of the surety. 30 A. I. R. 1943 Bom. 243, *Rel. on.* [Para 4]

Under S. 128 the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided for by the contract. The contract of guarantee has, therefore, to be construed to find out the exact point of time when the liability of the surety arises. In some cases it may be that the surety's liability may begin simultaneously with liability of the person guaranteed. But it often happens that the remedy against the principal is barred when the liability of the surety arises. The question depends on the terms of the contract of guarantee by which the surety has bound himself : 6 A. I. R. 1919 Cal. 636, *Rel. on.* [Para 4]

Where the liability arises only on the happening of a contingency the surety is not liable on his contract until that contingency has actually happened : 21 I. C. 437 (All.) ; 1937 All. L. J. 1265 ; (1918) 2 K. B. 833 and 17 A. I. R. 1930 Cal. 17, *Ref.* [Para 4]

(b) Civil P. C. (1908), O. 34, Rr. 1 and 6—Suit on mortgage — Surety for payment of deficiency arising on sale of mortgaged property also joined — Conditional decree for balance if can be passed against him—Contract Act (1872), S. 128.

In a suit on mortgage, though a surety for the mortgagor who has contracted to make good the deficit which may be found due on sale of the mortgaged property, is a necessary party by virtue of S. 91, T. P. Act read with O. 34, R. 1 no conditional decree for the balance can be passed against the surety. The reason is that the liability of the surety would arise only if the mortgaged property is found insufficient to repay the debt. Such a claim for relief against the surety would be premature. [Paras 5, 7 and 9]

Annotation : ('44-Com.) C. P. C., O. 34, R. 1, N. 6, pt. 5; O. 34, R. 6, N. 6.

Cases referred :—

1. ('43) 45 Bom. L. R. 510 : 30 A. I. R. 1943 Bom. 243 : I. L. R. (1943) Bom. 636 : 209 I. C. 161, Pannaji Devichand v. Basappa Virappa.
2. ('19) 53 I. C. 999 : 6 A. I. R. 1919 Cal. 636, Charu Chandra v. L. Faithful.
3. ('17) 44 Cal. 978 : 5 A. I. R. 1918 Cal. 707 : 39 I. C. 705, Brojendro Kissore v. Hindustan Co-operative Insurance Society, Limited.
4. ('13) 11 A. L. J. 689 : 21 I. C. 437, Kirkpatrick v. Chet Ram.
5. ('37) 1937 A. L. J. 1265, Radhakisan Das v. Ajodhiya Das.
6. (1918) 2 K. B. 833 : 88 L. J. K. B. 85 : 119 L. T. 727, Bradford Old Bank Ltd. v. Sutcliff.
7. ('30) 57 Cal. 764 : 17 A. I. R. 1930 Cal. 17 : 126 I. C. 138, C. L. Phillips v. A. E. Mitchell.
8. ('20) 47 Cal. 370 : 5 A. I. R. 1918 P. C. 159 : 49 I. C. 620 (P. C.), Jeuna Bhau v. Parmeshwar Narayan.
9. ('32) 36 C. W. N. 709 : 19 A. I. R. 1932 Cal. 775 : 59 Cal. 1314 : 140 I. C. 788, Fala Krista Pal v. Jagannath.
10. ('28) 15 A. I. R. 1928 Lah. 653 : 111 I. C. 808, Ralia Ram v. Hiralal.

A. V. Khare—for Appellant.

A. Ahmed—for Respondent 1.

Judgment.—This is a second appeal against the judgment and decree of Mr. N. H. Mujumdar, Third Additional District Judge, Akola, in Transfer Civil Appeal No. 53-A of 1943, decided on 26-6-1943.

[2] The suit was on the footing of a mortgage bond and the present appellant having stood surety for the repayment of the amount was joined as a party and against him relief was claimed that in case the sale of the property did not satisfy the debt, the balance should be ordered to be recovered from the surety. The trial Court passed a conditional decree and in so far as it affects the surety the wording of this decree in the appellate Court is:

"In default the property described on the reverse shall be sold and in case the mortgaged house is sold and the sale proceeds do not fully satisfy the decree, the balance due shall be recovered from defendant 2 . . ."

The contract of guarantee is incorporated in a mortgage bond, dated 14-11-1925. This mortgage bond is Ex. P-1. It was simple mortgage and according to the covenants the mortgage debt was to be paid on or before 29-11-1927. The plaintiff (respondent 1 in this matter), brought this suit against the mortgagor and the surety (appellant before me) on 24-11-1939. The claim against the mortgagor was decreed, and it was also ordered as shown above that if the mortgaged property was found insufficient to repay the decretal amount the balance was recoverable from the surety.

[3] Before taking up the two arguments urged before me on behalf of the appellant it is necessary to reproduce the material part of the mortgage bond which deals with the contract of guarantee. It reads thus:

"In case the mortgaged property passes to others because of any body's rights in any way being found to the property mortgaged by the debtor, I will pay your amount mentioned above with sharti (penal or conditional) interest. I further agree that I myself will personally make good the whole of the deficit also that may be found on the sale of the mortgaged property . . . . . ."

It was argued that the suit against the surety-appellant should have been brought within six years from the date of default, namely, 29-11-1927. It was also argued that the suit was premature inasmuch as this surety had agreed to make good the deficit found after the sale of the hypothecated property. These two arguments are destructive of each other. In view of what I hold on the second argument it is not necessary to consider the first.

[4] A contract of guarantee must be construed strictly in favour of the surety. This is settled law: *see* 45 Bom. L. R. 510.[1] Further, under S. 128, Contract Act the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided for by the contract. The contract of guarantee has, therefore, to be construed to find out the exact point of time when the liability of the surety arises. In some cases it may be that the surety's liability may begin simultaneously with the liability of the person guaranteed. But there are cases in which this may not happen. It was held in 53 I. C. 999[2] at p. 1000 as under :

"The liability of a surety does not necessarily in all cases arise simultaneously with that of the principal. It often happens that the remedy against the principal is barred when the liability of the surety arises. The question depends on the terms of the contract of guarantee by which the surety has bound himself."

If there is no stipulation to the contrary the liability of the surety arises at once: *see* 44 Cal. 978[3] at p. 990. It has been held in a large number of cases that where the liability arises only on the happening of a contingency the surety is not liable on his contract until that contingency has actually happened: *see* 11 A.L.J. 689;[4] 1937 A. L. J. 1265;[5] (1918) 2 K. B. 833[6] at pp. 840, 843 and 57 Cal. 764.[7]

[5] In the present case the agreement was that the surety was to make good the deficit which may be found due on the sale of the mortgaged property. The surety is entitled to say that the plaintiff must take action against the mortgaged property before he can claim any relief against him. This is borne out by the cases which have been cited above in which the claim was held to be premature. In my opinion, therefore, the claim of the plaintiff (respondent 1 in this matter) against the surety-appellant is premature.

[6] It was argued that under S. 91, T. P. Act the surety for the payment of the mortgage debt or any part thereof is entitled to institute a suit for redemption and may redeem the mortgaged property and that under O. 34, R. 1, Civil P. C. the plaintiff has to join in a suit for foreclosure or sale all persons having an interest either in the mortgage security or in the right of redemption. The surety, therefore, was a necessary party to the suit and the plaintiff having joined him merely claims a conditional decree against him. In support of this contention reliance is also placed upon the analogy of O. 34, R. 6, Civil P. C. Under O. 34, R. 6 of the Code it is laid down :

"Where the net proceeds of any sale under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance."

It was held by their Lordships of the Privy Council in 47 Cal. 370[8] that a decree can be passed even if the mortgaged property has not been brought to sale and in 36 C. W. N. 709[9] and A. I. R. 1928 Lah. 653[10] it was laid down that a conditional decree passed in anticipation of the sale of the property is not void.

[7] Their Lordships of the Privy Council in 47 Cal. 370[8] were interpreting S. 90, T. P. Act, 1882 and held that a personal decree, in anticipation of an attempt to sell the property can be passed against the mortgagor. Their Lordships observed that it was not necessary to put a strict and technical construction upon the section because no reason could be assigned in its favour and from which no advantage could possibly be derived by a mortgagor. Their Lordships also held that the order, though made at the time of the decree for the sale of the mortgaged estate, operates at a future date, and, therefore, causes no hardship to the mortgagor. The case of a surety who is only bound by his contract stands on a somewhat different footing, and in his case there is a considerable disadvantage to him if a decree is passed against him before the mortgagee has first attempted to realize his money from the mortgagor and the property involved in the mortgage. Also in the case of a surety the cause of action arises only when the bond is enforceable against him. A cause of action is said to accrue when all facts exist which the plaintiff has to prove as part of his case. It is true that the surety is a necessary party in a suit filed for the enforcement of the mortgage but it is one thing to join him as a necessary party and quite another to claim a decree against him. The plaintiff could have joined the surety as a necessary party under O. 34, R. 1, Civil P. C. without claiming any relief against him. That he was required to do by virtue of S. 91, T. P. Act read with O. 34, R. 1, Civil P. C. This is because the surety can, as a person interested claim to redeem the property. The mortgagee's right to claim relief against the surety would arise if the mortgaged property was found insufficient to repay the debt. That clearly shows that unless the cause of action against the surety has arisen no relief can be claimed against him.

[8] On redemption of the property by the surety or on payment of the amount under the mortgage bond the surety would be entitled under S. 92, T. P. Act to subrogation and even apart from this section he would be entitled to all the rights which the creditor had against the principal debtor. The surety may elect to satisfy the mortgage debt and claim his right against the principal either under S. 92, T. P. Act or Ss. 140 and 141, Contract Act. If he does not elect to do so the right of suit against the surety on his own bond still subsists and the accrual of that right depends upon the conditions of the bonds entered into by the surety.

[9] The learned Judges of the two Courts below failed to keep this distinction in mind and though the learned appellate Judge was of opinion that the suit was in a sense premature he fell into error that S. 91, T. P. Act read with O. 34, R. 1, Civil P. C. entitled the plaintiff to claim relief of a conditional nature against the surety. In my opinion the suit of the plaintiff is premature so far as the surety is concerned. The decree will be modified by omitting the part operating against the surety. The costs of the appellant in this Court and the lower appellate Court will be borne by respondent 1 who will bear his own costs in the two Courts. Costs of the trial Court will be borne as ordered by that Court.

R.G.D. *Decree modified.*

A. I. R. (35) 1948 Nagpur 126 *[C. N. 45.]*

BOSE J.

Vithoba — Auction-purchaser — Applicant v. *Dhanaji, decree-holder and another, judgment-debtor — Respondents.*

Civil Revn. No. 488 of 1945, Decided on 17-1-1947, from order of 1st Addl. Dist. Judge, Akola, D/-4-8-1945.

Civil P. C. (1908), O. 21, R. 89—Sale in execution of money decree—Subsequent reversal of decree on appeal — Application for setting aside sale, under R. 89—Deposit made under R. 89 (a) but no deposit under R. 89 (b) — R. 89 if complied with.

The sum referred to in R. 89 need not be received through the Court, nor need it have been received in cash. It can also be in kind, and the receipt can even be constructive: 15 A. I. R. 1928 Nag. 126, *Rel. on.* [Para 4]

Where the property of the judgment-debtor was sold in execution of money decree, but before the sale was confirmed the decree was reversed on appeal and thereupon the judgment-debtor applied under O. 21, R. 89 to have the sale set aside and made a deposit of 5% under R. 89 (a) for payment to the purchaser but did not make any deposit under R. 89 (b) for payment to the decree-holder on the ground that the decree having been reversed nothing was due to the decree-holder :

Held that although an application under R. 89 imported an admission that the sale was good despite any subsequent reversal of the decree the decree was no longer good and as between the judgment-debtor and the decree-holder it was wiped out and therefore there was under the law a constructive receipt within the meaning of R. 89 (b) by the decree-holder of what was once due to him. Hence the deposit under R. 89 (a) without deposit under R. 89 (b) was sufficient compliance with R. 89: 21 A. I. R. 1934 Nag. 21, *Approved*; 20 A. I. R. 1933 Mad. 598, *Not approved*; 18 A. I. R. 1931 P. C. 33, *Disting.* [Para 5]

Annotation : ('44-Com.) Civil P. C. O. 21, R. 89, N. 22, Pt. 3.

Cases referred:—

1. ('33) 56 Mad. 808 : 20 A. I. R. 1933 Mad. 598 : 143 I. C. 854, Sorimuthu Pillai v. Muthukrishna Pillai.
2. ('35) 31 N. L. R. 67 : 21 A. I. R. 1934 Nag. 21: 150 I. C. 611, Brijlal v. Monohar Prasad.
3. ('28) 15 A. I. R. 1928 Nag. 126 : 107 I. C. 199, Mt. Sakhu v. Kashiba.
4. ('31) 27 N. L. R. 95 : 18 A. I. R. 1931 P. C. 33 : 58 I. A. 50 : 130 I. C. 686 (P. C.), Nanhelal v. Umrao Singh.

A. L. Halve — for Applicant.

Order. — This is a stranger auction-purchaser's application for revision. Non-applicant 1 whom I will call the decree-holder, obtained a simple money decree against non-applicant 2 whom I will refer to as the judgment-debtor. In execution the property in question here was put up to sale and was purchased by the applicant Vithoba on 12-4-1944. Three days later the decree was reversed on appeal. On 4-5-1944, that is to say, within 30 days of the sale, the judgment-debtor applied under O. 21, R. 89, to have the sale set aside. He deposited the 5 per cent. payable to the auction-purchaser under O. 21, R. 89 (a), but made no deposit under R. 89 (b) for payment to the decree-holder on the ground that the decree having been reversed nothing was now due to the decree-holder. The first Court set aside the sale, and on appeal the lower appellate Court confirmed this order. The auction-purchaser now seeks to revise these orders.

[2] I agree with the lower appellate Court that the auction-purchaser is not affected by the subsequent reversal of the decree on appeal. His sale is good and can only be set aside under Rr. 89, 90 and 91. Neither R. 90 nor R. 91 has been called in aid in this case and so we are left with R. 89, and all I have to determine is whether in such circumstances the deposit of 5 per cent. under cl. (a) for payment to the purchaser without any deposit under cl. (b) for payment to the decree-holder is sufficient compliance with R. 89. I am of opinion that it is.

[3] The only case exactly in point cited before me was 56 Mad. 808,[1] but, with due respect to the learned Judge who decided that case, I prefer the Nagpur view. There is no reported case exactly in point in this Province, but the scope of R. 89 was exhaustively considered by Subhedar A. J. C. in 31 N. L. R. 67[2] and the principle which he laid will, in my opinion, apply here.

[4] It is to be observed that the judgment-debtor is not required to deposit the whole of the amount specified in the proclamation of sale. He need only deposit such amount

"less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder."

I agree with Subhedar Addl. J. C. and with Halifax Addl. J. C. in another ruling, A. I. R. 1928 Nag. 126[3] that the sum referred to there need not be received through the Court, nor need it have been received in cash. It can also be in kind, and the receipt can even be constructive. The law would, in my opinion, have grown very foolish and ultra-technical if it required a person to pay into a man's hands a sum of money which that man would be bound at the same moment to return. When A owes B a sum of money and B is under the law under an obligation to return that or a like sum, is not compelled to go through the farce of counting out a number of coins for the pleasure of seeing B hand them back the moment they are handed over. The law permits A and B mutually to cancel each other's debt, and that in law amounts to payment by A to B of the money A owes B, and a like payment by B to A of the sum B owes A. In the same way if the debt which A once owed B is cancelled for this reason or that, and the reason can, in my opinion, be anything—either an adjustment, or a

constructive payment, or a novation, or, as here, a cancellation of the debt by a competent Court, then A need not go through the farce of handing over money in order that he might get it back again. The Court will, where necessary, construe these facts to import constructive receipt of the sum specified.

[5] I agree with the learned Madras Judge that an application under O. 21, R. 89, Civil P. C., imports an admission that the sale was good. But the position adopted by the judgment-debtor here does not seek to challenge the validity of the sale. He admits that it is good despite the reversal of the decree. But O. 21, R. 89 does not require him equally to admit that the decree obtained against him still stands. With all due respect, the fallacy of the Madras reasoning seems to be there. The learned Judge assumes that because the judgment-debtor says he no longer owes the decree-holder anything, therefore he says the sale is bad. In my opinion, that is not the effect of an application like the present. The sale is good, as the Privy Council held, despite any subsequent reversal of the decree but the decree is no longer good and as between the judgment-debtor and the decree-holder is wiped out, and therefore there is under the law a constructive receipt within the meaning of R. 89 (b) of the decree-holder of what was once due to him.

[6] The Privy Council decision in 27 N. L. R. 95[4] does not apply because the 5% for payment to the auction-purchaser was never made there. This ruling has been considered and explained in 31 N. L. R. 67.[2]

[7] The application fails and is dismissed. There will be no order as to costs as no one has appeared for the other side.

N.S.D. *Application dismissed.*

A. I. R. (35) 1948 Nagpur 127 *[C. N. 46.]*

PADHYE J.

Laxmansing Baliramsing and others — Judgment-debtors — Appellants v. *Laxminarayan Deosthan, Kapshi, Decree-holder and others — Respondents.*

Misc. First Appeal No. 200 of 1946, Decided on 26-2-1947, from order of Addl. Dist. Judge, Wardha, D/- 15-10-1946.

(a) Civil P. C. (1908), S. 73 and O. 21, R. 89 — Parties — Creditor applying for rateable distribution.

A creditor applying for rateable distribution has no *locus standi* in proceedings for setting aside sale under O. 21, R. 89, or in appeal therefrom. The only persons concerned in these proceedings are the persons applying, decree-holder and the auction-purchaser: [Para 9]

Annotation.—('44-Com.) C. P. C., O. 21, R. 92, N. 4, pt. 14.

(b) Civil P. C. (1908), O. 21, R. 89 — Setting aside sale in part.

Order 21, R. 89 does not contemplate of a sale being set aside in part to the extent of the share of the applicant judgment-debtor; it is either set aside or not. Nor is it necessary that all the persons owning property should be the applicants. [Para 11]

Annotation. — ('44-Com.) C. P. C. O., 21, R. 89, N. 22.

(c) Civil P. C. (1908), O. 21, R. 89 — Application under — Mention of auction-purchasers in — Necessity of.

The auction purchasers are no doubt necessary parties to the proceedings for setting aside sales but it is not necessary that their names should be mentioned in the application under O. 21, R. 89, as their names are in the execution record. It is sufficient if notices are issued to them. [Para 12]

Annotation. — ('44-Com.) C. P. C., O. 21, R. 92, N. 4, pts. 10 and 11.

(d) Civil P. C. (1908), O. 21, R. 89 (1) (b) — Admission of decree-holder about full satisfaction of decree.

Order 21, R. 89 (1), cl. (b) is satisfied by an unequivocal admission of the decree-holder that his decree was satisfied within 30 days of the date of sale. Neither the auction-purchaser nor even the Court can ignore that admission: 25 A. I. R. 1938 Cal. 252; 21 A. I. R. 1934 Nag. 21; 27 A. I. R. 1940 Mad. 427 and I. L. R. (1937) 2 Cal. 606, *Rel. on*; 18 A. I. R. 1931 P. C. 33, *Disting.* [Para 14]

Annotation. — ('44-Com.) C. P. C., O. 21, R. 89, N. 22 pt. 3.

(e) Civil P. C. (1908), O. 8, R. 5 — Allegations by non-applicant — Applicability of rule to.

Order 8, R. 5 cannot apply to the allegations made by a non-applicant who is at best in the position of a defendant and the allegations cannot be deemed to have been admitted because they have not been expressly denied by the applicant. [Para 18]

Annotation. — ('44-Com.) C. P. C., O. 8, R. 5, N. 1, pt. 6.

(f) Civil P. C. (1908), O. 21, R. 89 — Provisions complied with — Court whether has discretion to set aside sale.

Order 21, R. 92 being imperative, the Court has no option but to set aside auction sale if the applicant complies with the provisions of O. 21, R. 89: 30 A. I. R. 1943 Bom. 336, *Rel. on.* [Paras 10 and 20]

Annotation.—('44-Com.) C. P. C., O. 21, R. 89, N. 2, pt. 8.

Cases referred:—

1. ('43) 30 A. I. R. 1943 Bom. 336 : 210 I. C. 159, Official Assignee v. Jehangir Sorabji.
2. ('38) 25 A. I. R. 1938 Cal. 252 : 177 I. C. 336, Mahendra Chandra v. Parashmani Dasya.
3. ('31) 27 N. L. R. 95 : 18 A. I. R. 1931 P. C. 33 : 58 I. A. 50 : 130 I. C. 686 (P. C.), Nanhelal v. Umrao Singh.
4. ('35) 31 N. L. R. 67 : 21 A. I. R. 1934 Nag. 21 : 150 I. C. 611, Brijlal v. Manohar Prasad.
5. ('40) I. L. R. (1940) Mad. 699 : 27 A. I. R. 1940 Mad. 427 : 188 I. C. 557 (F. B.), Muthuvenkatapathy Reddy v. Kuppu Reddi.
6. ('37) I. L. R. (1937) 2 Cal. 606, National Insurance Co. v. Ezekiel Aaron David.

T. L. Sheode — for Appellants.

D. T. Mangalmurti (for No. 6) and *V. B. Mandpe* (for No. 7) — for Respondents.

Judgment.—In execution of a decree passed in C. S. No. 31 of 1933 by the Additional District

Judge, Wardha, the immovable property of the judgment-debtors consisting of village shares was attached and put to auction on 3-1-1946 and 4-1-1946. It was purchased by different persons who are impleaded in this appeal as respondents 2, 3, 4 and 5. The total amount for which the property was sold was Rs. 12,700 though the decretal amount due was Rs. 18,752-3-8.

[2] On 1-2-1946, as per agreement between the decree-holder, who in this case is a deity represented by Mr. N. R. Nagle, the President of the 'Laxminarayan Deosthan Committee,' and the judgment-debtors the decree was agreed to be satisfied by payment of Rs. 10,000 in cash and execution of a promissory-note for Rs. 2000 which as a fact was executed by some of the judgment-debtors *viz.*, Laxmansingh and Pratapsingh. On the same day Mr. Nagle, on receipt of the amount and the promissory-note, passed a receipt of full satisfaction of the decree which runs as follows:

"I, the undersigned, Narayan Rao Rajaram Nagle, pleader, Hinganghat, president on behalf of the plaintiff Shree Laxminarayan Dewasthan, Kapsi, execute the receipt (this receipt) as follows:

In the said execution case the immovable property of the defendants was sold by auction on 3-1-1946 and 4-1-1946. The said execution having this day been privately compromised (i. e., a decision having this day been privately arrived at in respect of the said execution case), a sum of Rs. 12,000, twelve thousand rupees, has been agreed to be taken in full satisfaction of the decree. Out of the same, I have this day received Rs. 10,000, ten thousand rupees, in cash and for the balance of Rs. 2,000 two thousand rupees, the defendants have executed a promissory note.

In all I have taken and received Rs. 12,000 twelve thousand rupees as above. The remaining amount has been remitted. This execution case has been fully satisfied and nothing remains due from the defendants in respect of this execution case. Hence the auction sale may be set aside."

[3] On 1-2-1946, the judgment-debtor Pratapsingh deposited in Court the amount payable by way of commission to the auction-purchasers and applied under O. 21, R. 89, Civil P. C., to set aside sales, producing therewith the decree-holder's receipt for full satisfaction of the decree. This application appears to have been countersigned by Mr. N. R. Nagle for the decree-holder obviously by way of his consent to the setting aside of the sales.

[4] The auction-purchasers, who were noticed, however opposed the application and the contentions raised on their behalf are mainly these: (a) That O. 21, R. 89 does not recognize payments made privately to the decree-holder. The failure of the judgment-debtor to deposit the decretal amount in cash is fatal to the application to set aside the sale. (b) That payment alleged to have been made was at best Rs. 12,000, i. e., for less than the decretal amount. (c) That a private compromise between the decree-holder and the judgment-debtors for satisfaction of the decree cannot affect the rights of the auction-purchasers. (d) That as there are various claims for rateable distribution the decree-holder is fraudulently trying to appropriate the bulk of the money to himself.

[5] At a very late stage on 22-6-1946 i. e., nearly two months after the case was closed for arguments, a statement was put in on behalf of the decree-holder opposing the application to set aside sale on the ground that the promissory note for Rs. 2,000 was not executed by the judgment-debtor No. 3 and the judgment-debtors failed to pay Rs. 2,000 due on promissory note as orally undertaken by them to do.

[6] Seth Gopaldas Mohta of Hinganghat, who is a recorded co-sharer in these villages, *viz.*, Nandpur, Jejuri and Chicholi, the shares in which were put to auction, applied under S. 151, Land Revenue Act for pre-emption. He has in law no *locus standi* in proceedings under O. 21, R. 89, but he also put in a statement opposing the setting aside of the sale on grounds, similar to those raised by the auction-purchasers.

[7] The executing Court did not frame issues, did not fix the case for evidence and disposed of the application for setting aside sale after hearing arguments. This is the order appealed against by the judgment-debtors.

[8] In the order under appeal the learned Judge held that money paid privately is equivalent to a deposit under O. 21, R. 89, Civil P. C. and what is necessary is in fact only an unequivocal acknowledgment of the decree-holder that the decree was satisfied and it is immaterial whether the decree was satisfied by payment of full decretal amount or a part and whether the decree-holder received cash or anything which he treated equivalent thereto. The learned Judge, it must be said, most curiously accepted what was stated in the belated statement of the decree-holder dated 22-6-1946 as true and held that the decree-holder was not satisfied because in his view the agreement between the decree-holder and the judgment-debtors was in the nature of an executory contract and it failed as the amount due on promissory note was not paid within one month as orally agreed. In paras. 5 and 6 of the order, the learned Judge proceeded to deal with objections never raised by the parties and observed that the auction-purchasers were not impleaded in the application to set aside sales and that as only one of the judgment-debtors had applied to set aside sales it may, at the most, be that the sales could be set aside to the extent of his share. Finally the learned Judge took into consideration the fact that there were other creditors who were entitled to rateable distribution and held that the sales cannot be set aside

and O. 21, R. 89, Civil P. C. cannot be read in derogation of S. 73, Civil P. C.

[9] The auction-purchasers (respondents) have not appeared in this Court to oppose the appeal. The only person who was represented and who opposed the appeal was Seth Gopaldas Mohta who was a pre-emptor and also one of the creditors applying for rateable distribution. The question which at the outset arises for determination is if a creditor applying for rateable distribution has any *locus standi* in proceedings for setting aside sale or in appeal therefrom. It is clear from O. 21, R. 89, that the only persons concerned in these proceedings are the person applying, the decree-holder and the auction-purchaser. The question of rateable distribution is one between the decree-holders *inter se* in which neither the judgment-debtor nor the auction-purchaser has any concern. The creditor applying for rateable distribution is entitled to a share in the sale-proceeds if and when the amount becomes distributable. The amount deposited in Court by auction-purchaser does not become distributable until the sale is confirmed. The learned counsel for the respondent referred me to S. 64 and to O. 21, R. 72 but these provisions established that wherever it was thought necessary or proper to safeguard the position of a person applying for rateable distribution a specific reference to S. 73 was made. There is no reference to S. 73 in O. 21, R. 89, Civil P. C. In my view Seth Gopaldas Mohta has no *locus standi* in this appeal. The appeal has, however, been argued very fully and very vehemently on either side and I propose to decide it in the light of the arguments advanced.

[10] As held in A. I. R. 1943 Bom. 336[1] the Court has no option but to set aside auction sale if the applicant complies with the provisions of O. 21, R. 89, Civil P. C. and the executing Court dealing with an application under this provision has to concentrate its attention on its requirements. The first requirement is that the person applying must be the person owning such property or holding an interest therein by virtue of a title acquired before such sale; second is that the applicant should deposit in Court for payment to the purchaser and for payment to the decree-holder as required by cls. (a) and (b).

[11] There is no dispute in this case that the person applying is a person owning such property and that he deposited the sum necessary for payment to the purchaser and applied within 30 days of the date of sale for setting aside sale. The learned lower Court's view that the sales could at best be set aside to the extent of the share of the applicant judgment-debtor is something extremely novel. A moment's reflection should have convinced the learned Judge that O. 21, R. 89 does not contemplate of a sale being set aside in part; it is either set aside or not. Nor is it necessary that all the persons owning property should be the applicants. It is always dangerous, the learned Judge should have realized, to deal with imaginary objections. Evidently no such objection was taken because it was obviously untenable, specially when the judgment-debtors are members of a joint Hindu family as the judgment-debtors Nos. 1 to 3, most probably, are.

[12] What is required by Art. 166, Limitation Act, is that an application should be filed within 30 days of sale and it is clear from O. 21, R. 89 that the deposit should also be within the time that the application could be filed. This was obviously done. Notices were issued to the auction-purchasers and they not only appeared but opposed the application without ever suggesting that they were not impleaded in the application. What the learned Judge evidently means is that the names of the auction-purchasers are not mentioned in the application under O. 21, R. 89, Civil P. C. This is not necessary as the names of the auction-purchasers are in the execution record. The auction-purchasers are no doubt necessary parties to the proceedings for setting aside sales and the order setting aside sales passed without notice to them would be bad. That position did not arise in the present case as notices were issued and served and the auction-purchasers took part in the proceedings.

[13] The only point contested by the auction-purchasers in the lower Court was the due compliance with cl. (2) of O. 21, R. 89(1). According to them it could be complied only by depositing in Court full amount due on the decree and it was further suggested very vaguely that there were claims for rateable distribution.

[14] The learned Judge of the lower Court held and in my view quite correctly that clause 'B' is satisfied by an unequivocal admission of the decree-holder that his decree was satisfied within 30 days of the date of sale. Neither the auction-purchaser nor even the Court can ignore that admission. It was held in A. I. R. 1938 Cal. 252[2] that when the sale was set aside on the admission of the decree-holder that the decree was satisfied out of Court the auction-purchaser cannot have it restored on the ground that the alleged satisfaction was untrue. The receipt dated 1-2-1946 passed by Mr. Nagle contains an unequivocal and unconditional admission of the fact of full satisfaction of the decree. The last words of the receipt are:

"This execution case has been fully satisfied and nothing remains due from the defendants."

This is further corroborated by the fact that Mr. Nagle countersigned the application filed on the

same day for setting aside the sale. The promissory note dated 1 2 1946 appears to have been intended to be executed by three persons but it was actually executed only by two. It was not executed by Govindsingh, the younger brother of Pratapsingh. It is, however, immaterial as the promissory note executed only by Laxmansingh and Pratapsingh was accepted by the decree-holder and he passed a receipt for satisfaction of the decree. On the matters as they stood on 1-2 1946 there was no dispute between the applicant (judgment-debtor) and the decree-holder.

[15] It was argued by the learned counsel for the respondent that any compromise between the decree-holder and the judgment-debtor regarding satisfaction of the decree after the date of auction was bad and could not affect the interest of a third person i e , the auction-purchaser and the decisions which uphold such a satisfaction are opposed to what their Lordships of the Privy Council held in 27 N. L R. 95.[3] The learned counsel failed to distinguish between an adjustment of a decree and a satisfaction of the decree. Their Lordships were dealing with a case of mere adjustment and not of satisfaction and it is on this ground that the Privy Council case has been distinguished in 31 N. L. R. 67,[4] and in other cases, including the Full Bench decision of the Madras High Court reported in I.L.R. (1940) Mad. 609.[5] In I L.R. (1937) 2 Cal. 606,[6] it was held that an agreement between the judgment-debtor and the decree-holder outside Court whereby the decree was satisfied was sufficient compliance with O. 21, R. 89, Civil P. C.

[16] On the view taken by the learned Judge of the lower Court and, with which I agree, on the record as it stood on 2-1 1946 all the requirements of O. 21, R. 89 appear to have been complied with. The application for setting aside sale has, however, been disallowed by the lower Court on two grounds and I now deal with these grounds.

[17] In Para. 4 of the order the learned Judge remarked:

"In view of this the alleged satisfaction of the decree would have concluded the matter but for the fact that the amount has not been paid in full. I would pertinently point out that the judgment debtors have not replied to the allegation of the decree-holder that the amount of Rs. 2000 was agreed to be paid in full within one month ..... The other two judgment-debtors have not come up before me and have not yet cared to execute the promissory note upto now. It will thus be seen that the alleged agreement of 1-2-1946 was only executory ....."

[18] I feel obliged to observe that this part of the order of the learned Judge is not satisfactory. In the first place the learned Judge was in my view not right in allowing the decree-holder as a matter of course and to permit him to resile from the original position taken by countersigning the application for setting aside sale and to forward a case wholly contradictory thereto by filing a statement on 22-6-1946 when the case was already closed for argument on 27-4-1946. The lower Court not only allowed that statement to be placed on record but treated the allegations therein as true because they were not denied by the judgment-debtors. The judgment-debtors had no opportunity to deny the allegations made at the stage of argument and they were not called upon to do so Moreover, O. 8, R. 5, Civil P. C. cannot apply to the allegations made by the non-applicants who are, at best, in the position of defendants and the allegations cannot be deemed to have been admitted because they are not expressly denied. The questions which arose and which required determination were:

(a) Whether the statement dated 22-6-1946 should be admitted on record and taken into consideration?

(b) Whether in view of the unequivocal receipt of satisfaction of the decree, it is open to the decree-holder to plead and prove non-satisfaction?

(c) Having accepted the promissory note executed by two judgment-debtors, is it open to the decree-holder to plead and prove that the promissory-note was incomplete because it was not executed by the third judgment-debtor?

(d) Is it open for the decree-holder to prove that the amount due on promissory-note was payable within one month and not on demand as recited therein, and is oral evidence admissible on that point?

[19] If the Court finds all the above points in decree-holder's favour, then the parties should have an opportunity for adducing evidence and the final decision should be in the light of that evidence. There was no plea that the agreement dated 1-2-1946 was executory. I entirely disagree with the observations and the conclusion of the learned Judge in Para 4 of the order.

[20] At the conclusion of Para. 7 of the order the learned Judge opined that O. 21, R. 89 cannot be read in derogation of S. 73, Civil P. C. What this exactly means is difficult to understand. Does this mean that sales cannot be set aside under O. 21, R. 89 if other creditors of the judgment-debtor have applied for rateable distribution or does it mean that the judgment-debtor should in that case deposit in Court not only the amount payable under the decree in execution but also under decrees in favour of creditors who applied for rateable distribution and does it mean that O. 21, R. 89 should be interpreted differently when there are applications for rateable distribution and when there are no applications? Order 21, R. 89 does not at all refer to S. 73, Civil P. C. and it is difficult to see its relevancy in deciding an application under O. 21, R. 89, Civil P. C. The two provisions are entirely different dealing with different

subjects and there is no occasion for reading one in derogation of the other. The Courts cannot be permitted to read into O. 21, R. 89 something which it does not contain. As already observed above the creditors claiming rateable distribution have no *locus standi* in dealing with an application under O. 21, R. 89, Civil P. C. and that O. 21, R. 92 of the Code being imperative the sales have to be set aside if the provisions of O. 21, R. 89 as they stand in the Code of Civil Procedure are complied with. The conclusion of the learned Judge in Para. 7 of the order is wrong.

[21] The result is that the order of the lower Court rejecting the judgment-debtors' application for setting aside sales and consequently confirming the sales is set aside. The case is remanded to the lower Court for fresh decision with advertence to what is observed in Para. 18 above. The appeal is allowed with costs.

D.H. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 131 *[C. N. 47.]*

GRILLE C. J. AND HIDYATULLAH J.

Gendulal s/o Mungalal — Defendant — Appellant v. *Jangli s/o Ramchandra — Plaintiff—Respondent.*

Second Appeal No. 650 of 1942, Decided on 11-11-1946, from appellate decree of Dist. Judge, East Berar, Amraoti, D/- 29-8- 1942.

Hindu law — Joint family — Debt—Joint family business— Promissory note executed by manager for ancestral business — Adult member joining — All adults made defendants in suit based upon it — Minor members are bound by decree.

Where a person executes a promissory note as the manager of a joint Hindu family for the purposes of financing an ancestral joint family business, decree passed upon the promissory note is binding on the other members of the joint family, including the minor ones. [Para 5]

The fact that the other adult members had joined in the execution of the promissiory note and were made defendants in the suit would not lead to the conclusion that the signature of the manager is referrable only to his personal capacity. Signature of the other adult members is obtained by the creditor merely to safeguard himself. [Para 13]

In a suit based upon such a promissory note the minor member of the joint family is not a necessary party. The adult members who had joined in the execution of the promissory note and are made the defendants in the suit, act as managers on behalf of themselves and the minor member of the family : 20 A. I. R. 1933 Nag. 160 held modified by 21 A. I. R. 1934 P. C. 4; Second App. No. 64 of 1940, *Ref* ; *Case law referred.* [Paras 14, 15]

Cases referred:

1. ('33) 29 N. L. R. 312 : 20 A. I. R. 1933 Nag. 160 : 144 I C. 411, Motilal Lad v. Punjaji.
2. ('34) 30 N. L R. 60 : 21 A. I R. 1934 P. C. 4 : 61 I. A. 90 : 147 I. C. 1 (P. C.), Abdul Majid Khan v. Mt. Saraswatibai.
3. Second Appeal No. 64 of 1940, D/- 27-4-1946, Narayan Prasad v. Ram Kunwar.
4. ('19) 46 Cal 663 : 5 A. I. R. 1918 P. C. 146 : 46 I. A. 33 : 50 I C. 216 (P. C.), Sadasukh Janki Das v. Sir Kisben Pershad.
5. ('23) 10 A I. R. 1923 Bom. 244 : 72 I. C. 242, Vithalrao v. Vithalrao.
6. (1900) 23 Mad. 597, Krishna Ayyar v. Krishnasami Ayyar.
7. ('07) 11 C. W. N. 139, Baisnab Chandra v. Ramdhon.
8. ('22) 44 All. 393 : 9 A. I. R. 1922 All. 116 : 66 I. C. 150, Krishnand Nath v. Raja Ram Singh.
9. ('23) 45 All 434 : 10 A. I. R. 1923 All. 424 : 73 I. C. 1018, Raghunath Singh v Sri Narain.
10. ('24) 46 All. 709 : 11 A. I. R. 1924 All. 908 : 79 I C. 1001, Chetan Singh v Sartaj Singh.
11. ('20) 47 Cal. 924 : 7 A. I. R. 1920 P. C 1 : 47 I. A. 91 : 56 I. C. 274 (P. C.), Ganpatlal v. Bindbasini Prashad.
12. ('29) 8 Pat. 788 : 16 A. I. R. 1929 Pat. 741 : 121 I. C. 330, Lal Chand v. Seogobind.

V. V. Kelkar—for Appellant.
K. V. Brahma—for Respondent.

Judgment.—This is a second appeal from the reversing judgment and decree of Mr. M. G. Nashikkar, District Judge, East Berar, Amraoti, in Civil Appeal No. 11-A of 1941, decided on 29-8-1942.

[2] The suit out of which this appeal arises was brought by Jangli (plaintiff-respondent) against one Gendalal (defendant-appellant) for partition of certain joint family property obtained by Gendalal in auction sales following decrees passed in various suits. The dispute related to many items of property but the present appeal is concerned with a house which was described in the plaint as item (A). There is also a cross-objection filed by the respondent for damages, for use and occupation of the house but the cross-objection was not pressed, and we say nothing about it except that it is dismissed with costs.

[3] The suit really is one for declaration that one-fourth share in the house in item (A) belonged to the plaintiff and that the auction purchaser could not get any right in that share inasmuch as the decree was passed only against the uncles of the plaintiff. No objection was taken to the frame of the suit and, therefore, it is not necessary to say anything about it.

[4] The plaintiff alleged that Civil Suit No. 109 of 1925 of the Court of Subordinate Judge, First Class, Ellichpur, was filed by Girdhar Kirad against his uncles Gurudin, Rama and Gangadin in their personal capacity and that his share was not affected by the decree passed in that suit. That suit was brought by Girdhar Kirad on the basis of a promissory note executed by Jangli's three uncles, namely, Gurudin, Rama and Gangadin The promissory note in the suit is Ex. D-8 in this matter Girdhar Kirad had at first also joined Jangli in the suit, *vide* Ex. D-7, but later on he applied that Jangli should be discharged, and the suit, therefore proceeded against the

remaining three defendants. The decree was passed in the suit on 18-11-1925. The decree is not on record but a certified copy of the judgment is Ex. P-4. The house in question was brought to sale and was purchased by the present appellant and he has been in possession of it from 25-8-1928. At all material times, up to 25-8-1928 the present plaintiff (respondent in this matter) was a minor. The sole question in this case is whether the decree in Civil Suit No. 109 of 1925 is binding upon the plaintiff (minor) and whether the share of the minor in the house had been conveyed to Gendulal the present appellant, in the execution sale that followed it.

[5] The case of the defendant was that Gurudin, the uncle of the plaintiff, Jangli, was admittedly the manager of the joint Hindu family of which the plaintiff was a member and which had not been divided and in which there was no partition up to the date of the suit. The promissory note was executed by the uncle and his two brothers, Rama and Gangadin, as manager and adult members of the joint Hindu family, and the uncle being admittedly the manager of that family, the debt was binding upon the whole family including the plaintiff. It was also urged by the defendant that the money was borrowed by the joint family for the purpose of financing a stationery and a *pan bidi* shop which was an ancestral business. This business was started by Sital, the grandfather of the plaintiff and the father of defendant 3, in Civil Suit No. 109 of 1925.

[6] The case of the plaintiff was that he was not a party to the suit as he was discharged before the termination thereof and, therefore the decree which was ultimately passed was not binding upon him. He also contended that there was nothing to show that the suit was brought against Gurudin in a representative capacity, and that after the discharge of the present plaintiff the suit must be deemed to have proceeded against the remaining three defendants in their personal capacity only.

[7] Both the learned lower Courts below have found that the stationery and *pan bidi* shop was an ancestral business of this joint Hindu family and that Sital, the grandfather of the plaintiff who started this shop, as well as the uncles of the plaintiff were in the habit of borrowing money for financing the shop. The learned first appellate Court also gave a finding that this debt was raised for the business of the shop. These findings are binding upon us and we, therefore, start with the assumption that this was a joint family debt.

[8] The learned Court of first instance found in favour of the defendant, Gendulal, and held on the evidence in the case that the share of the plaintiff was also affected. But the learned first appellate Court came to the conclusion that the share of the plaintiff was not conveyed to the auction-purchaser. The present appeal has been preferred by the defendant in the suit.

[9] It is necessary at this stage to say that a manager of a joint Hindu family can bind the other members by his signature provided it can be shown that he was acting as a manager. In 29 N. L. R. 312[1] it was held by Niyogi A. J. C., that the members of a joint Hindu family cannot be held liable if the promissory note does not show that the member signing it did so in the capacity of a manager. This view of law must be held to be modified by the observations of the Privy Council in 30 N. L. R. 60[2] where their Lordships say :

"The promissory notes were signed by Pandurang in his own name and not in the name of the firm, and in their Lordships' opinion the promissory notes being signed by Pandurang in his own name is equally consistent either with a borrowing by him for his own individual purposes, or a borrowing for the purposes of the joint family business, ..."

In Second Appeal No. 64 of 1940[3] it was recently held by Niyogi J., Officiating Chief Justice, and one of us that the view in 29 N. L. R. 312[1] must be read as having been modified by the Privy Council decision. In the case referred to here their Lordships of the Privy Council declined to infer that in such cases there is a presumption that the borrowing is for the purpose of the joint family business. Reading the earlier case 46 Cal. 663[4] and 30 N. L. R. 60[2] together it is apparent that when the signature of a manager of a joint Hindu family appears on a document it neither signifies that the debt was taken for the joint family nor that the manager was acting *qua* manager. Either position can be established *aliunde*. In the present case there is a finding that the debt was a joint family debt. The learned District Judge, however, considered that the existence of the signatures of the other adult members of the joint family indicated that the manager had not signed *qua* manager but had signed in his personal capacity and that the other adult members had also signed in their personal capacity. He also held that the fact that after 1925 the creditor started insisting upon the signatures of the other brothers who had recently attained majority clearly showed that the debts were taken in their personal capacity and, therefore, were not binding upon the rest of the family.

[10] In this the learned District Judge was clearly wrong. He had already given a finding that the debt which was the subject-matter of the suit was borrowed for the purpose of the ancestral business which was being continued by the joint family after the death of Gurudin's

father. He had also held that Gurudin was admittedly the manager. This finding having been given, the conclusion based upon the evidence of the existence of other signatures upon the promissory note is inconsistent with it. The learned District Judge also held that a manager cannot act in a dual capacity at the same time. He held that the signature of Gurudin must be related either to his position as a manager of the joint family or must be taken to have been made in his personal capacity.

[11] In the case of a manager of a joint family his signature may not only bind the joint family but may even bind him personally if he owns property besides the joint family property.

[12] It was held in A. I. R. 1923 Bom. 244[5] that if the suit is based on a promissory note the other members of the joint Hindu family are not bound unless the plaintiff sues the family on the debt. The reasons given by their Lordships were that many difficulties would otherwise arise in a suit of this kind, not because of any clash between the two capacities of the manager but because of the defence which the other members of the joint family could raise if the suit were based on the debt. The Bombay view does not appear to have been endorsed in several other cases and the law on the subject summarised by Mulla in his Principles of Hindu Law, Edn. 9, at p. 269, is in the following words:

"It has been held in several cases that where the manager of a joint family borrows money on a promissory note for a joint family business or to meet a joint family necessity, the other members of the joint family may be sued on the note, though they are not parties to the note, but their liability is limited to their share in the joint family property unless they can be treated as contracting parties. If the suit is filed before partition, the creditor may sue the manager only and seek for a declaration that the whole joint family property is liable or he may implead the other members also. After partition, he must implead the other members in order to enable him to proceed against the portions allotted to them."

This view of the law is based upon 23 Mad. 597,[6] 11 C. W. N. 139,[7] 44 ALL. 393[8] and 45 ALL. 434.[9]

[13] It is obvious from this that a manager borrowing upon a promissory note may expose the other members to a liability on the note itself. In the present case the debt was for the family business and signature of the manager must, therefore, be referable to his capacity as the manager. The signatures of the other members of the family were obtained by the creditor merely to safeguard himself.

[14] The only question that remains now to be considered is what is the effect of the conduct of the plaintiff in Civil Suit No. 109 of 1925 in asking the Court to discharge the present plaintiff and the order passed by the Court discharging the present plaintiff from the earlier suit. It is to be remembered that for the purpose of suits filed against a joint family it is not necessary to join all the members. In 46 ALL. 709[10] it was held that where all the adult members of a joint Hindu family join in executing a mortgage of the joint ancestral property it is a legitimate presumption that they are acting as managers on behalf of themselves and the minor members of the family. The latter are not necessary parties to the suit. In 47 Cal. 924[11] the minors had brought a suit that the right of redemption was not lost to them by reason of a decree having been passed in a suit in which they had not been properly represented. Their Lordships held that inasmuch as the minors admitted the mortgage and that it was binding upon them they could not avoid the consequences of the sale by saying that they were minors at the time of the sale and that their interests were not effectively represented. Their Lordships held that the equity of redemption was extinguished because the sale was not set aside. In our opinion the same results would follow where the Court after considering the facts holds that the debt was a joint family debt and was binding upon the family. In such a case the absence of the minor members of the family from the array of defendants would not serve to preserve their rights.

[15] The plaintiff in this suit further contended that the manager was not described as such in the plaint. In 8 Pat. 788[12] it was held that in a suit against the joint Hindu family the *karta* may effectively represent the other members of the family even though he is not described as such in the records of the case. In our opinion, the failure to implead the present plaintiff in the array of the defendants makes no difference to the decree which was passed in the Civil Suit No. 109 of 1925 and the interest of the plaintiff was conveyed in the sale which took place on that decree unless the plaintiff can set aside that sale on some ground. The present claim of the plaintiff that it was not a joint family debt and that Gurudin did not execute the promissory note in his capacity as a manager of the joint Hindu family has been negatived by the two Courts below. The finding given by the learned District Judge that the signature of Gurudin is referable only to his personal capacity is clearly not tenable in view of the finding given by him as to the nature of the debt and the wrong assumption of law that the signature could not be made in his dual capacity. The result is that the appeal succeeds, the decree of the lower appellate Court is reversed and the decree of the trial Court is substituted in its place. The appeal is allowed with costs.

R.G.D. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 134 *[C. N. 48.]*

PADHYE J.

Mahadeo Vyankati — *Appellant* v. *Abbasbhai Hasanali and others* — *Respondents.*

Misc. Second Appeal No. 136 of 1945, Decided on 10-2-1947, from order of First Addl. Dist. Judge, Amraoti, D/- 21-3-1945.

(a) Berar Land Revenue Code (1928), S. 179 (a) and (b)—Occupant of sub-division selling his portion—Superior right of pre-emption between other occupant of same sub-division and occupant of other sub-division of same survey number.

Under S. 179 (a), on a sale of his portion by one of the occupants of a sub-division *A* of a survey number, the other occupant of the same sub division has a superior right of pre-emption, to that of the occupants of the other sub-division *B* of the same survey number, even though they have jointly a larger interest in the survey number. It is only when no occupant of the sub-division *A* wishes to exercise the right of pre-emption, that the cl. (b) of S. 179, comes for consideration. [Para 5]

(b) Berar Land Revenue Code (1928), S. 173 — Scope—"Occupant" in S. 54 and S. 173— Scope of —Co-heirs under Mahomedan law, cannot claim right of pre-emption jointly.

Section 173 is meant only to enlarge the definition of the term 'occupant' in S. 54 of the Code for the purpose of Ch. XIV, dealing with pre-emption. For the purposes of pre emption, a person i. e., a juristic person is an occupant in a survey number if he has a right of an occupant, whether in his sole right or jointly with others. This section is relevant only to determine the right of a person to pre empt. It is not relevant for the purposes of determining priority between rival pre-emptors, which in some cases depends on the extent of interest which the rival occupants claiming the right of pre-emption have in the survey number. The right to pre-empt is to be distinguished from priority amongst persons entitled to pre-empt; the former does not depend upon the extent of interest held by an occupant in the survey number, while the latter, in some cases, does. The basic principle of pre-emption, at least under the Berar Land Revenue Code, is that it is an individual right of an occupant and can be exercised by him for himself and in his own right. It is not a joint right in favour of several occupants and cannot be exercised by them jointly in joint interest even though the interest which they held in the survey number may be undivided. Two or more occupants cannot thus form a group and exercise the right of pre-emption jointly and cannot claim priority on the strength of their joint interest in the survey number. Where the plaintiffs are co-heirs under Mahomedan law for the purposes of determining priority under cl. (b) of S 179 of the Code, the interest of one of them has to be taken into consideration and not the interests of all the co-heirs jointly. [Paras 7, 9 and 10]

W. B. Pendharkar — for Appellant.

G. T. Bhide — for Respondents.

Judgment. — This miscellaneous second appeal arises out of Civil Suit No. 357-A of 1944 instituted by respondents 1 to 3 with which was consolidated the appellant's Civil Suit No. 356-A of 1944. Both suits were for the enforcement of a right of pre-emption under the Berar Land Revenue Code arising on account of a sale of 2.20 acres out of the sub-division 44/1 by Annapurnabai under the sale deed dated 12-7-1943 for Rs. 300.

[2] The facts which need be mentioned are these. Survey No. 44 of mauza Pardi in Taluq and District Amraoti is divided into two sub-divisions viz. 44/1 and 44/2. Mt. Annapurnabai was an occupant in sub-division No. 44/1 owning 2.20 acres, a part of the sub-division, while the appellant and his brother, Awadhoot own 3.15 acres in the same sub-division. Hasanali, father of respondents 1 to 3, owned 2.29 acres in the sub-division No. 44/2 and the same is inherited by respondents 1 to 3 under the Mahomedan law as co-heirs, each of them having 1/3rd share of that area which is cultivated jointly i. e., the area is not divided by metes and bounds.

[3] Respondents 1 to 3, on the one hand and the appellant on the other claimed a preferential right of pre-emption; respondents based their claim on the ground that they have jointly a larger interest in the survey number while the appellant based his claim on grounds, firstly that he is an occupant in the sub-division 44/1 itself and secondly that his interest in the survey number is larger than any one of the plaintiffs. The Courts below held that the respondents have a preferential right to pre-empt. Civil Suit No. 357-A of 1944 was decreed by the first Court and that decree is maintained by the first appellate Court.

[4] The sole question in this second appeal is whether the appellant or the respondents have a preferential right of pre-emption on the undisputed facts stated above. In my opinion, the question must be answered in favour of the appellant.

[5] I am surprised to find that the Courts below have missed a point which, to my mind, is obvious, in determining priority under S. 179, Berar Land Revenue Code. According to clause (a) of S. 179, the occupant who has the largest interest in the sub-division, a portion of which is being transferred, has priority in the absence of any occupant in that sub-division who is related to the occupant transferring his or her share. It is not alleged that any relation of Annapurnabai is an occupant in sub-division No. 44/1 and therefore obviously the appellant who is an occupant in that sub division has a right to pre-empt. In fact, no question of priority arises in the case between the appellant and respondents 1 to 3 as the latter are not the occupants in the sub-division though they are occupants in the survey number. Claue (b) of S. 179, Berar Land Revenue Code comes for consideration only when no occupant in the sub division wishes to exercise the right of pre emption. Thus, the appellant, an occupant in the sub-division, has decidedly a superior right of pre-emption and it is only if he fails to pre-empt, that respondents 1 to 3 have the right of pre-emption.

[6] The Courts below have determined the question of priority, treating the case as one falling under cl. (b) of S. 179. As pointed out above, cl. (b) has no application to the case. Assuming however that the case was governed by cl. (b) of S. 179, still the decisions of the Courts below are entirely wrong. The Courts below have not correctly appreciated the fundamental principles of pre emption under the Berar Land Revenue Code, and the appellate Court failed to comprehend the scope and purpose of S. 173 of the Code.

[7] Section 173, Berar Land Revenue Code is meant only to enlarge the definition of the term 'occupant' in S. 54 of the Code for the purpose of Ch XIV, dealing with pre-emption. For the purposes of pre emption, a person i. e. a juristic person is an occupant in a survey number if he has a right of an occupant, whether in his sole right or jointly with others. This section is relevant only to determine the right of a person to pre-empt It is not relevant for the purposes of determining priority between rival pre-emptors, which in some cases depends on the extent of interest which the rival occupants claiming the right of pre-emption have in the survey number. The right to pre-empt is to be distinguished from priority amongst persons entitled to pre-empt; the former does not depend upon the extent of interest held by an occupant in the survey number, while the latter, in some cases does. The learned Judge of the lower appellate, Court has not kept this distinction in view.

[8] The Judge of the lower appellate Court has relied on a passage from Hirurkar's Treatise on Berar Land Revenue Code at p. 386. That passage is in the notes under S. 173 and is not relevant in the matter of determining priority under S. 179 of the Code. The learned author meant only to point out that each one of the co-owners or the tenants-in-common is under S. 173, a person having the right of an occupant for the purpose of exercising the right of pre-emption under Ch. XIV, Berar Land Revenue Code.

[9] The basic principle of pre-emption, at least under the Berar Land Revenue Code, is that it is an individual right of an occupant and can be exercised by him for himself and in his own right. It is not a joint right in favour of several occupants and cannot be exercised by them jointly and in joint interest even though the interest which they hold in the survey number may be undivided. Two or more occupants cannot thus form a group and exercise the right of pre-emption jointly and cannot claim priority on the strength of their joint interest in the survey number. It is therefore that S. 173, Berar Land Revenue Code has declared a person having the right of an occupant jointly with others to be an occupant so that, if he desires, he may be able to exercise the right of pre-emption for himself. The Berar Land Revenue Code does not permit a decree for pre-emption being passed in favour of more persone than one. This is clear from sub-section (2) of S. 179 of the Code. By virtue of S 173, of the Code each one of the three plaintiffs is an occupant entitled to exercise the right of pre-emption. They are moreover equally entitled to the right but no decree can be jointly passed in their favour. Under sub-section (2) of S. 179, the person to exercise it shall have to be determined by lot.

[10] In the absence of division by metes and bounds, the position of co-heirs under the Mahomedan law is that of tenants-in common. They have a distinct interest though possession and management may be joint. They are not joint tenants and there is thus no unity of interest, which is to be distinguished from the unity of possession, between them. Thus the interest of each one of the three plaintiffs is 1/3rd of 2.29 acres, i. e. roughly 36 *gunthas*. For the purposes of determining priority under cl. (b) of S. 179 of the Code, the interest of one of the plaintiffs i. e. 36 *gunthas* has to be taken into consideration and not the joint interest of the three plaintiffs.

[10a] The appellant and his brother, Awadhoot own 3.15 acres in sub-division NO. 1 of survey NO. 44. The lower appellate Court has not permitted the appellant to reply on the position that he and his brother Awadhoot are co-parceners, and that position is not also necessary for the decision of this appeal. The interest of the appellant is 1/2 of 3.15 acres i. e. 1 27½ as against 36 *gunthas* of an individual plaintiff respondent. The appellant has thus the largest interest in the survey number and is entitled to priority even under cl. (b) of S. 179, assuming that priority is to be determined under that clause.

[11] The result is that the appeal succeeds and the decree of the lower appellate Court is set aside with costs. A fresh decree shall now be drawn up giving the appellant a first right of pre-emption if he deposits within one month from the date of this decree Rs. 300 and, on such deposit being made, the interest to be pre-empted should be placed in his possession The appellant is also authorized to deduct his costs certified against respondent 4, from the amount of Rs. 300 deposited by him. In the event of the appellant's failure to exercise the right of pre-emption in compliance with the directions of the decree, his suit would stand dismissed with costs and the trial Court should then decide by lot the person (out of the plaintiffs) who shall be entitled to exercise the right. The person so

determined would be entitled to exercise the right of pre-emption and to be placed in possession of the right on his depositing the amount of Rs. 300 within one month of the date of determination. In the event of a failure on the part of the person so determined to pre-empt, Civil Suit No. 357-A of 1944, would be dismissed with costs.

R.G.D. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 136 *[C. N. 49.]*

BOSE J.

Kamlu Amrita Marathe—Judgment-debtor-Appellant v. *Eknath Ananda Marathe—Decree-holder—Respondent.*

Misc. Second Appeal No. 80 of 1945, Decided on 18-12-1946, from order of Addl. Dist. Judge, Buldana, D/- 22-3-1945.

(a) C. P. and Berar Relief of Indebtedness Act (14 [XIV] of 1939), S. 13 (3) —Lahan-gahan mortgage—During pendency of suit on, amount scaled down and instalments granted—Mortgagee obtaining certificate under S. 13 (3) — Civil Court can enforce mortgage in terms thereof—Payment of balance due—Effect of.

While the suit on a lahan-gahan mortgage was pending, the mortgagor applied to the Debt Relief Court which scaled down the amount due and made it payable by instalments. Two instalments having been defaulted the mortgagee applied to the Deputy Commissioner under S. 13 (3) and obtained a certificate and applied to the Civil Court for enforcement of the mortgage and for possession of the property:

Held that (1) by virtue of the provisions of S. 13 (3) the Civil Court had jurisdiction to enforce the mortgage in terms thereof as if a final mortgage decree had been passed in terms of the mortgage: 33 A. I. R. 1946 Nag. 45 and S. A. No. 238 of 1944, *Approved;* Misc. S.A. No. 173 of 1944, *Rel. on.* [Para 8]

(2) No doubt the mortgage being a lahan-gahan the Court could have exercised its discretion under O. 34, R. 4 (3) in favour of the mortgagor by allowing him to redeem the property by depositing the amount due and refusing a decree for foreclosure in favour of the mortgagee. [Para 11]

(3) But on the grant of a certificate by the Deputy Commissioner under S. 13 (3) the final mortgage decree came into existence by operation of law namely S. 13(3) and the Civil Court at that stage was merely an executing Court and therefore could not exercise the discretion which O. 34, R. 4 (3) conferred on it before the stage of a final decree. [Para 13]

(4) Therefore the only way in which the Court could proceed was to give effect to the mortgage as if a final mortgage decree had been passed in terms thereof. As the mortgage provided that if the mortgagor failed to pay off the mortgage money punctually the property would stand foreclosed the mortgagee was entitled to be put in possession. [Para 14]

(b) C. P. and Berar Relief of Indebtedness Act (14 [XIV] of 1939), S. 13 (3)—Certificate under—Civil Court cannot go behind certificate.

The Civil Court when executing the order of the Debt Relief Court by virtue of the provisions of S. 13 (3) cannot go behind the Certificate of the Deputy Commissioner under S. 13 (3). [Para 15]

(c) C. P. and Berar Relief of Indebtedness Act (14 [XIV] of 1939), S. 13 (3) — Certificate under—Failure to state that claim shall be enforced as if a decree had been passed—Effect of.

All that S. 13 (3) requires the Deputy Commissioner to do is to issue the certificate. Once he does that the law comes into operation and directs that the claim shall be enforced as if a decree had been passed. It does not matter whether the Deputy Commissioner says this or not in the certificate. [Para 17]

Case referred:—

1. ('45) I. L. R. (1945) Nag. 973 : 33 A. I. R. 1946 Nag. 45, Vithal v. Laxman.

S. N. Kherdekar—for Appellant.
N. B. Chandurkar—for Respondent.

Judgment.—The main contention raised in this appeal revives a matter which has been settled by three Judges of this Court in three separate cases regarding the interpretation of certain sections of the Relief of Indebtedness Act. The facts are as follows.

[2] The appeal is by the judgment-debtor. He executed a mortgage on 2-11-1926 in favour of the decree-holder-respondent. The decree-holder filed Civil Suit No. 362-A of 1940 on the basis of this mortgage in the Civil Court. On 15-10-1940, while the suit was pending, the judgment-debtor (mortgagor) applied to the Debt Relief Court for a scheme. The claim of Rs. 1340-4-0 made in the Civil Court was scaled down to Rs. 1226-0-0 by the Debt Relief Court on 26-11-1941. This sum was made payable in 25 instalments, the first 24 being of Rs. 50-0-0 each and the last of Rs. 26-0-0.

[3] Two instalments were defaulted, and accordingly the decree-holder applied to the Deputy Commissioner under S. 13 (3), Relief of Indebtedness Act for a certificate. The certificate was granted on 12-9-1941. Accordingly, the decree holder filed the application, out of which this appeal arises seeking execution and asking for possession of the property. The application was made on 11-10-1944.

[4] The judgment-debtor objected that the decree-holder was not entitled to possession. According to him, the effect of the Debt Relief Court's order was to wipe out the original contract and to leave in its place what might be termed a simple money decree payable by instalments. When the Deputy Commissioner issued the certificate under S. 13 (3) of the Act all that happened was that a sort of exigibility clause came into force and the whole amount payable under this simple money decree became recoverable at once. The contract, however was not revived. Therefore, the lower Court had no power to execute this decree as if it was a mortgage decree and place the decree-holder in possession.

[5] This contention was overruled by the lower Court, and the learned Judge directed the decree-holder to be placed in possession. An appeal to the lower appellate Court against this

failed, and accordingly a second appeal was filed here. This is the appeal I am now hearing. An order for stay was obtained on 24-4 1945, and shortly afterwards, on 1-5-1945, the judgment-debtor deposited the whole of the balance due under the Debt Relief Court's order into Court. It is contended that this completely satisfies the decree-holder's claim, and accordingly the order directing possession to be delivered to the decree-holder should be reversed.

[6] The question whether the Civil Courts have power to execute an order of a Debt Relief Court under S. 13 (3) of the Act as if a mortgage decree has been passed, has been considered by Pollock J. in I.L.R. (1945) Nag 973,[1] by Grille J. in Second Appeal No. 238 of 1944 and by Hidayatullah J. in Miscellaneous Second Appeal No. 173 of 1944. All three learned Judges are agreed that such a decree is possible, and the later two cases follow the earlier one. Pollock J.'s decision can be gathered from the head-note in the reported case which is to this effect :

"Where there has been a preliminary decree for foreclosure, an order passed by the Deputy Commissioner under S. 13(3), C. P. and Berar Relief of Indebtedness Act has the effect of a final foreclosure decree."

[7] It is argued that this takes no notice of the fact that the effect of the Debt Relief Court's order is to wipe out the original contract. The mortgage was not for instalments and accordingly the moment the Debt Relief Court scales down the debt and makes it payable by instalments it wipes out the original contract and substitutes something different for it. The Act nowhere provides that the original contract shall be revived, and as S. 13 (3) speaks of the "balance remaining due" being recoverable it is evident that there was no intention to have the original contract revived.

[8] It is true the rulings cited do not refer to this exact point but they have dealt with the effect of the words "the balance remaining due shall be recoverable..." and the learned Judges have reached the conclusion that the section though inartistically worded is reasonably plain and means that in the case of a mortgage what has to be executed is a mortgage decree. In my opinion, the words "in the case of a mortgage, lien or charge as if a final decree had been passed by a Court of civil jurisdiction" would be meaningless if we were no longer to look to the original contract. The very fact that the different types of contract, namely, mortgage, lien or charge, have been set out in the section indicates that they have still to be looked to and given effect to as far as is possible after the Debt Relief Court's order scaling down the debt is taken into consideration. I respectfully agree with the three decisions above cited that in the case of a mortgage one must look to the mortgage and enforce the claim in terms of the mortgage.

[9] An examination of the cases cited will show that a preliminary decree had been passed in the first two of the cases. In the present case there has been no preliminary decree. The application to the Debt Relief Court was before that stage could be reached in the Civil Court. Accordingly to that extent the first two rulings are not in point. But the third ruling is. In that case no suit had been filed on the mortgage, and accordingly it is in point here. I respectfully agree with Hidayatullah J. that in such a case the effect is the same as when a preliminary decree has been passed.

[10] The next point urged is that this is a *lahan-gahan* mortgage, and accordingly the Court has a discretion under O. 34, R. 4 (3), Civil P. C. either to pass a decree for foreclosure or one for sale; and it is argued that as the full amount due under the Debt Relief Court's order has now been deposited in Court, the discretion should be exercised in favour of the mortgagor, and if that is done then the order directing delivery of possession to the decree-holder will be wrong.

[11] In my opinion, the stage at which the Court could exercise its discretion is gone. Had the judgment-debtor pursued his remedies in the Civil Court he would have been right in his present contention because the mortgage we are considering is admittedly a *lahan-gahan* mortgage. But he chose to go beyond that and to go to the Debt Relief Court. He was not bound to go, but as he was given an option he chose to exercise the option and go there. Accordingly, he is now bound by the special rules which obtain when such a course is pursued.

[12] The law, once that is done, so far as the present matter is concerned, is contained in S. 13 (3), Relief of Indebtedness Act. That lays down that once the Deputy Commissioner has given his certificate then,

"the balance remaining due shall be recoverable as if a decree, and in the case of a mortgage.... as if a final decree, had been passed by a Court of civil jurisdiction."

[13] Now what kind of final decree? It is evident that the Court executing this decree cannot pass the final decree. That is done by the law, namely, S. 13 (3) of the Act. The Civil Court at that stage is merely an executing Court, and therefore cannot exercise the discretion which O. 34, R. 4 (3) confers on the Court before the stage of final decree. Once we reach that position then it becomes obvious that the only way in which the section can be reasonably interpreted

is to mean that one must look to the mortgage and execute the "decree" in terms of it.

[14] The mortgage here is a *lahan-gahan* mortgage and gives no option to the judgment-debtor or to the decree-holder. It says, "If I fail to pay off the amount punctually then the above immovable property will stand foreclosed *(lahan-gahan)*." The matter will, therefore, have to be construed as if the decree which the Court is now supposed to be executing contained those words. If it contained those words then there is no doubt that the order directing delivery of posse-sion is right. In my opinion, that is the only way in which we can proceed, and therefore the order of the lower Court was right.

[15] It was then argued that before a final decree can be passed notice should, or at any rate ought, to be issued to the judgment-debtor. Whether such a notice is required by the law is a matter of dispute, and the various High Courts are not agreed on the point. But that apart, I am clear that the Civil Court when executing the order of the Debt Relief Court cannot go behind the Deputy Commissioner's certificate. The only person who could issue the notice would be the Deputy Commissioner because the law regarding execution in the Civil Court does not take effect until he has issued his certificate. That being the case, and the Deputy Commissioner acting under the Debt Relief Act not being subordinate to this Court, I have no power to go behind his certificate.

[16] It is also argued that the certificate of the Deputy Commissioner here is vague and therefore no executable decree is present before the Court. The certificate follows the wording of the section and is in these terms:

"I hereby order that the order dated 26-11-1941 of the Debt Relief Court, Buldana, fixing the instalments in case No. 275/1941 shall cease to have effect and the balance Rs. 1176-0-6 and costs Rs. 1-8-0 remaining due shall be recoverable as if a decree, and in the case of a mortgage, lien, or charge, as if a final decree, had been passed by a Court of civil jurisdiction."

[17] It is to be observed that the latter part of this certificate is in the alternative, and therefore it is argued it is inexecutable. In my opinion, the latter part of the certificate should be ignored. It is evident that S. 13 (3) has not been happily worded, but in my view all that it requires the Deputy Commissioner to do is to issue the certificate. Once he does that then the law comes into operation and he has nothing further to do. It is a law which directs that the claim shall be enforced as if a decree had been passed. It does not matter whether the Deputy Commissioner says this or not. That is not for him. That being the case, there being a certificate here and there being a mortgage, we have to enforce this mortgage according to its terms and regard the matter as if a decree in terms of the mortgage had been passed. The appeal fails and is dismissed with costs.

G.N. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 138 *[C. N. 50.]*

POLLOK AND SHEVDE JJ.

Jainab Begum w/o Sarfaraj Ali Beg — Plaintiff — Appellant v. *Faryazuddin Masiuddin and another — Defendants — Respondents.*

Second Appeal No. 212 of 1943, Decided on 30-7-1947, from Appellate decree of 3rd Addl. Dist. Judge, Amraoti, D/- 30-11-1942.

Berar Inam Rules, R. 5 — Inam to "Claimants and their lineal descendants" — Parties Shias — Daughter's daughter is lineal descendant.

An *inam* was granted for personal maintenance "to the claimants and their lineal descendants in perpetuity." The claimants were Shias and the question was whether a daughter's daughter was a lineal descendant:

Held, that the claimants being Shias, the daughter's daughter was as much an heir as a son's son. The daughter's daughter was therefore a lineal descendant: 17 A. I. R. 1930 P. C. 41 and 16 A. I. R. 1929 P. C. 162, *Rel. on.* [Para 4]

Cases referred:—

1. ('30) 26 N. L. R. 119 : 17 A. I. R. 1930 P. C. 41 : 121 I. C. 229 (P.C.), Sabdar Ali v. Maksudali Beg.
2. ('29) 16 A. I. R. 1929 P. C. 162 : 116 I. C. 608 (P. C.), Bhimnath Missir v. Tara Dai.

P. N. Rudra — for Appellant.
M. Y. Shareef — for Respondents.

Judgment. — This appeal arises out of a dispute over certain *inam* fields. The parties are descended from Gulam Ali, one of the original grantees, as shown in the following genealogical tree:

GULAM ALI
|
Imdad Ali
|
Hasan Ali
|
Munawar Ali
|
Chandni Begum — Imami Begum (Defendant).
|
Jainab Begum (Plaintiff).

[2] By a suit in 1915, the shares of Chandni Begum and Imami Begum on the one hand and Munawarali on the other were partitioned, and by a second suit in 1923 the shares of Chandni Begum and Imami Begum were partitioned *inter se*. Chandni Begum is now dead, and the question is whether her daughter, the plaintiff, is entitled to succeed to her share.

[3] The *inam* was granted for personal maintenance and is governed by R. 5 of the Berar Inam Rules, except in so far as the special terms of the grant apply. The *inam* was granted "to the claimants and their lineal

descendants in perpetuity." The question then is whether a daughter's daughter is a lineal descendant.

[4] The parties are Shias, and under the Shia law the daughter's daughter is as much an heir as a son's son, as no distinction is made between agnates and cognates. In 26 N. L. R. 119,[1] their Lordships of the Judicial Committee, dealing with an *inam* governed by R. 5, held that the words in that rule 'Successions limited to direct lineal heirs and undivided brothers' could not mean that the succession was limited to lineal male heirs, and that if you wished to limit the word 'heirs' either to the male or female line it was essential that you should do so in direct terms or by necessary implication. Again, in A. I. R. 1929 P. C. 162,[2] their Lordships held that the term "lineal descendants" includes all descendants and is not restricted to male descendants. Those two decisions conclude the matter.

[5] The appeal must therefore be allowed. There will be a decree in the plaintiff's favour with costs throughout.

D.S. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 139 *[C. N. 51.]*

SHEVDE J.

Lalchand Nathuram—Decree-holder—Appellant v. *Nandu s/o Paltu and another — Respondents.*

Misc. Second Appeals Nos. 28, 27, 29 and 30 of 1946, Decided on 28-7-1947, from order of Addl. Dist. Judge, Damoh, D/-19-10-1945.

(a) C. P. Tenancy Act (1 [I] of 1920), Ss. 55 (1) (d) and 58-A (introduced by the amending Act of 1940)—Sections are not retrospective—Rent decree obtained by lambardar — Surrender of holding to newly appointed lambardar — Execution of decree after commencement of amending Act.

Before the commencement of the amending Act of 1940, *A* obtained a decree for arrears of rent against a tenant of an occupancy holding in a village of which *A* was the lambardar. *B*, the mortgagee of the village, having purchased the village in execution of his mortgage decree, was subsequently appointed the lambardar of the village and the tenant surrendered the holding to him. *A* having sought the execution of the rent decree by sale of the holding after the commencement of the amending Act of 1940 :

Held (1) that the new Ss. 55 and 58-A, not being retrospective in operation, the case was not governed by those sections: 33 A.I R.1946 Nag.119, *Disting.* [Para 4]

(2) that the holding became *B*'s khudkasht property by reason of the surrender and being in possession of *B* for over three years, the tenant's rights to the holding, if any, were extinguished and *A* could not get those rights in execution, there being no tenancy right at the time of the execution of the decree which he could bring to sale. [Paras 4 and 5]

(b) C. P. Tenancy Act (1 [I] of 1920), S. 89 — Surrender and transfer—Distinction.

A surrender is not the same thing as a transfer. A surrender is an act by which the tenant puts an end to the contract of tenancy involving an extinction of the tenancy right ; it must, therefore, come into force immediately and its operation cannot be postponed till the surrendering tenant's death. An alienation, on the other hand, does not affect the contract between the landlord and tenant and does not extinguish the tenant right The alienee acquires the tenant right intact and gets the benefit of the contract with the landlord with its incidental obligations : 21 A. I. R. 1934 Nag. 89, *Foll.* [Para 4]

(c) Interpretation of statutes — Retrospective operation.

Acts which have the effect of impairing contracts and affect vesting rights must be strictly construed and in interpreting such laws the Courts must lean against giving retrospective effect to their provisions. Unless there is something in the language of an Act showing a contrary intention the duty and practice of the Courts of Justice is to presume that the Act is prospective and not retrospective : 25 A. I. R. 1938 Nag. 112, *Ref.* [Para 4]

Cases referred :—

1. ('34) 30 N. L. R. 175 : 21 A. I. R. 1934 Nag. 89 : 150 I C. 358, Mt. Kaushilya v. Ghanshyamsingh.
2. ('46) I. L. R. (1946) Nag. 39 : 33 A. I. R. 1946 Nag. 119, Rewaprasad v. Punamchand Kalidas.
3. ('38) I L. R. (1938) Nag 91 : 25 A. I. R. 1938 Nag. 112 : 179 I. C. 129, Bhagwant Rao v. Damodhar.

B. L. Gupta — for Appellant.

S. C. Dube — for Respondent 2.

Judgment. — This order disposes of four miscellaneous (second) appeals, namely, 27, 28, 29 and 30 of 1946 as all are on the same point.

[2] The facts of this case may be briefly stated as under. The appellant, Seth Lalchand obtained decrees for arrears of rent against Nandu (non applicant 1) in this appeal as well as against various other tenants who are impleaded in other sister appeals. He was the lambardar of the villages Madia and Kuraiya. He had executed a mortgage of his interest in these villages in favour of Musammat Kausalya Bai (respondent 2), who is also respondent 2 in all the other appeals. Mt. Kausalya Bai obtained a mortgage decree, and in execution of that decree she put to auction the appellant's share and herself bought it. Thus she obtained proprietary interest in these villages on 11 12-1932. The appellant, however, continued to be the lambardar of these villages till 16 1-1934 on which date Mt. Kausalya Bai was appointed lambardar of the villages. On 6 3-1944, the appellant applied for execution of his rent decrees against his tenants and prayed for the sale of their occupancy holdings. All his execution applications were dismissed by the trial Court and on appeal therefrom the orders of dismissal were upheld by the first appellate Court.

[3] The objections in all these cases were that the tenants who figured as respondent 1 in all these four appeals had been either ejected or had surrendered their holdings to the lambardar Mt. Kausalya Bai, that Mt. Kausalya Bai was in possession of the agricultural lands which formed the holdings of the judgment-debtors tenants for over three years, that the

tenants' right to the holdings, if any, had been extinguished and that the appellant could not bring to sale the holdings, which were not in existence when the applications for execution were made.

[4] For the purposes of all these four appeals before me, I am concerned only with those tenants who had surrendered their occupancy holdings to Mt. Kausalya Bai during the period of 1933 to 1936 inclusive and whether the said holdings had already become khudkasht land of Mt. Kausalya Bai long before the appellant applied for execution of his rent decrees on 6-3-1944. It is contended in this appeal by the learned counsel for the appellant that under the new S. 58-A, C. P. Tenancy Act the rent of the holding of an occupancy tenant shall be a first charge thereon and it is further contended that the provisions of new S. 55 (1) (d) of the Act with regard to recovery of rent shall apply to proceedings instituted after the commencement of this Act in execution of decrees for arrears of rent passed before the commencement of the Act. It is, therefore, argued that on the basis of these two sections read together the appellant is entitled to execute his decrees against all the holdings in question on the footing that they were occupancy holdings and should be deemed to continue as occupancy holdings for the purpose of satisfying the primary charge on them as regards the payment of rent. It should be borne in mind that these sections, namely, Ss. 55 and 58-A, were introduced in the C. P. Tenancy Act by amending Act of 1940. According to the contention of the learned counsel for the appellant the rent is fastened upon the holdings as a primary charge whether they remain in the hands of the original tenant or whether they go into the hands of a transferee, and it is argued that this statutory charge cannot be defeated by any subsequent transfer of the said holdings. The cases with which I am concerned are, however, not cases of transfer but cases of surrender, and a surrender is not the same thing as a transfer. It is laid down by the Bench consisting of Niyogi and Pollock, A. J. Cs. in 30 N. L. R. 175[1] as under:

"A surrender is an act by which the tenant puts an end to the contract of tenancy involving an extinction of the tenancy right; it must, therefore, come into force immediately and its operation cannot be postponed till the surrendering tenant's death. An alienation, on the other hand, does not affect the contract between the landlord and tenant and does not extinguish the tenant right. The alienee acquires the tenant right intact and gets the benefit of the contract with the landlord with its incidental obligations."

This is the reason why by reason of the surrender of the holdings by the tenants to the landlord Mt. Kausalya Bai all those holdings became her khudkasht property. The learned counsel for the appellant invited my attention to Puranik J.'s ruling reported in I. L. R. (1946) Nag. 39[2] in support of his contention that the appellant was entitled to execute the decrees against the holdings in question under new Ss. 55 and 58-A, C. P. Tenancy Act. This ruling is, in my opinion, easily distinguishable on the ground that the occupancy holding in the decided case had not ceased to be an occupancy holding; nor had it lost its original character as an occupancy holding by reason of any surrender in favour of the landlord and become converted into khudkasht land of the landlord. This ruling is, therefore, inapplicable to the facts of the case before me which are fundamentally different. There is also another difficulty and it is this. The holdings in question had become khudkasht land of Mt. Kausalya Bai by reason of various surrenders long before the appellant filed his execution applications. The legality of these transactions cannot be decided on the basis of new Ss. 55 and 58-A which were enacted in the year 1940. If the said prior transactions are sought to be governed by new provisions of law, which subsequently came into existence, that would amount to giving retrospective effect to the said provisions. Acts which have the effect of impairing contracts and affect vesting rights must be strictly construed and in interpreting such laws the Courts must lean against giving retrospective effect to their provisions. Unless there is someting in the language of an Act showing a contrary intention, the duty and practice of the Courts of Justice is to presume that the Act is prospective and not retrospective: *vide* I. L. R. (1938) Nag. 91.[3] Therefore, the provisions of new Ss. 55 and 58-A are, in my opinion, inapplicable to the case, and that the ruling in I. L. R. (1946) Nag. 39[2] based thereon is equally inapplicable.

[5] Respondent 2, Mt. Kausalya Bai had been in exclusive possession of the holdings of Nandu, Kishundas, Kare and Mt. Jagrani Bahu (respondent-tenants) for over seven years before the appellant applied for execution of rent decrees against them. All the tenants' right to possession had also become barred by time under Art. 1, Sch. II, C. P. Tenancy Act. Their tenancy rights, if any, were extinguished and the appellant could not get those rights in execution of his decrees for the simple reason that there was no occupancy right in existence at the time of the execution of the decrees which the appellant could bring to sale.

[6] The appeal fails and is hereby dismissed with costs. Counsel's fee Rs. 50 in all the cases.

V.R. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 141 *[C. N. 52.]*

SHEVDE J.

Kodu s/o Debidin and another — Plaintiffs — Appellants v. *Lola s/o Moatha and another — Defendants — Respondents.*

Second Appeal No. 597 of 1943, Decided on 23-7-1947, from appellate decree of 1st Addl. Dist. Judge, Jubbulpore, D/- 25-6-1943.

(a) Hindu law — Marriage — Form — Presumption as to — *Pat* marriage in *churi* form—Payment to former husband for obtaining divorce—Effect.

The presumption under Hindu law is that a marriage should be deemed to be in an approved form and that a *pat* marriage in *churi* form or in any other form is no exception : 33 A. I. R. 1946 Nag. 232, *Rel. on.* [Para 6]

The essence of *Asura* form of marriage is that a bride's price should be paid to the father or other relatives who give away the bride in consideration of the marriage and a marriage between a man and a divorced woman is not to be regarded as being in an unapproved form of marriage under Hindu law : 37 Bom. 295, *Rel. on.* [Para 6]

Hence the marriage of a divorced woman with a man in *churi* form cannot be said to be in an unapproved form from the mere fact that certain amount was paid and ornaments were returned to the former husband for obtaining divorce from him. [Para 6]

(b) Civil P. C. (1908), O. 6, R. 2—New plea.

It is not necessary for the second appellate Court to look into the evidence and decide a new point raised before it, in the absence of any plea or issue on the point in the lower Courts : 17 A. I. R. 1930 P. C. 57, *Rel. on.* [Para 5]

Annotation.—('44-Com.) C. P. C., O. 6, R. 2 N. 9.

Cases referred :—

1. ('30) 17 A. I. R. 1930 P. C. 57 : 24 S. L. R. 138 : 121 I. C. 204 (PC), Siddik Mahomed Shah v. Mt. Saran.
2. ('46) I. L. R. (1946) Nag. 378 : 33 A. I. R. 1946 Nag. 232 : 223 I. C. 113, Mahadeo v. Mt. Chandrabhagabai.
3. ('13) 37 Bom. 295 : 17 I. C. 949, Hira v. Hansji Pema.

B. L. Gupta — for Appellants.
V. V. Kelkar — for Respondents.

Judgment.—This appeal arises out of a suit commenced by the plaintiffs-appellants for possession of plaint mentioned property against the defendants-respondents. This property originally belonged to one Mt. Sita (also called Chhitiya) who died on 12-7-1941, without leaving any issue. The admitted facts of the case are that the property in suit was gifted to Mt. Sita by her father Khiladi who died after 1930. Mt. Sita was first married to one Brijlal Kurmi who died some time in 1930. After the death of her husband she was remarried to one Rama Kurmi in *churi* form. She did not pull on well with Rama for a long time, and left her husband and returned to her village. It is alleged that she had had illicit connection with Lola (defendant 1) and lived with him, with the result that Lola got into possession of all her property after her death. As Mt. Sita died without any issue and as the property in suit was admittedly her *stridhan* property, the question arose as to who could succeed to it as her heir under Hindu law. The appellate Court held, as pleaded by defendant 1 Lola, that Sita was remarried to Lola in *churi* form and was his legally wedded wife according to the custom of their caste, but the learned trial Judge having assumed that the *churi* form of marriage was an unapproved form of marriage under Hindu law, held that the plaintiffs-appellants, as agnatic relations of her parents, were preferential heirs and excluded Lola (defendant 1). The plaintiffs' suit was accordingly decreed to the extent of the landed property.

[2] On appeal by Lola the decree of the Court of first instance was reversed and the plaintiffs' suit was dismissed. The first appellate Court of Jubbulpore held that the *churi* form of marriage having been recognised as valid by custom, the presumption of Hindu law that a marriage should be deemed to be in an approved form must prevail, in the absence of any allegation or proof that bride's price, techically called *Sulka*, was received by the father or other guardian for giving the girl in marriage. The lower appellate Court having thus held that remarriage of Mt. Sita with Lola was in an approved form her husband Lola was alone entitled to succeed to her *stridhan* property in suit to the exclusion of the plaintiffs who were the agantic relations of her parents. The Court of appeal below, therefore, dismissed the plaintiffs' suit with costs.

[3] In the appeal before me, the plaintiffs have admitted all the findings of fact, namely, Lola was married to Mt. Sita in *churi* form and that marriage was legal and valid according to the custom of their caste. It is also admitted that before her remarriage with Lola she obtained a divorce from Rama and that that divorce was also valid according to custom. It was, however, contended that this remarriage of Sita with Lola is in an unapproved form, technically called *Asura*, inasmuch as an amount of Rs. 50 was paid to Rama in cash and her ornaments were returned to him for obtaining the said divorce as evidenced by Ex. D-3. As it is clear from this Ex. D-3 that some consideration was paid for obtaining the divorce her subsequent remarriage with Lola could not be deemed to be in *Brahma* form.

[4] Therefore, the only material point for consideration in the appeal is whether Mt. Sita's remarriage with Lola was in *Brahma* form or *Asura* form, and it is the determination of this point which will decide the course of succession to the property of Sita in suit.

[5] Before I deal with this question of Hindu

law it is necessary to bear in mind that the plaintiffs never raised any plea in this behalf; nor was any issue drawn up by the Courts below. The plaintiffs' case all along in the lower Courts was that Lola was mere paramour of Mt. Sita and nothing more. The *factum* of remarriage between Mt. Sita and Lola was emphatically denied by the plaintiffs. It is obvious that in the face of this total denial of the fact of remarriage no challenge was put forward by them against the form of marriage. In these circumstances it is really not necessary for me to look into the evidence and decide the point as to whether the remarriage was in a *Brahma* or *Asura* form in the absence of any plea or issue on the point; *see* A. I. R. 1930 P. C. 57[1], but as the point was, however, argued before the first appellate Court and as it has been argued before me I should like to record my decision thereon.

[6] As stated above, the presumption under Hindu law is that a marriage should be deemed to be in an approved form and that a *pat* marriage in *churi* form or in any other form is no exception: *vide* I. L R. (1946) Nag. 378.[2] The fact that Rs 50 were paid and ornaments were returned to Rama for obtaining divorce is neither here nor there. According to the plaintiffs' pleading Rs. 50 were paid by defendant 1 as a fine for having improper intimacy with Mt. Sita. Whether the said amount was paid as fine or whether it was paid towards the expenses of marriage which Rama had incurred, the fact remains that it was paid only for obtaining a divorce and not in connetion with the *churi* marriage of Mt. Sita with Rama. Apart from the fact that there is no plea put forward by the plaintiffs that any bride's price was paid it is well-established that the essence of *Asura* form of marriage is that a bride's price should be paid to the father or other relatives who give away the bride in consideration of the marriage and that a marriage between a man and a divorced woman is not to be regarded as being in an unapproved form of marriage under Hindu law: *vide* 37 Bom. 295[3] It is quite clear that the payment under Ex. D-3 was in connexion with the divorce and not with remarriage of Sita with Rama; nor was it a payment by Lola to Sita's father or her relations. Therefore, my conclusion is that Ex. D 3 on which the learned counsel for the appellants has concentrated his whole line of attack does not and cannot by any stretch of reasoning support his contention that Mt Sita's *churi* marriage with Lola was in an unapproved form.

[7] As I have already held that the presumption of Hindu law in favour of approved form of marriage holds good in this case and as there is nothing to rebut that presumption, the appeal before me fails and is hereby dismissed with costs.

S.C. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 142 *[C. N. 53.]*

HIDAYATULLAH J.

Madhao Narayanrao Ghatate —*Appellant* v. *Mt. Watsalabai w/o Ganpatrao Deshmukh and another* — *Respondents.*

Misc. First Appeal No. 95 of 1942, Decided on 12-4-1947, from decree of First Addl. Dist. Judge, Nagpur, D/-27-3-1942.

(a) Civil P. C. (1908), O. 21, R. 84 — "Forthwith" — Meaning of.

The word "forthwith" in O. 21, R. 84 means within a reasonable time. In fact, it would be in the interests of the auction-purchaser that the sale be properly advertised so that the deficiency arising on a re-sale be as little as possible: 17 A. I. R. 1930 Mad. 761 (F. B.), *Rel on*; 24 A. I. R. 1937 Lah. 924 and 16 A. I. R. 1929 Lah. 744, *Dissent.*; *Case law referred.* [Para 7]

Annotation: — ('44-Com.) Civil P. C. O. 21, R. 84, N. 5, Pt. 5.

(b) Civil P. C. (1908), O. 21, Rr. 66 and 71 — Maintenance decree —Right to charge and right of residence not mentioned in sale proclamation — Estoppel — Liability of auction-purchaser under R. 71.

Where a right to a charge and a right of residence given by the maintenance decree to the decree-holder are not mentioned in the sale proclamation, the decree-holder is *prima facie* estopped from enforcing these rights against the auction-purchaser; and, therefore, it cannot be said, because of the non-mention of these rights in the sale proclamation, that there was such a misdescription of the property or such omission in the sale proclamation of vital information which was likely to induce the auction-purchaser to offer a bigger price than he would have otherwise done to his own prejudice; and on his failure to deposit 25 per cent. of the purchase money and resale at a lower price, deficiency in price can be recovered from him. *Case law referred.* [Paras 11 & 13]

Annotation:—('44-Com.) Civil P. C. O. 21, R. 66 N. 11.

Cases referred:—

1. ('37) 24 A. I. R. 1937 Lah. 924: 176 I. C. 302, Ram Saran v. Kesho Nath.
2. ('29) 16 A. I. R. 1929 Lah. 744:121 I. C. 189, Hari Singh v. Sanwan Mal.
3. ('30) 53 Mad. 900 : 17 A. I. R. 1930 Mad. 761 : 127 I. C. 303 (F. B.), Hanumayamma v. Ankamma.
4. ('37) 24 A. I R. 1937 All. 556 : 171 I. C. 75, Prag Das v. Beni Prasad.
5. ('44) 31 A. I. R. 1944 Pesh. 27 : 214 I. C. 97, Mt. Durani Bibi v. Haji Ghulam Shah.
6. ('40) 27 A. I. R. 1940 Mad. 566 : 193 I. C. 325, Sivasubramaniam v. Murugesa Mudaliar.
7. ('41) I. L. R. (1941) Nag. 485 : 26 A. I. R. 1939 Nag. 269 : 186 I. C. 872, Lokman v. Motilal.
8. ('33) 29 N. L. R. 52 : 20 A. I. R. 1933 Nag. 123 : 141 I C. 367, Mannulal v. Nanhelal.
9. ('12) 36 Bom. 329:14 I. C. 777, Gangadas Dayabhai v. Bai Suraj.
10. ('31) 18 A. I. R. 1931 Bom. 367 : 134 I. C. 692, Venkatraman v. Mahabaleshwar Narayan.
11. ('89) 16 Cal. 535, Baijnath Sahai v. Moheep Narain Singh.

12. ('98) 25 Cal. 99, Kali Kishore Deb v. Guru Prosad.
13. ('39) I. L. R. (1939) Nag. 357 : 26 A. I. R. 1939 Nag. 179 : 186 I. C. 244, All India Railwaymen's Benefit Fund Ltd. Nagpur v. Ramchand Hemraj.
14. ('40) 27 A. I. R. 1940 Cal. 60 : 186 I. C. 833, Jnanendra Nath v. Sashi Mukhi.
15. ('33) 20 A. I. R. 1933 All. 934 : 147 I. C. 302, Matlub Hasan v. Mt. Kulawati.
16. ('18) 45 Cal. 530 : 5 A. I.R. 1918 Cal. 705 : 41 I. C. 73, Gobinda Chandra Pal v. Kailas Chandra Pal.
17. ('41) 20 Pat. 86 : 28 A. I. R. 1941 Pat. 95 : 192 I. C. 866, Mt. Basumati Kuer v. Mt. Harbansi Kuer.
18. ('43) I. L. R. (1943) Nag. 713 : 31 A. I. R. 1944 Nag. 1 : 210 I. C. 355, Maheshpuri v. Ramchandra.
19. ('39) 26 A. I. R. 1939 All. 579 : 184 I. C. 626, Durga Prasad v. Mt. Tulsa Kuar.

M. R. Bobde and V. V. Kelkar —for Appellant.
K. P. Vaidya and H. N. Gokhale—for Respondents.

Judgment.—This is a miscellaneous (first) appeal against the order of Mr. V. B. Sarwate, First Additional District Judge, Nagpur, in Execution Case No. 7A of 1937 passed on 27-3-1942.

[2] The appellant is an auction-purchaser who bought a house on 1-11-1940 for Rs. 6050. When he did not deposit 25 per cent. of the purchase-money, the house was attempted to be resold by the sale *amin* the same day but no bidders were found. Later, under orders of the Court, the house was again brought to sale and on 4-10-1941 the appellant bought it for Rs. 2100. The present appeal concerns proceedings under O. 21, R. 71, Civil P. C. for the recovery of the deficiency in price. The auction-purchaser who is the appellant resisted this recovery on various grounds. The lower Court has ordered that the expenses attending the resale and the deficiency of price be recovered from the auction-purchaser.

[3] The decree under which the sale had taken place is Ex. P-1. It was a maintenance decree in favour of one Mt. Vatsala Bai, widow of Ganpat Rao Deshmukh, and included an amount of Rs 2460 as arrears of maintenance from March 1936, to July 1939, inclusive. The execution application was filed on 2 4 1940 and the total amount claimed was Rs. 3008-12-8 In the decree, it is mentioned that the maintenance allowance shall be a charge on the immovable property left by the decree-holder's deceased husband Ganpat Rao Deshmukh and that the defendant shall allot a portion of the house at Nagpur for the residence of Vatsala Bai.

[4] In the sale proclamation which was issued these two facts were not mentioned, but the decree-holder who was responsible for the omission later applied to the Court that she was willing to waive these rights provided the auction-purchaser paid the full amount under the first sale. The auction-purchaser who had earlier signified his readiness to pay the full amount of Rs. 6050 provided the rights of respondent were waived, did not care to accept the offer of the decree-holder.

[5] Since this matter was not amicably adjusted the Court ordered the sale of the property with the result mentioned above. On the application of the decree-holder the learned Additional District Judge has ordered the auction-purchaser to pay the difference between the two prices, under O. 21, R. 71, Civil P. C. The contentions of the auction-purchaser were rejected. Hence this appeal.

[6] It was first contended that O. 21, R. 71, Civil P. C. is subject to the considerations mentioned in R. 84 of the same Order. Under R. 84 if 25 per cent. of the price is not deposited the Officer conducting the sale has to resell the property 'forthwith.' It is said that 'forthwith' means as expeditously as possible. It is argued that the sale which took place a year later does not comply with the terms of R. 84. Therefore, the auction-purchaser is not liable to make up the deficiency. As to the attempted and abortive sale on the same day, it is said that that was a bogus and fictitious transaction and no sale at all. It is, therefore, contended that since R. 84 has not been strictly complied with the auction-purchaser is not bound and R. 71 does not apply to his case.

[7] In support of this contention reliance is placed on A. I. R. 1937 Lah. 924[1] That ruling follows an earlier case of the same High Court reported in A. I. R. 1929 Lah. 744[2] The earlier case of the Lahore High Court was dissented from in 53 Mad. 900[3] and A. I. R. 1937 ALL. 556.[4] A delay of a few months does not matter has been held in A. I. R. 1944 Pesh. 27[5] at p 28 and A. I. R. 1940 Mad. 566.[6] The same meaning has been given to the word 'forthwith' in I. L. R. (1941) Nag. 485[7] at p. 492. In 29 N. L. R. 52[8] and in A. I. R. 1944 Pesh 27[5] at p. 28 it has been held that O. 21, R. 71, Civil P. C. applies to all cases in which a resale has been occasioned due to the failure of the auction-purchaser to deposit either the 25 per cent. of the sale price or the balance thereof. I respectfully agree with the cases which dissent from the Lahore view and say with all due respect that the Lahore High Court's view is too strict, and contrary to the intention disclosed in O. 21, R. 71, Civil P. C. In all cases where the word 'forthwith' occurs it must ordinarily be understood to mean 'within a reasonable time'. *See* Maxwell's Interpretation of Statutes Edn. 8, p. 351, where the following passage occurs :

> "When a statute requires that something shall be done 'forthwith', or 'immediately', or even 'instantly,' it would probably be understood as allowing a reasonable time for doing it."

In fact, as has been said in 53 Mad. 900,[3] it

would be in the interests of the auction-purchaser that the sale be properly advertised so that the deficiency arising on a resale be as little as possible. I am of opinion that the deficiency in price can be recovered from the auction-purchaser in this case unless he can escape liability in any other way.

[8] It was next contended that as the facts of the maintenance being a charge on the property, and the right of residence given to the decree-holder were not mentioned in the sale proclamation, the auction-purchaser was thereby misled and offered a larger price. As a result of this the auction-purchaser claims that he is excused from making up the deficiency. In support of this contention reliance is placed on 36 Bom. 329,[9] A. I. R. 1931 Bom. 367,[10] 16 Cal. 535,[11] 25 Cal. 99[12] and A. I. R. 1937 Lah. 924.[1] The respondents argue that the auction-purchaser has a right to resort to O. 21, R. 90, Civil P. C., to have the sale set aside and he cannot, having once bought the property, challenge the sale except under O. 21, R. 90 of the Code. Reliance is placed on I. L. R. (1939) Nag. 357.[13] That case, however, only lays down that an auction-purchaser is one of the persons whose interests are affected by the sale and has a right of making an application to get the sale set aside on the ground of illegality or material irregularity in conducting the sale. It has been held in a large number of cases that the auction-purchaser can resist the demand for the deficiency in price on the ground that he was deceived and misled into making a larger bid by reason of material omission in the proclamation of the sale. It was said in 16 Cal. 535:[11]

"In the present case, after the decree-holder has succeeded in misleading the defaulting purchaser to bid a high price, by withholding information as to encumbrances which it was his duty to notify, if he were allowed to recover the deficiency of price at the re-sale, it would be allowing him to take advantage of his own neglect of duty. That would so manifestly inequitable that we are unable to hold that the Legislature could have ever intended such a result."

In the Bombay cases it was laid down that the defaulter can question the defect in the sale proclamation and escape liability if it can make out a case showing a sufficient ground for exemption. The sufficiency of the grounds were examined in A. I. R. 1931 Bom. 367,[10] but in that case the grounds were not found to be sufficient.

[9] Bearing these cases in mind, I have therefore to see whether there was such a misdescription of the property or such omission in the sale proclamation of vital information which was likely to induce the auction-purchaser to offer a bigger price than he would have otherwise done, and whether he did so to his own prejudice. This case is different from the rulings cited because the same person has been the purchaser on both the occasions and no equities except those existing between the decree-holder and the auction-purchaser have to be considered. It is true that the judgment-debtor has challenged the sale but if the price fetched at the first sale is recovered, the question of inadequacy of price disappears.

[10] Two facts, here, are mentioned : firstly that this is a charge decree and fact of a recurring charge was not mentioned and secondly that the right of residence has not been mentioned. It must be pointed out that the decree-holder was willing to forego both these rights and at one time the suggestion had also emanated from the auction-purchaser that if these rights were given up he was willing to pay the full price. Though the decree-holder is willing to stand by this offer the auction-purchaser obviously does not want now to implement what he stated in his application dated 17-1-1941.

[11] As to the charge and the right of residence, I fail to see how they interested the auction-purchaser. They were not mentioned in the sale proclamation and the decree-holder would *prima facie* have been estopped from urging them at a subsequent stage. As to the charge the property was being sold in furtherance of the charge decree itself. It was argued that the charge is a recurring charge and would bind the property when the arrears of maintenance accumulate. No authority was cited in support of the contention that this would be so even if the charge was not mentioned in the sale proclamation. In Chitaley's Transfer of Property Act, Vol. II, under S. 100, note 27 at p. 1483. there is a passage which supports the contention that a charge continues to bind the property in the hands of the auction-purchaser. It is said there :

"But where a charge is of a recurring nature, as in the case of maintenance allowance, if the property is sold in execution of a decree for arrears, the liability in respect of future payments remains after the sale and is not extinguished by it. The effect of the sale is to satisfy the claim for the arrears only. The charge for future maintenance still remains attached to the property and the auction-purchaser gets the property subject to the charge."

In support of this passage three cases are cited.* They are 45 Cal. 530,[16] 20 Pat. 86[17] and I. L. R. (1943) Nag. 713.[18] To these may be added A.I.R. 1939 ALL. 579[19] which is relied upon in the

Note:— His Lordship while quoting a passage from Note 27 has, it is submitted, by oversight, cited in the footnotes cases given under Note 28 by Chitaley in his Commentary on the Transfer of Property Act, Vol. II, p. 1483. In support of the passage quoted in the judgment two cases are cited by Chitaley. They are : A. I. R. 1940 Cal. 60;[14] A. I. R. 1933 All. 934[15]—*Ed.*

Patna case and A. I. R. 1933 ALL. 934[15] and A. I. R. 1940 Cal. 60[14] at p. 62. The first case is not in point. A. I. R. 1939 ALL 579[19] was a case in which the sale proclamation distinctly stated that the property was being sold subject to the charge. That apart one of the reasons given in support of the conclusion is that such a charge created by a decree does not fall either within charges created by act of parties or by law. This view was not approved in 20 Pat. 86[17] and I. L. R. (1943) Nag. 713.[18] The latter case does not lay down the proposition for which it is cited in the passage referred to above. The other cases do support the proposition urged by Mr. Bobde. I do not propose to examine this matter in detail because I am satisfied that the charge not having been mentioned in the sale proclamation by the decree-holder in whose favour the charge operated, the decree-holder was *prima facie* estopped from enforcing it against the auction-purchaser. In Chitaley's Civil Procedure Code, Vol. II, (1944 Edn.) it is said :

"But a mortgagee may be estopped by his conduct from setting up the mortgage against a *bona fide* purchaser. Thus, a decree-holder on whom a duty is cast by this rule (O. 21, R. 66) to give full and true information, so far as it is known to him, will be estopped from setting up, as against the auction-purchaser, any mortgage *in his own favour*, which he has not mentioned in his application under this rule, and which does not appear in the sale proclamation, provided the auction-purchaser has actually bought without notice of the mortgage." (p. 2246).

The same view is expressed on the same page in respect of charges in the following words :

"In the case of a *charge*, however, it will not, as a general rule, be binding on the purchaser if he has no notice of such charge."

It is not necessary to discuss whether the doctrine of notice contained in S. 100, T. P. Act, applies to an auction-purchaser or not. In the present case on either view the auction-purchaser was safe if there was no notice to him as he says there was none, and the decree-holder even till to-day says that the charge is waived. The charge in favour of the decree-holder had to be mentioned in the sale proclamation to bind the auction-purchaser.

[12] The next question is whether the property sold a second time was different from the property sold the first time. That it was the self-same property cannot be denied. I have compared the sale proclamations issued on the two occasions and in neither has the fact that the charge continues been mentioned. Thus apart from the knowledge which the auction-purchaser may have possessed from sources other than the proclamation of sale the resulting position as to the property in the two sales was the same. What I have said about the charge applies equally to the right of residence. That is not even mentioned in the application for execution. In view of this also the difference in price must be paid by the auction-purchaser.

[13] In my opinion failure to mention these rights in the sale proclamation *prima facie* estops the decree-holder from enforcing these rights if they existed. I find it necessary to state in this case that the decree-holder apart from his conduct in not mentioning the charge and the right of residence, in the sale proclamation has again and again reiterated that she is willing to waive these rights. The decree-holder's reiteration of this fact that these rights are waived must *prima facie* be taken to bind her.

[14] In my opinion the order of the trial Court is correct, though the law was somewhat inaccurately stated by the learned Additional District Judge. The result is that the sale for Rs. 2100 is confirmed and the auction-purchaser must also pay the difference between the price offered by him at the first sale and the second sale as well as the expenses attending the first sale as has been ordered by the trial Court. The appeal is dismissed.

[15] As to the costs of this appeal, the costs would have followed the event but I decline to grant costs to the respondents. On the date of arguments the learned counsel for the respondents were absent. Arguments were heard in their absence. Later they applied for the re-hearing of the case. This was allowed by me as the learned counsel for the appellant had no objection. I, however, think that such conduct must be discouraged. I, therefore, order that costs will be borne as incurred.

V.R. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 145 *[C. N. 54.]*

PADHYE J.

Zingya Mohan Dhiwar — Defendant — Applicant v. *Ramchandra Sakharam — Plaintiff — Non-applicant.*

Civil Revn. No. 255 of 1946, Decided on 17-3-1947, from decree of Civil Judge, Second Class, Sakoli, D/-27-3-1946.

Provincial Small Cause Courts Act (1887), Sch. 2, Art. 13 — "Dues payable by reason of interest in immovable property" — Claim for manure from cattle of thalwa for grazing on banjar land.

A suit by landlord for the manure from the cattle of a thalwa i. e., a non-agriculturist resident of the village to which the landlord is entitled according to the wajib-ul-arz of the village for grazing the cattle of a thalwa on the banjar land of the landlord, falls under Art. 13 of Sch. 2 and is therefore excepted from the jurisdiction of the Court of Small Causes: 2 A.I.R. 1915 Nag. 106, *Expl.*; 19 Mad. 329 and 36 Mad. 18, *Disting.*; 5 A. I. R. 1918 All. 79 and 31 A. I. R. 1944 Nag. 310, *Rel. on.*

[Paras 8 and 11]

Cases referred:—

1. ('15) 11 N. L. R. 100: 2 A. I. R. 1915 Nag. 106 : 29 I. C. 815, Jairam v. Doma.

2. ('38) I. L. R. (1938) 2 Cal. 60: 25 A. I. R. 1938 Cal. 320 : 176 I. C. 712, Bata Krishna v. Deba Prosad.

3. ('13) 36 Mad. 18 : 11 I. C. 760, Mabarajah of Vizianagram v. Veeranna.

4. ('96) 19 Mad. 329, Balkrishnayya v. Venkatanarasinha Appa Rau.

5. ('44) I. L. R. (1944) Nag. 825: 31 A. I. R. 1944 Nag. 310, Sona Bai v. Ram Karan.

6. ('18) 40 All. 663 : 5 A. I. R. 1918 All. 79 : 46 I. C. 563, Baldeo v. Panna Lal.

T. B. Pendharkar — for Applicant.

P. P. Deo — for Non-applicant.

Order. — This is a revision by the defendant against the decree passed against him by the Judge, Small Causes at Sakoli, in a suit brought by the landlord of his village for Rs. 10 as the price of manure from the defendant's cattle. The plaintiff landlord alleged that the defendant was a thalwa i. e., non-agriculturist resident of the village and according to the wajib-ul-arz of the village, the landlord is entitled to the manure from the cattle of a thalwa in the village.

[2] The defendant denied the plaintiff's claim. According to him, he was a sub-tenant and not a thalwa. He cultivated lands of others either on rent or on batai contract and the landlord was not therefore entitled to the manure from his cattle. He also contended that the suit was excluded from the jurisdiction of the Small Cause Court under Art. 13 of Sch. 2, Provincial Small Cause Courts Act. The quantity and the price of manure were also disputed.

[3] The lower Court overruled the defendant's contention on the point of jurisdiction. It held that the defendant was a thalwa and not a sub-tenant. The claim of the plaintiff was decreed for Rs. 6 i. e., the value of three cartloads of manure at the rate of Rs. 2 per cart.

[4] The important question that arises in the revision is the question of jurisdiction. The suits which fall under any of the Articles of Sch. 2, Provincial Small Cause Courts Act, are exempted from the cognizance of a Court of Small Causes. Article 13 which is relevant in this case runs thus:

"A suit to enforce payment of the allowance or fees respectively called malikana or hakk or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immovable property or in an hereditary office or in a shrine or other religious institution."

[5] According to the wajib-ul-arz all cattle in the village are entitled to free grazing in the banjar land in the village. The banjar land in the village belongs to the landlord though there may exist some communal rights over it, the cattle belonging to a thalwa i. e., one who holds no land in the village and does not therefore pay anything to the landlord is allowed to graze on the banjar land in the village, but the landlord by reason of his interest in the banjar land is given the right of receiving manure from those cattle. The plaintiff's suit is in substance for receiving manure for the year 1944-45 which the defendant failed to deliver to him and as required by O. 20, R. 10, Civil P. C., that manure is valued at Rs. 10 so that the Court could pass a decree for the value of the manure. The plaint is not drafted very artistically.

[6] In holding that the plaintiff's suit did not fall within Art. 13 of Sch 2, the learned Judge of the lower Court followed the decision of Sir Henry Drake-Brockman J. C. reported in 11 N. L. R. 100[1] In that case the defendant had, in breach of the terms of the wajib-ul-arz already sold away the manure before the institution of the suit. The plaintiff knew this and therefore his suit, as held by the learned Judicial Commissioner, was not to recover the manure to which he was entitled under the wajib-ul-arz but was one for damages for manure wrongfully sold and it did not, according to the learned Judicial Commissioner, therefore, fall within the scope of Art. 13. It is observed in I. L. R. (1938) 2 Cal. 60[2] that the dues contemplated by Art. 13 must be dues arising directly from the interest in immovable property and cannot include dues which are indirectly connected with something arising out of an interest in immovable property. It was on that principle that interest due for default of payment of rent in time was held recoverable in a Small Cause Court suit. The learned Judicial Commissioner no doubt observed, though that observation was not necessary for the decision of the appeal before him that even if the claim be regarded as one for the manure itself as a 'due' within the meaning of that term as used in Art. 13 aforesaid still that 'due' was not payable to the plaintiffs by reason of their interest in immovable property. The reliance was placed on the observations in 36 Mad. 18[3] and 19 Mad. 329.[4]

[7] In I. L. R. (1944) Nag. 825[5] Bobde J., as he then was, observed in connection with the aforesaid observations that they were not necessary for the decision of the case before the learned Judicial Commissioner and were rather obiter. I respectfully agree with Bobde J. If these remarks were, however, not obiter I would have found considerable difficulty and I say so with all respect, in agreeing with the learned Judicial Commissioner that the plaintiff's claim for manure was based on custom and was not one for 'dues' payable to a person by reason of his interest in immovable property. Under S. 78, Land Revenue Act, the settlement officer has to

ascertain and record the custom in each estate in regard to the rights of persons resident in the estate or village in the common land of the mahal or its produce and other rights in regard to matters specified in that section and any other rights and customs which the Provincial Government may direct to be recorded. The village administration paper or the wajib-ul-arz which is prepared according to S. 79, Land Revenue Act, embodies the result of the inquiry under S. 78 and other sections. It is thus a record not only of customs but of rights and customs. Clause 6 of the wajib-ul-arz (EX. P-1) is headed as 'the rights over the banjar land of the village' and it runs thus:

"All the cattle in the village graze free on the entire banjar land in the village but in view of the grazing of the cattle of thalwas the proprietor takes the manure."

[8] It is thus clear that the clause deals with a right and not only with a custom and the right to take manure is because the cattle of thalwas graze in the banjar land which is owned by the proprietor. To my mind, it is a case which falls within Art. 13 of the Act and is, therefore, clearly excepted from the jurisdiction of the Court of Small Causes.

[9] 19 Mad. 329[4] relied on by the learned Judicial Commissioner was a suit by a zamindar to recover arrears of kattubadi and karnam's emoluments due by the defendants as owners of kattubadi-inams. The question was whether the suit was of a small cause nature and the second appeal did not therefore lie. The plaintiff's contention that kattubadi was a charge on immovable property was not accepted. As to emoluments payable to a karnam it was held that if the claim was made by the karnam himself it might come within Art. 13 but a suit filed by a zamindar is of a different character and must rest on some custom or a contract. The question in 36 Mad. 18[3] was again the same viz., whether the suit by the zamindar for recovery of land cesses from an inamdar was of a small cause nature. Though a zamindar is liable to pay land cesses to Government and he did pay it, as between him and the inamdar it is the inamdar who is liable to pay land cesses on his inam land. The suit is thus based on an implied contract or on the principle embodied in S. 69, Contract Act. These cases are, therefore, not in point.

[10] In 40 ALL. 663[6] the plaintiff landlord filed a suit against a Teli resident in the village on the basis of a term in the wajib-ul-arz under which the Teli was liable to give a certain quantity of oil to the landlord. It was held that the suit fell within Art. 13 and was thus excepted from the jurisdiction of the Court of Small Causes. It was observed that the suit was certainly for dues which were claimed by the plaintiff as payable to him by reason of his interest in immovable property. This decision was followed by Bobde J., in I. L. R. (1944) Nag. 825[5] cited above where the landlord sued a cobbler resident in the village for dues payable to him under the term of the wajib-ul-arz. It was observed that the wajib-ul-arz provided for payment to the landlord because of his interest in the village.

[11] The plaintiff's claim in the lower Court for manure of cattle grazing on his banjar land falls directly within Art. 13 of Sch. 2, Provincial Small Cause Courts Act. The suit was therefore excepted from the jurisdiction of the Court of Small Causes. The decree passed by the lower Court is, therefore, void. The plaint shall have to be returned to the plaintiff for presentation to a proper Court for trial. The revision is allowed with costs. Counsel's fee Rs. 20.

D.S. *Revision allowed.*

A. I. R (35) 1948 Nagpur 147 *[C. N. 55.]*

PADHYE J.

Rukhadu Parbatsingh and others — Appellants v. *Krishnarao Kaluram — Respondent.*

Misc. Second Appeal No. 261 of 1945, Decided on 7-4-1947, from order of Addl. Dist. Judge, Nimar, D/- 27-8-1945.

(a) Civil P. C. (1908), S. 47(2)—Conversion of suit into proceedings under S. 47—Mortgage renovated by agreement—Suit on mortgage—Conversion of.

Before converting a suit into a proceeding under S. 47 the Court must apply its mind and see whether the suit involves such questions as fall under S. 47 and in respect of which separate suit is filed. [Para 4]

When on an application by the mortgagor to the Debt Conciliation Board, his debt on the mortgage is conciliated and an agreement is executed providing that the debt is to be satisfied by transfer of some property to the mortgagee, but the mortgagor does not carry out the agreement and thereupon the mortgagee files a suit on the mortgage ignoring the agreement before the Board, the mortgage having been renovated by the subsequent agreement has no legal existence and cannot therefore be sued upon. The suit is not hit by S. 47 and cannot therefore be converted into a proceeding under S. 47. [Para 5]

Annotation:—('44-Com.) Civil P. C., S. 47, Note 82.

(b) Civil P. C. (1908), S. 47(2) — Suit treated as proceeding under S. 47— Proceedings barred by time on date of institution of suit—Effect.

Where a Court orders a suit to be treated as a proceeding under S. 47, it is not the date when that suit was so treated, but the date on which the suit was instituted which should be taken as the date on which proceedings under S. 47 were initiated. If on the date on which the suit is instituted the application under S. 47 of the Code is barred by limitation, the Court has no discretion to ignore the law of limitation and to treat that application as filed within limitation: 27 A. I. R. 1940 Nag. 92, *Expl.* [Para 7]

Annotation: ('44-Com.) Civil P. C., S. 47, N. 82 Pt. 9.

(c) Limitation Act (1908), Art. 181 and S. 29— Application under S. 47, Civil P. C., for execution of notional decree under S. 12(2), C. P. Debt Conciliation Act—Limitation—Applicability of S. 29.

Under S. 12 (2), C. P. Debt Conciliation Act, a registered agreement before the Board has the force of a decree and even though it is not in fact a decree passed by the Court of civil jurisdiction, still for the matter of enforcement that is regarded as a decree of the Civil Court. Hence limitation for an application under S. 47, Civil P. C., arising in a proceeding in execution of such a registered agreement is governed by Art. 181, Limitation Act: 31 Mad. 24 and 24 A. I. R. 1937 Mad. 31, *Rel. on*; 23 A. I. R. 1936 Bom. 396, *Considered*. [Para 10]

Section 29, Limitation Act, has no application to such a case, the registered agreement being treated as a notional decree of the Civil Court. [Para 12]

Annotation : ('42-Com.) Lim. Act, Art. 181, N 22, Pt. 4.

(d) C.P. Courts Act (1 [1] of 1917), S. 21—Power of District Judge to take away, reduce or enhance inherent jurisdiction of Sub-Judges.

A District Judge is no doubt empowered under the C. P. Courts Act to divide work conveniently between different Sub-Judges and for that purpose to determine particular cases up to a particular jurisdiction to be tried by the one Sub-Judge or the other. But it is not within the power of the District Judge to take away, to reduce or to enhance the inherent jurisdiction of a Court fixed by the C. P. Courts Act. [Para 14]

Cases referred :—

1. ('39) 1939 N. L. J. 500: 27 A.I.R. 1940 Nag. 92: 188 I. C. 743, Abdul Rashid Khan v. Singhai Bansbilal.
2. ('36) 23 A. I. R. 1936 Bom. 396 : 165 I. C. 512, Raghavendra v. Industrial Bank, Guledgud.
3. ('08) 31 Mad. 24, Sambasiva Mudaliar v. Panchanada Pillai.
4. ('37) I. L. R. (1937) Mad. 495 : 24 A. I. R. 1937 Mad. 31 : 167 I. C. 223, Co-operative Credit Society, Arungunam v. Chinnaswami.

M. R. Bobde and R. S. Dabir—for Appellants.

S. C. Dube—for Respondent.

Judgment.— The defendants-appellants are the mortgagors. They borrowed a debt from the plaintiff and executed a mortgage deed dated 24-1-1930 in his favour. The cause of action of this mortgage accrued on 24-1-1930. On 5-9-1936, the mortgagors applied to the Debt Conciliation Board for conciliation of their debt. The Board passed an order dated 8-9-1938 conciliating the debt and an agreement was accordingly executed and registered on 8-9-1938 (Ex. 1-D-2). This agreement provided that the debt due on the mortgage was to be satisfied by transfer of some immovable property by the mortgagors in favour of the mortgagee. The mortgagors did not carry out this agreement and no deed of conveyance was, as required by the agreement, executed.

[2] Thereupon the mortgagee filed a suit against the mortgagors on 25-1-1943 for recovery of the mortgage debt on the strength of the mortgage dated 24-1-1930. He ignored completely the agreement before the Board Ex. 1-D-2 and fell back on the original cause of action. This suit was originally filed in the Court of First Sub-Judge but it was subsequently transferred by the District Judge to the Court of Second Sub-Judge on 28-9-1944. One of the issues, that is issue No. 4(a) in the suit, was whether the suit on the original cause of action, ignoring the agreement before the Debt Conciliation Board, was maintainable. The trial Court held that it was not maintainable and that the remedy of the mortgagee was on the execution side for specific performance of the agreement reached and recorded before the Debt Conciliation Board. The trial Court, however, considered that it was a fit case in which under S. 47(2), Civil P. C., the suit can be treated as a proceeding in execution under S. 47 and it ordered accordingly.

[3] By the latter part of the order, namely by treating the suit as a proceeding under S. 47 of the Code, the defendants felt aggrieved. They, therefore filed an appeal but the lower appellate Court dismissed their appeal and they have filed this miscellaneous second appeal.

[4] Under S 47 (2), Civil P. C., a suit which involves questions relating to the execution, discharge or satisfaction of the decree, can, subject to any objection as to limitation and jurisdiction, be treated as a proceeding under S. 47 of the Code. It is, however, necessary before converting a suit into a proceeding under S. 47 that the Court must apply its mind and see whether the suit involves such questions as fall under S. 47 of the Code and in respect of which separate suit is filed.

[5] The suit filed by the mortgagee was not for specific performance of the agreement. If it was so, then obviously it would involve questions relating to the execution, discharge or satisfaction of the decree, and at least to that extent there was no objection in converting that suit into a proceeding under S. 47, Civil P. C. The suit filed by the plaintiff was, however, not to enforce agreement before the Debt Conciliation Board which on registration had the force of a decree. The plaintiff, on the other hand, ignored that agreement altogether and filed the suit on the basis of the mortgage itself. Now, the suit on the basis of a mortgage was not maintainable because that mortgage was renovated by a subsequent agreement and, therefore, had no legal existence and could not, therefore, be sued upon. The suit was not hit by S. 47, Civil P. C. Thus, the mortgage suit filed by the plaintiff could not be converted into a proceeding under S. 47 of the Code. It is not that any suit can be converted into a proceeding under S. 47, but it must be one to which S. 47, Civil P. C., is a bar. It is immaterial if the suit is not maintainable on any other account such as the plaintiff's in the present case was. In my opinion, the lower Courts were wrong in ordering that the suit filed by the plaintiff for enforcement of the mortgage should be treated as a proceeding under S. 47, Civil P. C.

[6] There are other objections to the decisions of the Courts below and the most important of them is the question of limitation. The agreement which is now sought to be enforced is one dated 8-9-1938. The plaintiff's suit on the basis of the mortgage was instituted on 25-1-1943 and the Court decided to treat that suit as a proceeding under S. 47, Civil P. C., some time in the year 1944. Even assuming that as a result of the order of the trial Court the suit could be treated as a proceeding under S. 47, that proceeding could at best be said to have been instituted on 25-1 1943. That means nearly 4½ years after the date of the agreement, and thus even on that date on which the suit was instituted, the application of S. 47, Civil P. C., was barred by limitation.

[7] The lower appellate Court has entirely misunderstood the case reported in 1939 N. L. J. 500.[1] In that case the suit was instituted within less than a year of the date of the agreement before the Debt Conciliation Board, and therefore, if the date of the institution of the suit be regarded as the date on which proceedings under S. 47, Civil P. C., were started, no question of limitation would arise; or that where a Court orders a suit to be treated as a proceeding under S. 47, Civil P. C., it is not the date when that suit was so treated, but the date on which the suit was instituted which should be taken as the date on which proceedings under S. 47, Civil P. C., were initiated. It is indeed surprising that the lower appellate Court should read into that decision a novel proposition, namely, that even if the application under S 47 of the Code is barred by limitation the Court has still a discretion to ignore the law of limitation and to treat that application as filed within limitation. The learned Judge of the lower appellate Court was obviously wrong. The Judge also observed that this was a case of a registered decree, which obviously it is not, and therefore, limitation was not six years instead of three years.

[8] The learned counsel for the respondent did not think it proper to support this part of the judgment of the Court below. It is a registered agreement which has the force of a decree and thus registration is a pre-requisite for an agreement before the Debt Conciliation Board to have the effect of a decree. It is not that the decree is registered but the agreement is registered so that the agreement should have the force of a decree. According to the procedure for registration of decrees it is never the original decree which is registered. It is only the certified copy of that decree which is presented for registration before the Sub-Registrar and registration of the certified copy of the decree is taken to be the registration of the decree. In the case of an agreement before the Debt Conciliation Board, it is the agreement itself, like any other document, which has to be registered. I do not think it is necessary to dilate on this point any further in view of the fact that the observations of the learned Judge of the lower appellate Court are obviously incorrect and the counsel for the respondent did not support them.

[9] The learned counsel for the respondent, however, urged before me that neither Art. 181 nor Art. 182, Limitation Act, applied, as the registered agreement before the Board was not actually a decree of the civil Court. It is merely to be treated as a decree for certain purposes. If this argument is stretched to its logical conclusion it means this—and it is frankly admitted to be so—that in the matter of executing a notional decree under S. 12 (2) or S. 13, Debt Conciliation Act, there is no limitation at all and in fact the learned counsel interpreted S. 12 (2), Debt Conciliation Act, in a manner as to keep the agreement alive forever so that it could be executed as a decree at any time. In my view, this was never the intention of the Legislature and this is not borne out by the provisions of the Debt Conciliation Act.

[10] In the first place, the interpretation put by the learned counsel on S. 12 (2) is not correct. What is kept alive is not the agreement but it is the mortgage and the provision is that in spite of the fact that the mortgage deed may be incorporated into an agreement, the mortgage is kept alive so that the mortgagee in the matter of realisation of that debt shall have preference against simple money credit. Moreover, under S. 12 (2), Debt Conciliation Act, a registered agreement before the Board has the force of a decree, and even though it is not in fact a decree passed by the Court of civil jurisdiction still for the matter of enforcement, that is regarded as a decree of the civil Court. There is thus no difference between a notional decree and a decree which is actually passed by a civil Court in the matter of execution of that decree. This notional decree must either be treated as a decree passed by a civil Court or not, there cannot be any half-way house. If it is not to be treated as a decree passed by a civil Court then that Court shall have no jurisdiction to execute the decree as it could only execute the decree passed by it or which is transferred to it for execution under the provisions of the Civil Procedure Code. If a notional decree is to be treated as a decree passed by a Court of civil jurisdiction, then for all purposes including limitation, it can be at a par with any other decree passed by a civil Court and in that view limita-

tion for an application under S. 47, Civil P. C., would be governed by Art. 181, Limitation Act. In fact, the respondent is on the horns of the dilemma; he wants to take advantage of S. 47, Civil P. C., and at the same time does not want to admit that a notional decree is for purposes of execution a decree of a civil Court. It is obvious that if it is not a decree of a civil Court then the provisions of the Civil Procedure Code, including S. 47 of the Code would not apply In my view, therefore, it is clear that limitation for an application under S. 47, Civil P. C., whether arising in a decree passed by a civil Court, or arising in a proceeding in execution of a notional decree under the Debt Conciliation Act is governed by Art. 181, Limitation Act.

[11] As stated above, under S. 47 (2), Civil P. C., a suit can be treated as a proceeding under S. 47, subject to the question of limitation and jurisdiction. Here in the present case, even if these proceedings are treated as having been initiated on 25-1-1943, the date on which the suit was instituted, still this was long barred The Courts below therefore went wrong in treating the suit as a proceeding under S. 47, Civil P. C.

[12] The learned counsel for the respondent relied on S. 29, Limitation Act. In my view that section has no application because here we are not concerned with the provisions of the special Act. The decree that is to be executed is the notional decree of the civil Court and it is beyond doubt that Art. 181 or Art. 182 would apply to such a case.

[13] The learned counsel relied on A. I. R. 1936 Bom. 396,[2] where a doubt has been expressed regarding the applicability of Art. 182, Limitation Act, in respect of an award passed by the Registrar, Co-operative Societies. To my mind there should be no doubt on that point but anyhow the case does not decide anything positively and need not be considered further. On the other hand, the learned counsel for the appellants relied on 31 Mad. 24[3] and I. L. R. (1934) Mad. 495[4] which appear to be in point.

[14] The learned counsel for the appellants also raised a question of jurisdiction but in my view it has no substance. According to him, the suit for enforcement of the mortgage was originally instituted in the Court of Sub-Judge First Class which Court had, according to the distribution memo then prevalent to try cases having more than Rs. 500 as its value for purposes of jurisdiction. The Sub-Judge, Second Class, is according to the distribution memo, empowered to try cases below Rs 500. This particular case was however transferred by the District Judge from the Court of the Sub-Judge, First Class, to the Court of Sub-Judge, Second Class, for special reasons. It was contended that the execution for enforcement of the agreement would according to the distribution memo lie in the Court of the Sub-Judge, First Class, and not in the Court of Sub-Judge, Second Class, as its value would be more than Rs. 500. Even if it be so, according to me, that does not matter much as the inherent jurisdiction of the Sub-Judge, Second Class, is Rs. 5000, and that of the First Class, from Rs. 5000 to Rs. 10,000. It is not within the power of the District Judge to take away, to reduce or to enhance the inherent jurisdiction of a Court fixed by the C. P. Courts Act. The District Judge is no doubt empowered to divide work conveniently between different Sub-Judges and for that purpose to determine particular cases up to a particular jurisdiction to be tried by the one Sub-Judge or the other. This does not, however, affect the inherent jurisdiction of the Sub-Judges. As stated above, I do not find any substance in the point of jurisdiction.

[15] However on the first two points, namely that the suit did not involve questions which fell within S. 47, Civil P. C, or to which S 47 applied and also on the ground of limitation the decisions of the Courts below are erroneous and not according to law. They are, therefore, set aside.

[16] In view of the finding of the first Court that the plaintiff's suit on the strength of the mortgage was not maintainable as the mortgage was renovated by the agreement before the Debt Conciliation Board the plaintiff's suit stands dismissed. The plaintiff to bear the costs of the defendants throughout.

N.S.D. *Suit dismissed.*

A. I. R. (35) 1948 Nagpur 150 *[C. N. 56.]*

PADHYE J.

Jago and another — *Defendants 1 & 2*— *Appellants* v. *Narayan Plaintif and another, Defendant 3* — *Respondents.*

Second Appeal No. 615 of 1943, Decided on 1-4-1947, against appellate decree of Dist. Judge, Wardha, 1-10-1943

(a) Civil P. C. (1908), S. 47—Execution dismissed as infructuous under S. 15 (3), C P. Debt Conciliation Act, 1933 — Suit for declaration that proceedings before Board were void is not barred under S. 47.

A decree-holder against whom a certificate under S. 15, C. P. Debt Conciliation Act, 1933, had been granted filed an application for execution of his money decree but the execution was struck off as infructuous on the ground that he could not execute his decree by virtue of S. 15 (3) of that Act unless the instalments of debt of another secured creditor, *L*, as fixed by the Debt Conciliation Board under S. 12 of that Act were paid in full. The decree-holder thereupon filed a suit for declaration that all the proceedings before the Board were null and void as the mortgage in favour of *L* which alone gave the defendant right to apply to the Board was bogus and that the plaintiff was entitled to execute his decree against the defendant:

Held that the suit was not barred by S. 47. The obstacle in the way of plaintiff's execution application, namely, the agreement before the Board could not be removed unless *L* was a party to the proceedings but he could not be a proper party as he was not a party to the plaintiff's decree nor a representative of a party to the decree. Therefore, any dispute between the plaintiff and *L* was outside the scope of S. 47. [Para 9]

Annotation:—('44-Com) Civil P. C., S. 47 Note 4.

(b) Civil P. C. (1908), S 11 — Constructive res judicata — Facts on which plea might have been raised in former suit not within knowledge of the party It cannot be said that he "might have" raised the plea in former suit. 14 A. I. R. 1927 Nag. 83, *Rel. on.* [Para 10]

Annotation:—('44-Com.) Civil P. C., S. 11 Note 36 Pt. 5.

(c) Limitation Act (1908). Arts. 95 and 120—Suit for setting aside proceedings before Conciliation Board on ground of fraud.

No Civil Court has a right to examine the orders passed, the debts settled or an agreement registered by the Debt Conciliation Board with jurisdiction except on the ground of fraud: 24 A. I. R. 1937 Nag. 259, *Rel. on.* [Para 13]

Thus a suit for relief against the consequences of fraud namely for setting aside the proceedings before the Board on the ground of fraud is governed by the specific Art. 95 and not Art. 120: 3 Cal. 300 and 34 Cal. 241, *Rel. on.*; 3 Cal. 504 and 25 Cal. 49, *Disting.*; 6 All 406, *Ref.* [Para 14]

Annotation: — ('42-Com.) Lim. Act, Art. 95 Note 10.

(d) Limitation Act (1908), Art. 95—Starting point —Knowledge of fraud—Meaning of.

It is a fundamental proposition of law of limitation that as long as a person is the subject of fraud no time shall run against him. What is required for the limitation to start is actual knowledge of fraud and not merely suspicion. The difference between suspicion and knowledge is a difference in the degree of certainty which a person feels specially when the knowledge relates to something intangible and is necessarily based on inferences. Knowledge does not include means of knowledge and the fact of knowledge of fraud must be distinguished from the evidence in proof of fraud. Knowledge of fraud means the knowledge of circumstances on which any reasonable man concludes that a fraud has been committed. It may be his conclusion or knowledge further corroborated by additional circumstances known by him subsequently. He cannot however say that he had no knowledge of fraud till the last piece of evidence came to light or till the persons committing the fraud admitted the same : 37 Cal. 81, *Rel. on.* [Paras 15 & 21]

Annotation: — ('42-Com.) Lim. Act, Art. 95 Note 12 Pts. 1, 3.

(e) Limitation Act (1908), Art. 95—Knowledge of fraud — Burden of proof.

If fraud is established burden is on the defendant to show that it was known to the plaintiff beyond the period of limitation: 17 Bom. 341 (P. C.) and 31 Mad. 230, *Rel. on.* [Para 16]

This burden can be discharged by circumstantial evidence and by the statements and the conduct of the plaintiff. [Para 16]

Annotation: — ('42-Com.) Lim. Act, Art. 95 Note 17 Pt. 4.

Cases referred:—

1. ('27) 14 A. I. R. 1927 Nag. 83 : 98 I. C. 695, Venkatrao v. Ganpat.
2. ('37) 20 N. L. J. 57 : 24 A. I. R. 1937 Nag. 259 : I L. R. (1938) Nag. 489 : 170 I. C. 905, Shivdin Kaluram v. Ram Rattan Udaram.
3. ('78) 3 Cal. 504, Chunder Nath v. Tirthanund Thakoor.
4. ('78) 3 Cal. 300, Bhoobun Chunder v. Ram Sunder Surma.
5. ('07) 34 Cal. 241, Syamlal Mandal v. Nilmonay Das.
6. ('98) 25 Cal. 49, Gour Mohun Gouli v. Dinonath.
7. ('84) 6 All. 406, Natha Singh v. Godha Singh.
8. ('10) 37 Cal 81 : 3 I. C. 316, Indra Nath v. Rooke.
9. ('93) 17 Bom. 341 : 20 I. A. 1 : 6 Sar. 256 (P. C.), Rahimbhoy Habibbhoy v. Charles Agnew Turner.
10. ('08) 31 Mad. 230, Moidiyan's Son Punnayil Kuthu v. Raman Nair.

R. S. Dabir and M. W. Paranik—for Appellants.

M. R. Bobde (for No. 1) and H. N. Vaidya (for No. 2)—for Respondents.

Judgment. — This is a second appeal by defendants 1 and 2 against the decree of the lower appellate Court which on reversing the decree of the trial Court granted to the plaintiff-respondent the relief prayed for. The relevant facts are these. In Civil Suit No. 241 of 1933, the plaintiff obtained on 4-4-1934 a money decree against defendants 1 and 2 (appellants) Only a day before this decree was passed i. e. on 3-4-1934, the appellants mortgaged their entire attachable property in favour of their relative, Laxman (respondent 2). On 6-12-1935, the appellants applied to the Debt Conciliation Board for conciliation of their debts and in that application besides the plaintiff they showed themselves indebted to Laxman for Rs. 600-0-0 due on mortgage and to one Vithoba for a petty amount of Rs. 10-0-0. Laxman did not comply with a notice under S. 8 (1), Debt Conciliation Act, nor was present on 7-10-1936 the date of hearing before the Board and his debt stood discharged. After some hearing on 4-6-1937, the Board issued a certificate under S. 15 of the Act against the plaintiff and passed an order embodying the settlement of debts due to Laxman and Vithoba Laxman's debt, i. e. Rs. 600-0-0 due on mortgage, was settled at Rs. 200-0-0 and was made payable in twenty years by an annual instalment of Rs. 10-0-0 and Vithoba's debt was made payable in two instalments at Rs. 5-0-0 each per year An agreement as required by S. 12 was duly executed and registered.

[2] On 4-7-1941 the plaintiff sued out execution of his decree against the appellants and attached their immovable property through the civil Court. The appellants objected on the strength of the agreement before the Debt Conciliation Board. On 25-11-1941 the execution application was struck off as wholly infructuous with an observation by the executing Court that attachment will take effect after the instalments of the Debt Conciliation Board were satisfied.

[3] On 28-4-1942, the plaintiff filed a suit from which this second appeal arises and asked the following relief:

"That it be declared that the proceedings, order dated 4-6-1937, agreement effected and registered and the certificate issued to the plaintiff in respect of his aforesaid decretal debt are null and void on account of fraud stated above and the plaintiff was entitled to execute his aforesaid decree against the defendants."

[4] In the plaint it was alleged that a debt of Rs. 600-0-0 shown by defendants 1 and 2 as due to Laxman was false and fraudulently shown with a view to persuade the Board to believe that the creditor to whom more than 40 per cent. of the debt was owing was willing to conciliate so that the Board could accept the settlement and have an agreement executed and registered. It was alleged that the mortgage deed dated 3-4-1934 was entirely bogus and the bond dated 16-11-1933 on which the consideration for mortgage was alleged to be due was equally bogus. It was further alleged that the mortgagee was a man of no means and could not advance any debt and one Doma to whom Rs. 415-0-0 out of the consideration are alleged to have been paid, was himself indebted on a mortgage which he was unable to satisfy. In short, it was pleaded that defendants 1 and 2 in collusion with Laxman played a fraud on the plaintiff and also on the Board. As to the cause of action for the suit it was alleged that immediately after the dismissal of the plaintiff's execution application dated 25-11-1941, defendants 1 and 2 began to give out that they succeeded in defrauding the plaintiff and in delaying his claim by their machination and fraud. The cause of action was put down on 27-11-1941.

[5] The defendants denied all the facts pleaded in the plaint and they denied the plaintiff's claim. They asserted that the mortgage deed and the consideration mentioned therein were genuine and that no fraud was practised by the defendants either on the plaintiff or on the Board. They opposed the plaintiff's claim on grounds of law including the ground of limitation No cause of action is alleged to have accrued in plaintiff's favour on 27-11-1941 and this date was said to be falsely put down to avoid the bar of limitation.

[6] The trial Court in an admirably clear and well reasoned judgment held that the mortgage debt was not bogus and that the plaintiff failed to establish the fraud alleged to have been practised by the defendants. According to the learned Judge the plaintiff knew of the mortgage and circumstances connected therewith soon after the execution of the mortgage in 1934 and the plaintiff's claim was therefore not within limitation. The plaintiff's suit was accordingly dismissed. The plaintiff appealed and on 11-8-1943 while the appeal was still pending, the defendant Laxman applied to the lower appellate Court that he had given up his right over the debt made payable under agreement before the Debt Conciliation Board and had already applied to the Debt Conciliation Board on 23-7-1943 to record satisfaction of the debt due to him under the agreement. He claimed to be discharged from the appeal.

[7] The appellate Court in its judgment dated 1-10-1943 reversed the findings of the trial Court and held that the mortgage in favour of Laxman was bogus and was brought into existence to practise fraud on the plaintiff and to defeat and delay the realisation of the decretal debt. It further held that the defendants practised a fraud on the plaintiff and the Board in putting forward a bogus debt and in securing on that basis the orders of the Board which but for the fraud it would not have passed. According to the learned Judge the certificate issued against the plaintiff and the agreement executed and registered were a nullity. On the point of limitation the learned Judge held that the plaintiff had knowledge of the fraud within three years of the date of suit and the suit was therefore within limitation. The plaintiff's claim was therefore decreed.

[8] It was pointed out at the outset by the learned counsel for respondent 1 that in view of Laxman's application dated 11-8-1943 to the lower appellate Court and the admissions contained therein about the giving up of his debt this appeal has no more than an academic interest. It was said that the agreement before the Board has ceased to subsist as instalments mentioned therein were not satisfied and the plaintiff was free to proceed to execute his decree against the attached property. The learned counsel for the appellant did not accept this view and argued the appeal on merits.

[9] It was contended by the appellant's counsel that the plaintiff's suit was barred by S. 47, Civil P. C., and also by *res judicata* either actual or at any rate constructive. This bar of S. 47, Civil P. C., was not raised before but was argued as a pure question of law. In my view the suit was not hit by S. 47 of the Code. There are two hurdles in the way of the immediate execution of the decree by the plaintiff : first, that is, the certificate under S. 15 is, however, inconsequential in the absence of an agreement under S. 12, Debt Conciliation Act, between the debtor and other creditors, the second, that is, the agreement which makes the debts due to two creditors payable by instalments is however the main obstacle to immediate execution. That obstacle cannot, however, be removed unless Laxman (respondent 2) is a party to the proceed-

ings and Laxman cannot be a proper party as he was not a party to the decree or a representative of a party to the decree. Any dispute between the plaintiff and Laxman would fall beyond the scope of S. 47, Civil P C. It was contended on behalf of the plaintiff that the objection has no force as under S. 47 (2) of the Code the present suit could itself be treated as a proceeding under S. 47, if it was necessary. In view of what is stated above it is not necessary to examine this contention any further.

[10] There is also no force in the objection raised on the ground of *res judicata* or constructive *res judicata*. The invalidity of the certificate and the agreement was not actually raised in proceedings under S. 47, and there was no *res judicata* unless it was actually raised, tried and decided. The only question therefore is whether the question is barred on the ground of constructive *res judicata*. If the plaintiff's case be true he got knowledge of fraud invalidating the certificate and the agreement in 1941, i. e., long after the order dated 4-6-1937 in proceedings under S. 47. Where the facts on which a plea might have been raised were not within the knowledge of the party at the time of the former suit, it could not be said that he might have raised that plea : A. I. R. 1927 Nag. 83[1] at p. 84.

[11] It was thus necessary to examine and decide the plaintiff's plea regarding the alleged fraud on merits. While the trial Court held that the mortgage in favour of Laxman and the transactions ancillary thereto were genuine and for consideration, the learned Judge of the lower appellate Court, for reasons set out fully in his judgment, disagreed with this finding and held that all the transactions including mortgage itself were bogus and fraudulent. According to the learned Judge the whole thing was a fraud effected for the purpose of defeating and delaying the plaintiff. It is thus a finding of fact on which two careful Judges, after fully considering the evidence on record and drawing legitimate inferences therefrom, have differed. The least therefrom that can be said is that the evidence on record is so dubious or inconclusive that two contrary findings are possible. In these circumstances I cannot in this second appeal disbelieve the evidence believed by the learned lower appellate Court. It was quite possible that the same finding which was reached by the learned Judge of the lower appellate Court may have been reached by this Court on examination of evidence on record and the circumstances including the conduct of Laxman. The finding of the lower appellate Court on this point is accepted.

[12] The only question that remains to be considered now is the question of limitation. That question resolves itself into two parts, viz., the Article of the Limitation Act by which the suit is governed and the date from which the period of limitation is to be computed On the first part it was urged by the learned counsel of the respondent that the appropriate Article was Art. 120 and not Art. 95 as urged by the appellants. Article 95 is a special Article governing suits to set aside a decree obtained by fraud or any other relief on the ground of fraud. It is well established that a general Article, such as Art. 120 would not apply except in the absence of a special Article governing the case.

[13] It is not disputed in this case that the Debt Conciliation Board which entertained the application of the appellants for conciliation of their debts had initial jurisdiction to do so. No civil Court has a right to examine the orders passed, the debts settled or an agreement registered by the Debt Conciliation Board with jurisdiction except on the ground of fraud: 20 N. L. J. 57.[2] The agreement duly executed and registered under S. 12, Debt Conciliation Act, has the force of a decree. It is thus clear that the only ground on which the agreement having the force of a decree registered under s. 12 of the Act or other orders passed by the Board with initial jurisdiction can be set aside is the ground of fraud.

[14] The learned counsel for the respondent relied on several cases in support of his contention but they are, in my opinion, clearly distinguishable. In 3 Cal. 504[3] cited by the learned counsel it was pointed out that fraud in that case was merely a part of the machinery to bring about a particular result. It was not on the ground of fraud that the relief of possession was asked for. That was a suit by a reversioner for possession of property on the death of a Hindu with a life interest. The ground on which the relief was asked was the fact that he was a reversioner and was therefore entitled to possession. Fraud was alleged to remove an obstacle in his way, i. e., the revenue sale. Even on proving fraud he would not be entitled to the relief of possession if he was not a reversioner. This case was therefore held not to be governed by Art. 95 which governs a suit by a reversioner. In the same volume there is another case reported at p. 300[4] which is applicable to the present case. In that case the relief was founded on fraud. A cosharer filed a suit for reconveyance of the property on the ground that it was brought to sale by the other cosharer fraudulently and got purchased in the name of his son. It was held that for purposes of limitation, the suit was governed by Art. 95, Limitation Act. To the same effect is the decision in 34 Cal. 241.[5] In 25 Cal.

49[6] the relief was not based on fraud. The plaintiff sought a declaration that the sale in the defendant's name was benami and the suit was held governed by Art. 120, Limitation Act It was pointed out in 6 ALL. 406[7] at pp. 414, 415 that fraud vitiates everything and prevents application of the law of limitation. A suit for relief against the consequences of the fraud is therefore governed by a specific Art. 95, Limitation Act. It is therefore to my mind clear that the proper Article to govern the present suit is Art. 95 and not Art. 120, Limitation Act.

[15] The question which remains to be considered is the starting point of limitation. According to Art. 95, limitation starts when the fraud became known to the party wronged. It is a fundamental proposition of law of limitation that as long as the person is a subject of the fraud no time shall run against him. In England the cause of action arises when reasonable diligence discovered fraud but under the Limitation Act limitation does not begin to run before the date of actual knowledge. It is pointed out in 37 Cal. 81[8] at p. 85 that what is required for the limitation to start is actual knowledge and not merely suspicion. Moreover knowledge does not include means of knowledge and the fact of knowledge of fraud must be distinguished from the evidence in proof of fraud.

[16] It is further pointed out by their Lordships of the Privy Council in 17 Bom 341[9] that if fraud is established burden is on the defendant to show that it was known to the plaintiff beyond the period of limitation. That is also the view taken in 31 Mad. 230.[10] This burden can, however, in my opinion, be discharged by circumstantial evidence and by the statements and the conduct of the plaintiff.

[17] Though a person who is the subject of fraud is given sufficient latitude for the purposes of escaping from the consequences of his fraud, the law on the subject cannot be so construed as to leave it entirely to the sweet will of the plaintiff to claim a relief on the ground of fraud whenever he chooses. It was, however, urged that the time when the fraud became known to the plaintiff is a finding of fact. The lower appellate Court has, accepting the evidence of Tatyaji (P. W. 4), held that the fraud became known to the plaintiff in November 1941, i. e., within 3 years of the date of suit.

[18] The finding given by the lower appellate Court is in a way very halting. While accepting the evidence of Tatyaji, the learned Judge of the lower appellate Court felt obliged to remark that the facts stated by the witness are rather unusual. The learned Judge has not given reasons to accept such an unusual story. However it may be assumed that what Tatyaji deposed is true. He deposed:

"In November last casually defendants 1 and 2 told me that plaintiff's execution was struck off because they showed defendant 3's debts in the Debt Conciliation Board and got 40 per cent. amount . . over instalments by the Board. I told them that was not the good thing that they did. That execution of plaintiff was dismissed two days before this talk. I told this to plaintiff on the Maroti temple the same day in the afternoon.

The plaintiff had told me that defendants 1 and 2 had shown false debts before the Debt Conciliation Board to conceal his dues. The plaintiff told me one month before I learnt the same falsehood from the mouths of defendants 1 and 2. When I told plaintiff this falsehood he kept silent and said justice will be done."

[19] Thus according to this witness the plaintiff already had the knowledge of the falsehood i. e., regarding the bogus nature of Laxman's debt before that fact was admitted by defendants 1 and 2. He did not therefore add anything new to the plaintiff's knowledge. At best he furnished the plaintiff with a piece of evidence in the shape of the admission of defendants 1 and 2. On having learnt of this admission of the defendants from Tatyaji, Bapurao, the plaintiff's nephew, is said to have made some further inquiry but in that inquiry nothing had come out which was not known before.

[20] The fraud that is alleged in the present case is that the mortgage deed in favour of Laxman was bogus and that the mortgage debt, which in fact did not exist was fraudulently utilized to secure an agreement before the Debt Conciliation Board. It may be noted that defendants 1 and 2 i. e., the debtors, are related to the plaintiff, the sister of defendant 2 being married to the plaintiff Laxman, defendant 3 is also a relation as his sister is married to Baliram, defendant 2 about 15 years ago. The plaintiff admits that he knew Laxman since 15 years and it is difficult to believe that the plaintiff was not aware of the financial positions either of defendants 1 and 2 or of defendant 3 Laxman. The plaintiff as (P. W. 8), admits that he came to know of the mortgage about six months after its execution i. e., in 1934, and he surmised that it was a plan to deprive him and was meant as a device to defeat his claim. On 7-10-1936 he saw the indifference on Laxman's part inasmuch as he did not file any statement of his claim in response to the notice from the Debt Conciliation Board, did not produce the mortgage deed before the Board and did not care to be present at the hearing. Then the plaintiff must have noticed a collusion between defendants 1 and 2 and Laxman. Though Laxman did not care to have his mortgage debt revived the debtors agreed to the conciliation of the debt which had already stood discharged Then they noticed a very extraordinary conduct on the part of Laxman to

agree to have his mortgage debt of Rs. 600 and interest reduced to Rs. 200 and to make it payable by annual instalments of Rs. 10. This agreement was executed and registered on 4-6-1937.

[21] Knowledge of a particular fact or an object is derived through one or more senses which a human being is gifted with. Knowledge of the object, if it is a tangible thing, may be derived by the sense of sight, of touch or by taste but fraud is not something tangible. The knowledge of fraud means therefore the knowledge of circumstances on which any reasonable man concludes that a fraud has been committed. It may be his conclusion or knowledge further corroborated by additional circumstances known by him subsequently. He cannot, however, say that he had no knowledge of fraud till the last piece of evidence came to light or till the persons committing the fraud admitted the same. The real test therefore is if in 1934 to 1937 the plaintiff knew facts and circumstances on which he as a reasonable man would have concluded that the fraud was practised on him by bringing into existence a bogus and a fraudulent mortgage deed. If the answer is in the affirmative then the fraud was known to the plaintiff in 1936-37 though he may have further learnt of the admissions of defendants in 1941. The difference between a suspicion and a knowledge is the difference in the degree of certainty which a person feels specially when the knowledge relates to something intangible and is necessarily based on inferences. In my opinion, the fraud was known to the plaintiff by June 1937 and the period of limitation started from that date at the latest. The plaintiff's suit being not filed within 3 years of that date is barred by limitation.

[22] The appeal is allowed with costs. The judgment of the lower appellate Court is set aside and that of the first Court dismissing the plaintiff's suit is restored.

N.S.D. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 155 *[C. N. 57.]*

GRILLE C. J. AND PADHYE J.

Bhimasingh Kishorsingh—Defendant 1—Appellant v. *Fakirchand Nandlal and others—Defendants 2 to 21 — Respondents.*

First Appeal No. 85 of 1940, Decided on 30th January 1947, from decree of Addl. Dist. Judge, Khandwa, D/- 27th April 1940.

(a) Evidence Act (1872), S. 68, Proviso—Specific denial—What amounts to.

A statement by the defendant that he is not aware of the mortgage deed in suit and that the execution, attestation and consideration of the mortgage are therefore denied, does not amount to a specific denial within the meaning of Proviso to S. 68 when it is nowhere specifically denied that it was signed by the person by whom it purports to have been signed. Hence, the examination of the attesting witness in such a case is not necessary under S. 68 : 15 A. I. R. 1928 Bom. 267, *Rel. on.* [Para 7]

(b) Transfer of Property Act (1882), S. 3—Attestation—Validity of.

Where the executant signed in the presence of the two attesting witnesses and the witnesses signed in the presence of each other and there was nothing to show that execution and attestation was not done in the same sitting it was held that there was valid attestation as the witnesses must be deemed to have signed the document in the presence of the executant. [Para 9]

(c) Hindu law—Custom—Mitakshara joint family—Family custom of impartibility and inalienability of estate pleaded — Burden of proof — Nature of evidence.

The property of a joint Hindu family governed by Mitakshara is not impartible and the father can alienate it for the satisfaction of his antecedent debts not tainted with illegality or immorality or for legal necessity of the family or the benefit of the estate One who pleads against the ordinary law, that the property is impartible and inalienable on the strength of a family custom, has a heavy burden to discharge. Where a family custom (kulachar) as opposed to a local or a torritorial custom (Deshachar) is pleaded, the onus of establishing it is specially heavy and more difficult to discharge. Instances may not be absolutely necessary to establish custom but they furnish the best and most reliable evidence in proof of custom. To prove a family custom of a particular family instances from other families are not relevant unless the closest possible analogy between these families is established. Though there is a greater latitude in admission of evidence in proof of an ancient custom and even hearsay evidence is to a certain extent admissible, still the evidence must, before it is admitted in proof of a custom, conform to certain well established principles incorporated within the relevant provisions of the Evidence Act : *Case law referred.* [Paras 14 and 15]

(d) Hindu law—Impartible estates — Succession to property governed by rule of primogeniture—Power of holder to alienate property

Where property is descendible by rule of primogeniture the holder of the property is the absolute owner thereof and even if such property be joint Hindu family property governed by the Mitakshara the son or the sons of the holder have no vested interest in it. The absence of vested interest by other coparceners and consequently the absence of power to demand a partition empowers the holder for the time being to alienate the property in any manner he likes including an alienation by way of mortgage : 10 All. 272 (P. C.) and 21 A. I. R. 1934 P. C. 157, *Rel. on.* [Para 18]

(e) Hindu law—Impartible estates—Custom as to inalienability Proof of.

The absence of evidence of an alienation without any evidence of facts which would make it probable that an alienation would have been made cannot be accepted as proof of a custom of inalienability : 10 All. 272 (P. C.) and 14 A. I. R. 1927 P. C 159, *Foll.* [Para 19]

(f) Civil P. C. (1908), O. 41, R. 27—Power of appellate Court to admit document rejected by trial Court on ground of late production.

Where the trial Court in the exercise of its judicial discretion refuses to admit a document in evidence on the ground of its late production, the appellate Court will not interfere with such discretion and admit the document in evidence unless there is sufficient ground to do so. [Para 20]

Annotation : ('44-Com.) C. P. C., O. 41, R. 27, N. 3 Pt. 2.

(g) Grant—Crown grant — Incidents of property to be determined with reference to last grant.

Where a person holds property under a grant from British Government in 1865, the incidents of the property should be determined with reference to the terms of that grant. It is not open to such person to rely upon a previous grant from Moghul Emperor as the foundation for the right of inalienability of the property. The British Government as a conqueror was not bound by the grants made by the conquered though it may respect the same with such variations as may be deemed proper: 34 A. I. R. 1947 P. C. 1, *Rel. on.* [Para 21]

(h) Custom—Discontinuance of—Proof as to.

Though the burden of proving discontinuance of a custom is on the person who pleads it, slight evidence may be sufficient to discharge that burden, if other circumstances and the conduct of the members of the family which relies on that custom are consistent only with the discontinuance of the custom: 27 All. 203, *Rel. on.* Thus instances of alienations of the property and acts which are inconsistent with a custom of inalienability will lead to the inference that the custom of inalienability was discontinued. [Para 24]

Cases referred:—

1. ('19) 15 N. L. R. 176 : 6 A. I. R. 1919 P. C. 100 : 53 I. C. 630 (P.C.), Kishore Singh v. Mt. Gahenabai.
2. ('28) 52 Bom. 219 : 15 A. I. R. 1928 Bom. 267 : 111 I. C. 287, Yakubkhan v. Guljarkhan.
3. ('06) 2 N. L. R. 10, Mt. Jhama v. Deobux.
4. ('30) 26 N. L. R. 277 : 17 A. I. R. 1930 Nag. 273 : 124 I. C. 453, Narainrao v. Hanmantram.
5. ('39) 26 A. I. R 1939 P. C. 117 : I. L. R. (1939) Kar. 222 : 181 I. C. 216 (P.C.), Surendra Bahadur v. Behari Singh.
6. ('29) 25 N. L. R. 121 : 16 A. I. R. 1929 P. C. 190 : 56 I. A. 280 : 117 I. C. 1 (P. C.), Ramji Patel v. Rao Kishore Singh.
7. ('41) I. L. R. (1941) Nag. 632 : 27 A. I. R. 1940 Nag. 278 : 193 I. C. 598, Bhimsingh v. Gangaram.
8. ('74) 13 Beng. L. R 445 : 22 W. R. 17, Thakoor Kapilnath Sahai v. The Government.
9. ('88) 10 All. 272 : 15 I. A. 51 : 5 Sar. 139 (P. C.), Sartaj Kuari v. Deoraj Kuari.
10. ('23) 10 A. I. R. 1923 Mad. 402 : 71 I. C. 533, Annadana Jadaya Goundan v. Konammal.
11. (1861-63) 9 M I. A. 66 : 1 Suther 460 : 1 Sar. 826 : 1 W R 30 (P.C.), Naragunty Lutchmedavamah v. Vengama Naidoo.
12. ('77-78) 3 I. A. 259 : 26 W. R. 55 : 3 Sar. 611 : 3 Suther 304 (P. C.), Hurpurshad v. Sheo Dyal.
13. ('02) 24 All. 273 : 29 I. A. 70 : 8 Sar. 233 (P. C.), Chandika Bakhsh v. Muna Kunwar.
14. ('34) 56 All. 468 : 21 A I. R. 1934 P. C. 157 : 61 I. A 286 : 150 I. C. 545 (P.C.), Collector of Gorakhpur v. Ram Sundar Mal.
15. (27) 54 Cal. 955 : 14 A. I. R. 1927 P. C. 159 : 54 I. A. 289 : 102 I. C. 599 (P.C.), Protapchandra Deo v. Jagadish Chandra Deo.
16. ('47) 34 A. I. R. 1947 P. C. 1 : 229 I. C. 502 (P.C.), Asrar Ahmad v. Durgah Committee, Ajmer.
17. ('28) 24 N. L. R. 25 : 15 A I. R. 1928 P. C. 10 : 55 I. A. 45 : 55 Cal. 403 : 107 I. C. 7 (P.C.), Martand Rao v. Malhar Rao.
18. ('75-76) 1 Cal. 186 : 19 W. R. 8 (P. C.), Rajkishen Singh v. Ram Joy Surma Mozoomdar.
19. ('05) 27 All. 203, Sarabjit Partab Bahadur Sahi v. Indrajit Partab Sahi.

S. C. Dube and A. Razak — for Appellant.

M. R. Bobde and K. G. Chendke—for Respondents.

Judgment. — The action out of which this appeal has arisen was brought by Seth Nandlal and Seth Mojilal, now deceased and represented by Champalal son of Seth Mojilal, respondent 1, for enforcement of a mortgage dated 12th October 1928 (EX. P-14) executed in their favour by Rao Kishoresingh, mortgaging thereunder full proprietary rights in *mauza* Selda which he held in *maufi* rights. It is common ground that on Rao Kishoresingh's death in 1930, this village along with other property passed to the appellant, Ram Bhimsingh by right of primogeniture. Out of 21 defendants in the suit, Ram Bhimsingh who was defendant 1 was the only contesting defendant; the other defendants being aliendes from Ram Kishoresingh or their legal representatives supported the plaintiffs on the main point in contest.

[2] It is not disputed that the property in Rao Kishoresingh's family passed by the rule of primogeniture and in fact the point is settled by the decision of their Lordships of the Privy Council reported in 15 N. L. R. 176.[1] The grounds on which defendant 1 opposed the present suit were briefly as follows: (a) That the mortgaged property, *mauza* Selda was a part of the Bhamgarh Estate which was the ancestral property in the hands of Rao Kishoresingh and this estate was impartible and inalienable by virtue of the original grant as well as by the ancient family custom of the mortgagor's family. (b) The alleged consideration of the mortgage in suit was a personal debt of Rao Kishoresingh and was not binding on the property in the hands of the defendant, who got it by right of primogeniture. It was also averred that the mortgage was not justified by legal necessity as the mortgagor had no necessity to borrow having in his hands sufficient funds from income from the property and from Government pension. (c) That the defendant was not aware of the fact of the mortgage and he therefore denied the execution, attestation and consideration of the mortgage in suit.

[3] The plaintiffs, in their replication, denied the defence completely, including the alleged inalienable character of the property. The alleged grant and also the family custom were denied and it was properly complained that the defence in that respect was very vague. In reply, defendant 1 in his oral statement dated 15th November 1938 averred that the Bhamgarh Estate was in the defendant's family from time immemorial and so far as tracable from Government record at least from the time of the Moghul Emperors, though the defendant has in his possession no *sanad* or any other document in evidence of the grant from the Moghul Emperors. The defendant asserted that the property was inalienable on account of the lost grant as well as the family custom of inalienability and he mentioned in his oral statement dated 16th December 1938

three judicial decisions in which the unsecured debt of the holder of the property was held not realizable from the estate after it passed into the hands of the successor. In the defendant's oral statement recorded on 4th January 1939 he admitted that in 1865 a sanad relating to this property was granted by the Government of India (British Government) to Rao Daulatsingh, the defendant's predecessor, granting full power of alienation by gift, sale, adoption or otherwise. It was, however, contended that this could not affect the pre-existing family custom against alienability. The plaintiffs, on the other hand, pleaded alternatively that even if there was any custom as alleged it ceased to exist after the grant of 1865 and also by the conduct of Rao Kishoresingh, the mortgagor.

[4] The learned Judge of the lower Court, after a careful survey and a correct appreciation of the oral and documentary evidence on record, held that the mortgage deed in suit was duly executed and attested and it was for a valid and binding consideration and was justified even on the ground of legal necessity. It was further held that the Bhamgarh Estate was not inalienable by virtue of the grant or family custom and no such grant and family custom were established, The claim of the plaintiffs was decreed in full.

[5] Defendant 1 (Rao Bhimsingh) has alone preferred an appeal against the decree of the lower Court and has reiterated the grounds raised by way of defence in the lower Court. The learned counsel for the appellant argued before us two points, first, that the due attestation of the mortgage deed in suit was not proved, and second, that the property mortgaged was inalienable and therefore the mortgage was void and inoperative in law.

[6] On the point of attestation we are in complete agreement with the finding of the first Court and we did not, therefore feel the necessity of calling upon the respondents to answer.

[7] The present definition of the term 'attested' as contained in S. 3, T P. Act, with the exception of words 'and shall be deemed always to have meant' was enacted by Act 27 [XXVII] of 1926 and the words noted above were added by Act 10 [X] of 1927 with a view to clarify that the definition had a retrospective effect. By Act 31 [XXXI] of 1926 a proviso was added to S. 68, Evidence Act, according to which the examination of an attesting witness in proof of the execution of a registered mortgage deed was not necessary unless the execution thereof by the person by whom it purports to have been executed was specifically denied. As held in 52 Bom. 219[2] a statement that the defendant had no knowledge of the mortgage bond does not constitute a specific denial. In para. 3 of the written statement filed by defendant 1 (appellant) in the present case, he stated that he was not aware of the fact of the mortgage in suit and the execution, attestation and consideration of the mortgage were therefore denied. It was nowhere specifically denied that it was signed by Rao Kishoresingh or that the signature appearing on the deed as the executant was not his. The plea would not therefore amount, within the meaning of the proviso to S. 68, Evidence Act, to specific denial and the examination of an attesting witness was not necessary. The document could be legally proved by examining any witness who could depose to its execution such as Maujilal (P. W. 3), one of the plaintiffs in the present case. We need not, however, pursue this matter further as we do not rest our judgment on this narrow basis.

[8] The document bears the signature of two persons, viz., Balmukund and Amritrao as witnesses and they are examined as P. W. 9 and P. W. 10 respectively. In these provinces the witnesses depose usually in Hindi or in Marathi and it is translated and recorded in brief by the Judge in English. The deposition as recorded is not therefore a verbatim report of what the witness deposed. The deposition of Balmukund (P. W. 9) as recorded is, 'This (i. e., the mortgage deed dated 12th October 1928) was attested by me and executed by Rao Kishoresingh in my presence. Amritlal also attested in my presence.' Similarly, the deposition of Amritrao (P. W. 10) is 'I attested it (i. e., the mortgage deed dated 12th October 1929) and it was executed by Kishoresingh in my presence.' An experienced Judge who recorded these depositions would not have used the word 'attested' unless he was satisfied that what was deposed to by the witnesses satisfied the requirements of attestation as defined by S. 3, T. P. Act. The depositions of these witnesses, which are not challenged by way of cross-examination on this point, leave no manner of doubt that the deed was executed and attested at the same sitting; the witnesses saw the executant sign and they in their turn signed in presence of the executant. We examined for ourselves the original document and we are satisfied that the document appeared to have been scribed, executed and attested with the same ink and there was nothing on the face of the document negativing the presumption of due attestation permissible in law according to the well-known maxim '*omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium*': *vide* 2 N. L. R. 10[3] and 26 N. L. R. 277[4] at p. 281.

[9] The learned counsel for the appellant contended that the evidence on record did not establish that the two attesting witnesses put their

signatures in the presence of the executant and he relied on A. I. R. 1939 P. C. 117=I.L.R (1939) Kar. 222.[5] We do not agree. It is true that no direct question on this point was put to the witnesses. But when it is positively deposed that the executant signed in the presence of the two attesting witnesses and the witnesses signed in the presence of each other and there is no suggestion that the execution and attestation was not done at the same sitting it is almost certain that the witnesses signed the document in the presence of the executant. The Privy Council decision relied on by the learned counsel is distinguishable as there the fact of due attestation was sought to be proved on the strength of the proceedings relating to registration including the signatures of the two identifying witnesses Their Lordships duly pointed out that the particulars endorsed on documents under S 58, Registration Act, did not include facts necessary for proving due attestation of the deed and the fact that the witnesses are present before the registrar for the purpose of identification only.

[10] We therefore hold, agreeing with the lower Court, that the mortgage deed in suit was duly attested.

[11] The question which next calls for consideration is the alleged inalienability of the property and the invalidity of the mortgage in suit on that account. The appellants are at a disadvantage in this matter as in the first litigation regarding Bhamgarh Estate when ended with the decision of the Judicial Committee reported in 15 N. L. R 176[1] it was remarked by their Lordships that no restraint on alienation was imposed in other respects by this custom, i. e., by the special family custom pleaded in that case. The second litigation which ended with the decision of the Judicial Committee reported in 25 N. L. R. 121[6] was for specific performance of the agreement dated 11th November 1912 whereunder Rao Kishoresingh agreed to sell mauza Khedi, one of the villages forming part of Bhamgarh Estate. In this litigation, the custom of inalienability, though highly relevant, was not pleaded and their Lordships of the Privy Council passed a decree for specific performance, though in view of the finding that compensation in money was an adequate relief as contemplated under Ss. 12 (c) and 21 (a), Specific Relief Act, the relief actually granted was for payment of Rs. 20,000 as compensation. This decision was not possible if the property was inalienable and the agreement was void on that account. The Divisional Bench of this Court in I. L. R. (1941) Nag. 632[7] held that the Bhamgarh Estate was not inalienable and the family custom pleaded in that respect was not established; it is said that an appeal against this decision is pending before the Judicial Committee. In Miscellaneous Judicial Case No. 17 of 1934 (Ex. P-16) and Miscellaneous Judicial Case No. 24 of 1934 (Ex. P-29) the custom of inalienability pleaded by the present appellant was not established.

[12] The defendant's plea that the property was inalienable by virtue of a grant by the Moghul Emperor as well as by ancient family custom lacks in clarity and in precision. As to precision, the appellant has not given the time and the occasion of the alleged grant or the particular Emperor who gave it though in one of his previous statements (Ex P-15) the appellant stated that he was informed by his father that the estate was given to their family by Muhammad Ghori. No sanad or a writing is produced in evidence of this alleged grant and the appellant admitted that he had none in his possession or to his knowledge. As to clarity, the defendant has not pleaded that a family custom existed at the time of the alleged grant and was merely recognized thereby. If inalienability was based on the particular tenure that was granted then there is no scope for a family custom. The conduct of the family in confirmation of the tenure granted should not be confounded with a custom of inalienability which pre-supposes an absence of a grant or contract.

[13] Let us, however, assume that what was meant to be pleaded was an ancient family custom subsequently confirmed by the alleged Moghul grant which is the most favourable interpretation for the appellant, though it is argued by the learned counsel for the respondent that the plea as actually taken destroys itself. It is, however, to be noted at this stage that, according to the appellant's plea, impartibility and inalienability are based on one and the same custom. This may be possible but inalienability is not a necessary concomitant or a necessary result of impartibility. It is so held in several cases but it may be sufficient to refer to the decision in 13 Beng. L. R. 445[8] which was noted with approval by their Lordships of the Privy Council in 10 ALL. 272[9] at p. 288 where their Lordships observed thus:

"It had been previously held by the same Court in a case in 13 Beng. L. R. 445,[8] where the plaintiff alleged that the descent of the estate was governed by Mitakshara law, and that by the usage and custom of the family the estate was impartible and descendible according to the law of primogeniture on the male heirs of the original grantee, the estate was not on the case stated shown to be inalienable. Their Lordships think this is the correct view."

Their Lordships further observed

"the inalienability of the estate depends upon custom, which must be proved, or it may be in some cases, upon the nature of the tenure."

[14] It is admitted by the appellant that he and his father were members of a joint Hindu

family governed by the Mitakshara and the family was governed by that law except to the extent to which it was abrogated by the family custom. It has also been held in A.I.R 1923 Mad. 402[10] on a review of the entire case law on the subject that the succession to an impartible estate is governed by the rule of survivorship if it is joint family property and by the rule of inheritance if it is a separate property. It was so held in the well-known decision of their Lordships of the Privy Council known as the '*Shivaganga case*' reported in 9 M. I. A 66[11] and which was followed in numerous cases. The property of a joint Hindu family governed by Mitakshara is not impartible and the father can alienate it for the satisfaction of his antecedent debts not tainted with illegality or immorality or for legal necessity of the family or the benefit of the estate. One who pleads against the ordinary law, such as the appellant does in the present case on the strength of the alleged family custom, has a heavy burden to discharge. It was observed by their Lordships of the Privy Council in 3 I. A. 259[12] that a custom must be ancient, certain and reasonable and has to be construed strictly A custom cannot be enlarged beyond what is established by parity of reasoning. It is easier to prove a custom supplementing the law but the onus is necessarily heavy where a family custom is pleaded in derogation of the prevailing law as was observed by the Judicial Committee in 24 ALL. 273[13] where a family custom was sought to be established by relying on four instances of a comparatively modern date. Their Lordships of the Privy Council observed :

"It is obvious that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation."

[15] The custom that is pleaded by the appellant is a family custom (Kulachar) as opposed to a local or a territorial custom (Deshachar). The onus of establishing a family custom is specially heavy and more difficult to discharge. Instances may not be absolutely necessary to establish custom but they furnish the best and most reliable evidence in proof of custom. To prove a family custom of a particular family instances from other families are not relevant unless the closest possible analogy between these families is established. Though there is a greater latitude in admission of evidence in proof of an ancient custom and even hearsay evidence is to a certain extent admissible, still the evidence must, before it is admitted in proof of a custom, conform to certain well established principles incorporated within the relevant provisions of the Evidence Act.

[16] Before we enter into the actual proof of the alleged custom, it is necessary to note the previous history of the family as can be gathered from the Settlement Report of Captain Forsyth published in 1870. Rajputs, the ancestors of the appellant, are said to have come from the north and they occupied the central Nimar some 20 generations ago. About 3 or 4 centuries prior to the Muhammadan conquest of Nimar, the Bilala families to which the appellant belongs, subdued Bhils and established themselves as chiefs. As they had amongst them an institution of a 'Gaddi' the succession to the property was by primogeniture. After the Mahomedan conquest these chiefs were deprived of whatever royal powers they had and they or at least some of them were constituted 'Zemedars' or fiscal officers and they were allowed to retain villages in their possession. It also appears that the Rajput families were given grants in lieu of military services which they were expected to render to the Muhammadan conquerors: *vide* para. 115 at page 58 of the Report. The exact character and nature of the estate and the tenure under which the property was held by these families under the Mahomedan rule is left in obscurity. There is no evidence in this case, either oral or documentary, which throws light on this point except the preamble to the sanad granted by the British Government on 18-12-1865. The preamble runs thus:

"Whereas you formerly held the office of Zamidar as a Pargana-officer in the District of Nimar enjoyed certain allowances by way of Zirat, Jagheer, and cash percentages and whereas the services you rendered in that office will not in future be required by the Government .... etc."

[17] It is thus clear that the ancestors of the appellant were, under the Mahomedan rule, pargana officers and they were remunerated for their services in the shape of certain allowances and concessions.

[18] It is apparent that the institution of a 'gaddi' necessarily requires a holder of a 'gaddi' and he is called 'Gaddi-Nashin'. As only one person can be 'Gaddi-Nashin' at a time, the succession to the 'gaddi' is according to the rule of primogeniture. It does not, however, follow that the estate held by the 'Gaddi-Nashin' or the holder of the 'gaddi' must be inalienable. In fact, the Emperors and Kings in ancient times, both Hindus and Mahomedans, were freely making grants of property in favour of religious institutions and even in favour of persons either in lieu of services rendered or otherwise. The property in their hands was thus not inalienable. It is well established that where property is descendible by rule of primogeniture the holder of the property is the absolute owner thereof and even if such property be joint Hindu family property governed by the Mitakshara the son or the sons of the holder have no vested interest in

it. In 10 ALL. 272[9] the validity of a gift deed executed by the father in a Mitakshara joint Hindu family who had succeeded to the property under a rule of primogeniture was challenged. It was *prima facie* invalid under the school of Hindu law by which the family was governed. It was however held valid by their Lordships of the Privy Council because as a result of the custom of primogeniture even the eldest son of the holder of the property had no vested interest in the property and was not a co-sharer in it along with his father and consequently the father had an absolute right to dispose of the property by transfer *inter vivos* or by a will. This decision was no doubt criticized by Golapchandra Sirkar in his book on Hindu Law and by others as well. It is however binding on us and as was observed by their Lordships of the Privy Council very recently in 56 ALL 468[15] the view taken in that case has been in force so long that it cannot now be disturbed. The inalienability (save for a proper cause) of a joint family property is founded on the interest which other coparceners have in the property and which they can enforce by a partition at any time they choose. The absence of vested interest by other coparceners and consequently the absence of power to demand a partition empowers the holder for the time being to alienate the property in any manner he likes. The learned counsel for the appellant tried to distinguish the case of a mortgage from other testamentary and non-testamentary alienations but we do not see any force in that distinction.

[19] Let us consider one more argument of the learned counsel for the appellant at this stage. According to him the custom of inalienability should be presumed from the very fact that the property in the family was not alienated by the holders prior to Rao Kishoresingh and that it was retained in the family for some centuries past. There is no evidence on record of transactions or alienations, if any, prior to 1865 and it is hazardous to speak definitely one way or the other on this point. The law on the subject is however clear. Their Lordships of the Privy Council observed in 10 ALL. 272[9] at p. 289 that the absence of evidence of an alienation without any evidence of facts which would make it probable that an alienation would have been made cannot be accepted as proof of a custom of inalienability. This is what was again observed by their Lordships of the Privy Council in 54 Cal. 955.[15]

[20] The plaintiffs attempted to place on record a certified copy of the mortgage deed dated 11th February 1886 by Rao Ramsingji, the holder of the Bhamgarh Gaddi but it was not admitted by the lower Court on the ground that it was filed late. The document has been again produced in this Court and it is prayed that it should be admitted into evidence under O. 41, R. 27, Civil P. C. In our opinion, it was the duty of the plaintiffs when they had to meet a case of inalienability to search at the very initial stage of litigation the public records and particularly the Registration department to find out alienations of property by the defendant's ancestors. We are not satisfied that the late production of the document was justified and in any case we see no sufficient ground to interfere with the discretion exercised by the lower Court judicially. We have, however, on record documents showing alienations by Rao Kishoresingh from 1923. These documents are EXS. P-25, P-24, P-23, P-22, P-21, P-20 and P-19. These are sales of malik makbuza and maufi lands in villages appertaining to the Bhamgarh Estate. Further Rao Kishoresingh mortgaged one of the malguzari villages on 12th April 1927 and thereafter the entire property consisting of maufi and malguzari villages in the Bhamgarh Estate was mortgaged by Rao Kishoresingh and the appellant on 17th April 1929. It was primarily to satisfy the debt due on the mortgage dated 12th April 1927 that Rao Kishoresingh executed the mortgage deed in suit on 12th October 1928. The appellant explained his association in the execution of the mortgage deed dated 17th April 1929 on the ground that it was due to undue pressure of his father. We do not find much substance in the explanation. The appellant applied on 8th February 1930 to an executing Court (*vide* EX. P-17) for extension of time to satisfy the decree on the ground that he was raising funds by alienating his property. It is thus clear that not only Rao Kishoresingh but even the appellant regarded the property as alienable. The learned counsel for the appellant attempted for the first time before us to restrict the custom of inalienability only to villages held in maufi rights, thereby suggesting that the transfers of malguzari villages and malik makbuza lands did not offend against the custom of inalienability. The plea of the defendant was that the Bhamgarh Estate was inalienable. This estate as has been deposed to by Sujatkhan (D. W. 4) and Ramchandrarao (D. W. 9) consisted of three maufi villages, four malguzari villages and lands. The learned counsel cannot be permitted to narrow down or extend the scope of the custom as pleaded. Besides the above alienation, Rao Kishoresingh alienated village Malegaon as deposed to by Haji Abdulji (D. W. 1) and Sahib Mahtabsingh (D. W. 2). This village, according to the evidence on record, formed part of the Bhamgarh Estate but was given for maintenance to the junior branch of the family i. e. to Thakur Shersingh, Rao Kishoresingh's paternal grand-father (*vide* genealogical table of the family in the Privy Council case 15 N. L. R. 176[1] at p. 178). If the custom of inalienability existed in the family

this village as well was inalienable. The three judicial orders mentioned by the appellant in his pleadings, at p 4 of the record are not relevant. In those orders it was held in execution proceedings that a debt of the holder of the 'Gaddi' cannot be realized from estate attached to the 'Gaddi' after it passed into the hands of the successor by right of primogeniture. These were cases of unsecured debts and have to be distinguished from cases of alienations. The debts are not binding as the holder of the property for the time being does not at his death leave the property attached to the 'Gaddi' as his assets and his successor takes that property in his own right and not as a legal representative of the holder (the deceased). Thus, there is no judicial decision in which the family custom of inalienability has been found in the appellant's favour. It appears from Ex. P-23 that the applicant applied to the Debt Conciliation Board in 1935-36 and agreed to alienate malik makbuza lands in mauza Mundi in satisfaction of his debts due to a creditor, Gulabchanda Manikchanda.

[21] The *sanad* granted by the Government of India (Ex 1-P-(A)) on 18th December 1865 appears from its recitals to be a fresh grant with fresh conditions and not a mere recognition or a renewal of the grant, whatever and wherever it may be, by a Moghul Emperor. This fresh grant was accepted by the appellant's ancestor in substitution of whatever allowances and concessions were enjoyed by him from the Moghul period. The power of alienation mentioned in this *sanad* may be due either to the fact that the property was alienable from 1865 or to the decision of the Government of India to grant the property with power of alienation. In either case it is quite clear from the *sanad* that after 1865 the Bhamgarh Estate was not inalienable and the subsequent conduct of Rao Kishoresingh and of the appellant is consistent with this position. It is remarked in Captain Forsyth's report, p 143, that quit-rent was imposed in view of the free-hold tenure being made transferable. The British Government, as a conqueror was not bound by the grants made or allowances given by the conquered (*vide* A I R 1947 P. C. 1[16]) though the conqueror may respect the same with such variations as may be deemed proper The special tenure with an incident of inalienability if created by a Moghul grant must come to an end with the termination of that grant and the incidents attached to the property now are those which are granted by the last grant, which in this case was the grant by the Government of India on 18th December 1865. The appellant cannot, therefore, rely on the alleged grant by a Moghul Emperor as the foundation for the right of inalienability claimed by him. It is however clear, as held by their Lordships of the Privy Council in 15 N. L. R. 176[1] that neither the alleged Moghul grant nor the *sanad* of the Government of India would destroy the family custom of the appellant's family if it existed before these grants We have, therefore, to find out from the evidence on record if family custom in favour of inalienability before the Moghul grant is established.

[22] There is no documentary evidence on record in favour of the custom pleaded and even the report of Captain Forsyth does not speak of the existence of a custom in pre-Moghul times. Sir Reginal Craddock in his note on the status of zamindars in the Central Provinces expressed an opinion in 1889:

"It must at once be conceded that these zamindars never had any transferable rights in their estate until they were given proprietary rights."

He was speaking of Bhandara, Balaghat and Raipur zamindars. Even assuming that the same applied to Nimar zamindars – there is no basis for this assumption it does not take us very far. In the first place, we have not been told the evidence on which this opinion is based, and secondly much evidentiary value cannot be attached to the opinion expressed in these reports, however eminent the author of the report may be: *vide* 24 N L. R 25.[7] It may be, as observed in I. L. R. (1941) Nag 632[7] at page 641, that impartibility and inalienability are often so closely associated that a young officer, as Sir Reginal Craddock was in 1889, considered that what was impartible was also inalienable. This opinion does not more over support the appellant as even according to it, the Bhamgarh Estate of the appellant would be alienable at least after 1865 We concur in what was observed by the Divisional Bench of this Court at p. 644 in I. L. R (1941) Nag. 632[7]:

"Further in this case we have the grant This grant (Ex D-9 shows that Rao Doulat Singh in 1865 was given a quit-rent tenure with full power of alienation. We are not disposed in this case to restrict the rights of this family to those conferred by this Sannad. We are prepared to assume that if we looked behind it to the ancient rights we should find something different from a quit-rent holding. We should find a joint Hindu family with an impartible estate devolving by a custom of primogeniture. But we can find nothing to show that this estate was inalienable. On the contrary for many years past the person in enjoyment has alienated."

[23] The oral evidence on record, even if accepted, does not establish the custom of inalienability either before or after the alleged grant by a Moghul Emperor. (After discussing the oral evidence with regard to the custom of inalienability their Lordships proceeded as follows.)

[24] The family custom, unlike local custom, can also be put an end to This was pointed out by their Lordships of the Privy Council in

1 Cal. 186.[18] It was held in 27 ALL. 203[19] that though the burden of proving discontinuance of a custom is on the person who pleads it, slight evidence may be sufficient to discharge that burden, if other circumstances and the conduct of the members of the family which relies on that custom are consistent only with the discontinuance of the custom. In the present case, proprietary right with power of alienation was granted in 1865 and accepted by the appellant's ancestor. Thereafter the appellant's father and the appellant himself alienated several items of property and did acts which are inconsistent with inalienability of the family property. Thus it is proper to infer that the custom of inalienability was discontinued at least from 1865.

[25] The mortgage deed in suit was for a consideration of Rs. 6500 of which Rs. 4354-15-3 were due on a prior mortgage bond dated 13th April 1927 for Rs. 3500 and Rs. 2145-0-9 were required for the expenses of litigation in connection with the estate. The mortgage deed of 13th April 1927 for Rs. 3500 was executed for the discharge of an antecedent liability of Rao Kishoresingh due to Abbas Ali Bohara who had assigned the same in favour of the mortgagees. Thus, out of Rs. 6500 Rs. 4354 15-3 were due on account of the antecedent debt of Rao Kishoresingh and, according to the Mitakshara School of Hindu law, would be binding on his son, even apart from the question of legal necessity. Maujilal (P. W. 3), one of the mortgagees, has deposed to the *bona fide* enquiry made by him as to the needs of Rao Kishoresingh and of his being reasonably satisfied that Rao Kishoresingh was in need of Rs. 2145 for the purpose of litigation It is clear from this record that Rao Kishoresingh had to fight out very costly litigations to acquire and preserve the Bhamgarh estate and he succeeded in doing so. He had naturally to incur heavy costs and had to borrow money for the litigations. The mortgagee was satisfied on *bona fide* enquiry that Rao Kishoresingh's representations regarding his needs were true. He was not bound to see to the application of the money borrowed. In these circumstances the mortgage debt would be binding on the appellant, assuming that he had succeeded to the estate under ordinary Hindu law by right of survivorship. As the property was governed by the custom of primogeniture the right of Rao Kishoresingh to mortgage the property was absolute and his son, the appellant, has no right to challenge the same.

[26] Our conclusions therefore are: (i) That the mortgage deed sued upon was duly executed and attested (ii) That the defendant failed to establish that the Bhamgarh estate was inalienable as a result of a grant from a Moghul Emperor. No such grant is established; at any rate, it is not established that the property was inalienable according to the tenure granted. (iii) It is not established that the property was inalienable as a result of an ancient family custom. No such custom is established either before the alleged grant by a Moghul Emperor or thereafter. (iv) That the plea of inalienability as a result of tenure granted, if any, by the Moghul Emperor is not available to the appellant as the result of a fresh grant by the British Government in 1865 with power of alienation. (v) That the custom of inalienability, assuming that it ever existed in the appellant's family, was discontinued or put an end to in 1865 and it did not exist thereafter. (vi) That the mortgage was binding against the appellant on the ground that the debt was partly for the antecedent debt of the father and partly for legal necessity; the mortgagee having satisfied himself about the same on reasonable and *bona fide* enquiry. (vii) As a result of the custom of primogeniture Rao Kishoresingh had an absolute right to mortgage the property and that right was not liable to be challenged by the appellant in the same manner as a joint Hindu son could do, if the property mortgaged was ancestral or joint family property

[27] None of the other grounds raised in the memorandum of appeal were urged before us. They were either expressly or impliedly abandoned. The appeal is dismissed with costs.

K. S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 162 *[C. N. 58.]*

BOSE AND MANGALMURTI JJ.

Yeshwantrao Ganpatrao and others — Appellants v. *Dattatrayarao Ramchandrarao and others — Respondent.*

Misc. Appeal No. 168 of 1941, Decided on 3-12-1946, from order of Addl. Dist. Judge, Hoshangabad, D/- 29-1-1941.

(a) Evidence Act (1872), S. 65 — Award, filing of — Whether original should be filed — Original on record of office of Gwalior High Court — Rules not permitting removal - Secondary evidence is admissible — Copy of original signed by sarpanch who had signed original and authenticated by production of certified copy from Gwalior State can be filed —Civil P. C. (1908), Sch. 2, Para 21.

In the ordinary way an application for filing an award cannot be entertained if it is based on a copy. There are, however, exceptions to this, one of them being when the original cannot be obtained, or has been lost or destroyed Where the original was signed by a Judge of the Gwalior High Court who was the sarpanch and according to the State laws, the original had to be maintained on the files of the High Court Office and all that the parties were entitled to get was a copy of the original :

Held that S. 65, Evidence Act, was called into play and it was permissible for the Court to proceed upon

secondary evidence consisting of a copy of the original signed by the sarpanch who had signed the original and authenticated by a certified copy of the original. [Paras 8 and 9]

Annotation ('46-Man.), Evidence Act S. 65 N. 5.

(b) Civil P. C. (1908), Sch. II Paras 21 and 10—Parties agreeing to accept unanimous award of panchas or in case of difference that of sarpanch—Award by sarpanch and signed by him alone on difference between panchas—Validity.

Where by the terms of reference to arbitration (without intervention of Court) the parties have agreed to abide by the unanimous award of the panchas or in case of difference of opinion between them, by the award given by the sarpanch, the award by sarpanch and signed by him alone, in case of a difference of opinion between the panchas is not invalid. [Para 13]

Even if the clause referred to above had not been there in the agreement the sarpanch would have authority to decide because of the difference of opinion between the arbitrators. In any event the majority view would prevail, and the sarpanch having agreed with the views of two of the four panchas on the disputed issue there would be a majority opinion in favour of the matter enunciated in the award. [Para 14]

But in the case of the latter position the award signed by the sarpanch for himself and on behalf of the other two would be invalid, if the arbitration is with the intervention of the Court. But in arbitration without the intervention of the Court this can be done : 19 A.I.R. 1932 Pat. 60, *Rel. on.* [Para 15]

(c) Civil P. C. (1908), S. 100 — Question of fact—Withdrawal of arbitrators, whether before or after conclusion of arbitration — Question of effect of withdrawal.

The question whether the withdrawal of some of the arbitrators from arbitration was before or after the conclusion of thearbitration is a question of fact. What the effect of withdrawal would be if it is before the conclusion of the arbitration, is a matter of law. [Para 21]

Annotation : ('44-Com.) Civil P. C. Ss. 100 and 101 Notes 30 and 51.

(d) Civil P. C. (1908), Sch. II Paras. 21 and 10—Withdrawal of arbitrators after conclusion of arbitration—Validity of award.

Where by the agreement of reference parties agree to abide by the unanimous decision of the panchas or in case of the difference of opinion between them by the award of the sarpanch, withdrawal of some of the panchas after recording their difference of opinion, and disagreement on the question of award does not invalidate the award by the sarpanch given after their withdrawal, the withdrawal being after the conclusion of the arbitration in accordance with the terms of the reference but before the award was made. [Para 23]

(e) Civil P. C. (1908), Sch. II, Paras. 21, 14 (a)—Award held not exceeded scope of reference.

The relevant clause in the agreement of reference relating to the question of maintenance was as follows :

"We hereby authorize them to take the action of partitioning the properties after examining accounts and hearing pleadings of the parties and after taking into consideration the orders passed by late Huzur Anver Saheb dated 22-4-1924 and the Supreme Council of the Gwalior State dated 4-8-1926 and 1934."

The law of the Gwalior State and orders referred to precluded the plaintiff from obtaining any maintenance out of the Jahagir property in the event of a partition between the two parties :

Held, that the only point of making such a reference was to enable the arbitrators to take the inequality which would result from that into consideration and make a fair partition by giving the plaintiff compensation from the rest of the property. In other words, it only means that the arbitrators were asked to make a fair partition taking that into consideration and, therefore, compensating the plaintiff for the fact that the defendant would receive not only the lion's share of the Jahagir estate but all of it. Accordingly the question of maintenance did fall within the terms of the reference and that, therefore, the arbitrator had authority to deal with the matter. [Paras 25 and 26]

(f) Civil P. C. (1908), Sch. II, Para 21—Court cannot sit in appeal on decision of arbitrator.

Arbitrators are judges of fact as well as law and have jurisdiction and authority to decide wrong as well as right. Accordingly, if they reach a decision and reach it fairly after hearing both sides their award cannot be attacked. The Court filing the award has no power to sit in appeal on the decision of the arbitrator : 23 A I R. 1936 Nag. 197; 29 Cal. 167 (P. C.), *Rel. on.* [Para 27]

(g) Civil P. C. (1908), Sch. II, Paras 20, 21 and 19—Parties agreeing to modification of original award—Award in terms of agreement—Validity.

If the parties agree to a modification of the original reference before the arbitrators then they are bound by their agreement; and when the arbitrators decide in accordance with the agreement of the parties it does not render their award invalid or make it any the less an award. The parties are bound by this agreement and the award is not incompetent : 21 Cal. 590 (P.C.); 25 A I.R. 1938 Nag. 132 and 15 A I.R. 1928 Pat. 7, *Applied.* [Para 30]

(h) Civil P. C. (1908), Sch. II, Paras 21 and 14—Arbitrators held did not exceed scope of reference.

Where it is evident from the terms of reference that the parties were at issue regarding the liability of the plaintiff to account and they referred that dispute in wide and general terms and the reference did not contain any admission by the plaintiff, as to the basis on which he is liable to account :

Held, that the arbitrator had authority to take into consideration the law by which the parties were governed and to determine whether the plaintiff was liable to account on the footing of an agent or trustee of the family or as manager under the Hindu law. [Para 34]

(i) Civil P. C. (1908). Sch. II, Para 21 — Court cannot go beyond award.

While making a decree on award under para. 21, the Court has no jurisdiction to travel beyond the award and has no jurisdiction to attach lists to its decree which were not attached to the award and which did not form part of it. The lists given by the Court in its decree were ordered to be deleted and the lists attached to the award substituted in their place. [Para 37]

Cases referred : —

1. ('32) 11 Pat. 131 : 19 A.I.R. 1932 Pat. 60 : 135 I. C. 518. Ram Bilas Singh v. Birich Singh.
2. ('36) I. L. R. (1936) Nag. 44 : 23 A. I. R. 1936 Nag. 197 : 165 I. C. 556, Tulsiram v. Jhanak Lal.
3. ('02) 29 Cal. 167 : 29 I. A. 51 : 8 Sar. 154 (P. C.) Ghulam Khan v. Muhammad Hassan.
4. ('94) 21 Cal 590 : 21 I A. 47 : 6 Sar. 423 (P. C.) Mukund Ram Sukal v. Saliq Ram.
5. ('37) I.L.R. (1937) Nag. 449 : 25 A. I. R. 1938 Nag. 132 Dulan Bai v Sundersao
6. ('27) 6 Pat. 556 : 15 A. I. R. 1928 Pat. 7 : 109 I. C. 821, Jnanendra Nath v. Suresh Chandra Roy.

T. L. Sheode and S. T. Khirwadkar — for Appellants.

S. C. Dube and V. R. Sen — for Respondent.

Judgment.—This is an appeal against a decree following against an award with certain modifications under Para. 21, Sch. 2, Civil P. C.,

(Act 5 [V] of 1908) The Arbitration Act does not apply to this case and the matter falls within Sch. 2, Civil P. C.

[2] The parties to this suit had certain disputes regarding the division of their property. They were members of a joint Hindu family and the defendant was the jahagirdar of a jahagir estate in the Gwalior State. The defendant desired partition, and as the parties were unable to agree regarding several matters incidental to the partition, they decided, with the assistance of the Home Member of the Gwalior State, to refer their disputes to arbitration. The reference is Ex. P2 and is dated 30th April 1935. This was a reference made before the matter reached the Court and accordingly falls within the purview of Sch. 2, Civil P. C., dealing with references without the intervention of the Court.

[3] The property consisted of the jahagir property in the Gwalior State and certain other properties—some in British India and some in Gwalior. The mater having been referred to the arbitration of five arbitrators—two chosen by each side and a sarpanch chosen with common consent—an award was delivered on 28th May 1935. This is the award which is now said to be filed Under this award all the non-jahagir property was directed to be partitioned and the jahagir property being impartible was left as it is. The defendant being the jahagirdar naturally got the jahagir property and the plaintiff was given Rs 20 000 in lieu of maintenance which he would have obtained from the jahagir estate had the parties not partitioned The parties were given the choice of resorting to another arrangement for maintenance equivalent to that which the plaintiff was getting from the jahagir estate, but we need not concern ourselves with that. The award also contained certain other matters which we need not enumerate at this stage.

[4] On 24th August 1935, the plaintiff filed the application out of which this appeal arises to have the award filed. On 10th June 1935 the defendant had instituted a suit for partition. The partition suit was stayed pending the decision on the question of the award. According to the lower Court, the two suits were consolidated. That, however, appears to be inaccurate It seems that the partition suit was stayed and the documents filed in the one case were admitted to evidence in the other.

[5] The award was ordered by the lower Court to be filed and a decree followed in terms of the award, with however one variation. The lower Court held that the question of maintenance was beyond the competence of the arbitrators. It further held that this question was separable from the rest, and accordingly struck out this part of the award.

[6] The plaintiff appeals against this part of the decision which strikes out the portion of the award relating to the award of maintenance to him. The defendant filed a cross-objection in which he contends that the application for filing the award should be dismissed.

[7] Objection was taken at the outset to the maintainability of the application on the ground that the original award has not been produced. All that the plaintiff produced in Court is what has been called a counter-part of the original award. The description is inaccurate because as a matter of fact the document produced is not a counter-part but a copy of the original. This copy is signed by the sarpanch who alone signed the original award.

[8] It may be accepted at once that in the ordinary way an application for filing an award cannot be entertained if it is based on a copy. There are, however, exceptions to this, one of them being when the original cannot be obtained, or has been lost or destroyed. In this case the original was signed by a Judge of the Gwalior High Court. He was the sarpanch, and it seems that, according to the State laws, the original has to be maintained on the files of the High Court Office and all that the parties are entitled to get is a copy of the original. Endeavour was made by the defendant to obtain the original and letters were sent to the Registrar of the Gwalior High Court. An answer was received from him dated 12th January 1940. in which he stated that the original could not be sent. That being the state of affairs, S. 65, Evidence Act, is called into play and it is permissible for the Court to proceed upon secondary evidence.

[9] The secondary evidence in this case consists of a copy of the original signed by the sarpanch who, as we have said, signed the original. There is also on record a certified copy of the original which is among the files of the Gwalior High Court Office. There can, therefore, be no doubt about the authenticity of the copy which is produced, and secondary evidence being permissible, the objection taken on this score falls to the ground.

[10] As we have said, four panchas and a sarpanch were appointed as arbitrators. The award, Ex P1 is signed by the sarpanch alone. Objection is taken to this and it is stated that the award not having been signed by all the arbitrators is invalid.

[11] The reason why the award has been signed by one alone appears to be this. Exhibit P-2, which is the deed of agreement containing the reference, has the following provisions regarding panchas and their duties It says:

"We lay down and agree that we hereby appoint the following panchas and sarpanch....."

Then follows the names of the sarpanch and the panchas. Originally each side appointed 3 panchas and, as we have said, the sarpanch was appointed by common consent.

[12] The agreement of reference then continues :

"Any such award if unanimously given by the panchas or an award that may be given by the sarpanch in the event of the difference of opinion among the panchas shall be accepted and approved by us. Again, the panchas and the sarpanch will under this deed of agreement, give an award in the month of May 1935."

It will be seen from this quotation that the parties appointed six arbitrators, three from each side, and a sarpanch, and the authority given to the panchas was that they should decide the disputes between the parties unanimously if that were possible. If they were not able to reach unanimity, then the sarpanch was to give the decision. Whether this means that the sarpanch would be invested with authority to make the sole decision even if one of the remaining six disagreed need not be considered here because the situation does not arise But there was a difference of opinion between the panchas appointed by the defendant and those appointed by the plaintiff. The difference of opinion was equal, and accordingly the authority of the sarpanch at once arose under the clause quoted above.

[13] We ought to have stated that though each side appointed three arbitrators, apart from the sarpanch, one from each side later dropped out and the matter proceeded with four arbitrators and a sarpanch. This was with consent and the parties took part in the arbitration once it started. This being the position, the award by the sarpanch is not, in our judgment, invalid.

[14] That apart. Even if the provisions to which we have referred had not been in the terms of reference the law is that as soon as there is a difference of opinion between the arbitrators then the umpire assuming that the *sarpanch* occupied that position enters upon the reference. If not, of course, the majority opinion would prevail. That law is to be found in Russell on Arbitration Edn. 13, p. 320 where the following is quoted from the English Statute on arbitration of 1889 :

"If the arbitrators (have allowed their time or extended time to expire without making an award, or) have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators."

Again at page 321 Russell states :

"Where the provisions of para. (d) '(the provisions which we have just quoted)' of the Schedule are included in the submission, and the umpire enters 'on the reference in lieu of the arbitrators,' all the matters referred fall to be decided by him, and not merely the matters in respect of which the arbitrators have disagreed."

The same enunciation of the law is to be found in Banerji's Law on Arbitration and Award Edn. 4, p. 734 It is clear then that even if the clause to which we have referred had not been there then the *sarpanch* would have had authority to decide because of the difference of opinion between the arbitrators. Also, in any event, as we have said, if this was not the law then the majority view would prevail, and the *sarpanch* having agreed with the views of two of the others on the disputed issue there was a majority opinion in favour of the matter enunciated in the award.

[15] The latter position, however, raises the question whether one arbitrator can sign on behalf of the others. Had the arbitration been with the intervention of the Court that would not have been proper. But in arbitrations without the intervention of the Court this can be done : *see* 11 Pat 131.[1]

[16] That brings us to the next question, viz., whether there was a difference of opinion among the *panchas* and to what extent the difference goes. The history of the arbitration will be found set out in the award, Ex. P-1, which, as we have said, is signed by the *sarpanch*. It shows that the first sitting of the arbitrators was at Ujjain on 21st May 1935. Exhibit P-4 is a copy of the order-sheet of that date. On this date the plaintiff's *panchas* were absent but the two *panchas* of the defendant were present, as also both the plaintiff and the defendant in person. The plaintiff raised no objection regarding the absence of his *panchas* and the matter proceeded. The parties were asked to clarify the points on which they were at issue and three issues were drawn up.

[17] The second sitting was on the following day, 22nd May 1935. On that date the *panchas* of both sides were present, as also the parties in person. The order-sheet is signed by everybody. The parties agreed on that day regarding the partition of the property. It was agreed that the defendant should divide the property in his possession into two equal shares excluding the jahagir estate and that the plaintiff should be permitted to choose one of the two lists. Similarly, the plaintiff was directed to draw two lists of the property in his possession and the defendant was given the choice. The matter was then adjourned to the following day for arguments on the other two issues on which the parties were not able to reach an agreement.

[18] The order-sheet of the 23rd is Ex. P-8. The question of the plaintiff's liability to account and other incidental matters relating to the accounts was argued and the sitting was then adjourned to the 24th. Exhibit P-9 is the order-sheet of the 24th. The defendant was not pre-

sent on that date and he sent a letter asking for an adjournment. The sitting was, therefore, adjourned till the morning of 27th May 1935.

[19] The *panchas* assembled at 8-30 in the morning. All were present. The plaintiff was also present in person but the defendant was absent. He, however, sent a telegram asking for a further adjournment. The order-sheet records that the meeting of that day had been purposely set for the 26th (27th?) but the arbitrators agreed to wait till the evening, and accordingly the meeting adjourned till 5 in the evening.

[20] It is relevant at this stage to point out that there was a certain urgency about this matter. The agreement of reference (EX. P-2) made this condition. It stated:

"Again, the *panchas* and the *sarpanchas* will, under this deed of agreement, give an award in the month of May 193". In case no such award is given this agreement shall be deemed to be invalid and the parties shall not be liable for what has been stated herein nor for the statements made during the arbitration proceedings and shall be entitled to seek their respective legal redresses in Court."

It will be evident from this that it was essential that the award should be delivered before the end of May. That explains the urgency of the matter and explains why the arbitrators were not prepared to wait beyond 5 O'clock on that date. It is to be observed that no one raised any objection to this.

[21] The arbitrators met again in the evening at 5 O'clock. The order-sheet of that date is EX. P-11. Exactly what occurred at that meeting is a matter of dispute. It is contended on the one side that the arbitrators finished their work and after that the two arbitrators of the defendant sent a letter to the *sarpanch* withdrawing from the arbitration. On the other side, it is contended that the withdrawal was before the work was concluded, and accordingly the arbitration was invalid. Whether the withdrawal was before or after is a question of fact. What the effect of withdrawal would be—assuming it to have been before the conclusion of the arbitration—is a matter of law. We will first deal with the question of fact.

[22] The inherent evidence of EX. P-11 indicates that the withdrawal was after the conclusion of the arbitration proceedings but before the signing of the award. (Their Lordships considered the evidence on this point and continued.)

[23] In our opinion, this evidence leads to the conclusion that the arbitration proceeded up to a stage when the arbitrators had to decide what their award was to be. At that juncture they discovered that they were not able to agree or, in the terms of the reference (EX. P-2), were unable to give a unanimous award. At that stage the *panchas* of the defendant withdrew. The legal effect of this is that they withdrew after the arbitration had concluded in accordance with the terms of the reference but before any award was made. As we have pointed out, the agreement was that the award was to be in accordance with the unanimous decision of the arbitrators. But they were not able to agree. Therefore the *sarpanch* had to decide. As they were not able to agree the *sarpanch* became vested with authority to give the sole award. He became so vested under the terms of reference, as also under the law.

[24] The next question we will deal with is the question of maintenance. The first question here is, was this matter referred to the *panchas*? In our opinion, it was. The relevant clauses in the agreement of reference (EX. P-2) relating to this are as follows:

"We hereby authorize them to take the action of partitioning the properties after examining the accounts and hearing pleadings of the parties and after taking into consideration the orders passed by late Huzur Anver Saheb dated 22nd April 1924 and the Supreme Council of the Gwalior State dated 4th August 1926 and 1934."

[25] The defendant's contention is that the orders referred to unequivocally stated that the plaintiff was not to get any maintenance in the event of a partition between the two. That is not entirely accurate. What the order states is that in the event of a partition the plaintiff will not get maintenance out of the jahagir estate. That also appears to be in consonance with R. 14-A, Gwalior Jahagir Rules. We need not here determine what exactly these orders import nor need we construe the Jahagir Rules of the Gwalior State. All that is foreign law, and so far as we are concerned the questions which arise out of them are ones of fact. We have no expert opinion before us regarding the State law on this subject and accordingly are not in a position to reach a conclusion on that point. We, can, however, accept, for the basis of argument, that the contention of the defendant that the qualification which we have mentioned above is right, namely, that the law of the Gwalior State and orders referred to in the terms of agreement preclude the plaintiff from obtaining any maintenance out of the Jahagir property in the event of a partition between the two parties. The next question is what was the point of referring to this in the manner which we have set out above in the terms of reference. In our opinion, the only point of making such a reference was to enable the arbitrators to take the inequality which would result from that into consideration and make a fair partition by giving the plaintiff compensation from the rest of the property.

[26] We say this for the following reasons. If parties wish arbitrators to partition properties A, B and C, and not to partition X, they either leave X out of their reference altogether and say definitely "please partition A, B and C," or, if they wish to make the matter clearer still, they say please partition A, B and C but not X". That, however, is not the form in which this document is couched. It does not tell the arbitrators to leave X out of consideration, but to make the partition after taking into consideration the fact that the plaintiff cannot obtain any share or maintenance from the Jahagir estate. In our opinion, that can only mean that the arbitrators were asked to make a fair partition taking that into consideration and, therefore, compensating the plaintiff for the fact that the defendant would receive not only the lion's share of the Jahagir estate but all of it. We are accordingly of opinion that this question of maintenance did fall within the terms of reference and that, therefore, the *sarpanch* had authority to deal with the matter.

[27] The next question is whether he was wrong in making the award he did regarding maintenance. As we have said, he awarded Rs. 20 000/- to be deducted out of the defendant's share. He also made an alternative direction with which we need not concern ourselves at the moment. Now, it does not matter whether the arbitrator was right or wrong in what he did because as has been pointed out by the Privy Council, and also by this High Court, arbitrators are Judges of fact as well as law and have jurisdiction and authority to decide wrong as well as right. Accordingly, if they reach a decision and reach it fairly after hearing both sides, their award cannot be attacked. The Court filing the award has no power to sit in appeal on the decision of the arbitrator. This law will be found in I. L. R. (1926) Nag. 44,[2] at p 45 and is based on the authority of the Privy Council in 29 Cal. 167,[3] at p. 186. But that apart, the decision was, in our opinion, a fair and a just one. The defendant was the *jahagirdar*. He forced the partition. The plaintiff did not want it. He knew that once there was separation in the family the plaintiff would receive neither share nor maintenance out of the *jahagir* estate. Accordingly, he knew that he would get the whole of that estate. That being the position, it was the fair and just thing to make compensation to the other side. That is what the arbitrator did. Further, as we say, whether he was right or wrong in what he did is not a matter into which we can enter. The matter was within the scope of the reference, and accordingly he had authority and jurisdiction to reach a decision on this point.

[28] The next objection is regarding the partition. It is said that on this point at any rate either the parties were agreed, in which case the *sarpanch* had no authority to make an award, or, if the parties were not agreed then the *sarpanch* in fact made no award. What he has done has been in effect to tell the parties to do the work which he was supposed to do.

[29] Now, as to this it is clear from the order-sheets as well as from the evidence of the *sarpanch* (P. W. 5), and also from the award Ex. P-1, that the parties and their *panchas* were agreed that there should be partition. Further, that the parties were agreed that each should divide the property in his possession into two parts and allow the other side to choose whichever he pleased. In order to enable the lists to be prepared, the arbitration was adjourned, and it was only at this stage that the defendant did not turn up and did not submit his list. However, the agreement already reached was embodied in the award.

[30] Now, it is evident that all the arbitrators and the *sarpanch* were unanimous about this. It is also evident that quite apart from what the *panchas* and the *sarpanch* thought or decided, the parties themselves were agreed. Now it is open to the parties at any stage to modify the reference which they had originally made and to agree to modifications in the settlement of their disputes. This will be evident from the Privy Council in 21 Cal. 590[4] as well as from I.L.R. (1937) Nag 419[5] and from 6 Pat. 556.[6] These decisions are not exactly in point but the principle is there that if the parties agree to a modification of the original reference before the arbitrators then they are bound by their agreement; also the fact that when the arbitrators decide in accordance with the agreement of the parties it does not render their award invalid or make it any the less an award. We hold that the parties are bound by this agreement and that the award is not incompetent. As we have said, even if the other panchas did not sign the award the sarpanch had authority on their behalf to deliver and sign their agreed conclusion.

[31] As regards the other two matters, the maintenance and the accounts, as the panchas for the respective parties were not agreed, the clause investing the sarpanch with authority to decide the matter came into play and accordingly he had jurisdiction to decide that point on his own.

[32] Objection was next taken to the accounts. It was said that the award does not make any decision regarding this. It was contended that under the agreement the plaintiff admitted that he was an accounting party and liable to render accounts. Accordingly, as the sarpanch did not

investigate the accounts and determine his liability. the award is, to this extent, vitiated.

[33] The position in the terms of reference regarding this is as follows The relevant clause runs :

"We hereby authorize them to take the action of partitioning the properties after examining the accounts and hearing the pleadings. . . . . and to cause to be paid with interest that has become due for payment such amount as may be found due by one party to the other on rendition of accounts."

[34] In our opinion, there is no admission here by the plaintiff that he is liable to render accounts on the footing of an agent or on any footing other than as manager of a joint Hindu family Accounting can be on many bases The accounts which an agent is expected to render are very different from the accounts which can be called for from a manager of a joint Hindu family. It is evident that the parties were at issue regarding the liability of the plaintiff to account. They referred that dispute in wide and general terms. Accordingly, the arbitrator had authority to take into consideration the law by which he parties were governed and to determine whether the plaintiff was liable to account on the footing of an agent or trustee of the family or as manager under the Hindu law.

[35] It is relevant to note that when the parties were called upon to explain the scope of their disputes before the arbitrators on 21st May 1935, (Ex. P-4) the issues upon which they agreed were simple and in general terms viz., "Account in respect of the property situate at Harda from Samvat 1986 to Samvat 1990" In our opinion, this left the matter at large, and the arbitrators had authority to determine on what footing the plaintiff should be called upon to account.

[36] The decision which the sarpanch reached on this is embodied in his award. He points out there that the plaintiff could only be called upon to account on the basis of his being manager of the joint Hindu family, and he there correctly quotes the Hindu law on the point, viz.. that except as regards fraud or mismanagement or gross negligence prejudicial to the family the manager cannot be called upon to account. He pointed out that there was no evidence of fraud or mismanagement or gross negligence, nor was any evidence produced to show prejudice Accordingly, the plaintiff was not liable to account beyond the extent to which he consented to account. The plaintiff produced all his books and said he was quite prepared to account on the basis of those books provided the accounts were examined by an auditor, and he was prepared to pay what the auditor would decide was due from him That is embodied in the award. In our opinion, the arbitrator had jurisdiction to decide as he did.

[37] The decree of the lower Court embodies certain lists which the learned Judge of the lower Court appears to have thought were part of the award. A good deal of argument was addressed to us regarding these lists, and there was a certain amount of confusion because a large number of lists were prepared. The award refers to two lists They are, however, not the lists which have been attached to the decree. The lower Court, of course, had no jurisdiction to travel beyond the award and had no jurisdiction to attach lists to its decree which were not attached to the award and which did not form part of it The only lists which form part of the award are those to be found in EX. P-13. These will be translated, and the lower Court's decree will be corrected after these lists have been translated The lists given by the lower Court in its decree will be deleted and the lists attached to the award will be substituted in their place. Except for that, and except as regards the direction in the award regarding maintenance, the decree of the lower Court will stand.

[38] The direction regarding the maintenance is as follows and this will now be incorporated in the decree. The defendant will pay to the plaintiff a sum of Rs 20,000 which shall be deducted from the defendant's half share of the profits of the property in the plaintiff's possession.

[39] This is not in the award in quite these terms, but counsel on both sides agree that that is what this passage in the award means and we make this variation with the consent of counsel on both sides in order to clarify the position.

[40] There will also be added to the decree this clause. In the alternative, the defendant shall give the plaintiff in lieu of maintenance eight anna zamindari share in mouza Lahadpur and eight-anna share in mouza Palasner. The defendant may at his option carry into effect either of these two alternatives. The result is that the appeal succeeds and is allowed with costs, and the cross-objection fails and is dismissed with costs.

R. G. D. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 168 *[C. N. 59.]*

BOSE J.

Sheonarayan Harlal Maheshwari—Plaintiff—Applicant v. *Kanhaiyalal Devidin and another—Defendants—Non-Applicants.*

Civil Revn No 530 of 1945, Decided on 31st January 1947, from order of Second Addl. Civil Judge, 2nd Class, Khandwa, D/ 1st November 1945.

(a) Civil P C (1908), S. 52—Suit against person as heir of deceased—Proof required — Existence of assets if should be proved at stage of suit or execution—Position, when suit is undefended — Civil P. C. (1908), O. 9, R. 6.

When a person is not an heir but is sued as a legal representative on the sole assertion that he is an intermeddler in the estate, it will be necessary for the plaintiff to establish in the suit itself that there is an estate, that is to say, the plaintiff must prove that the estate which the defendant is said to be intermeddling with belonged to the deceased. Otherwise of course the defendant is not a 'legal representative' and unless it can be established that he is a legal representative no decree can be passed. But when the defendant is proved to be an heir, there is a difference of opinion in C. P. and Berar, on the question whether the existence of the assets must be proved in the suit or may be left to the stage of execution. [Para 3]

The practice accordingly varies and litigants are at a loss to know what to do. That being the case the plaintiff ought to be told that he would be required to establish this in the suit and that it would not be enough to leave the matter to the execution stage. This is all the more necessary in a case where the defendant does not appear. [Para 3]

Annotation : ('44-Com.) C. P. C., S. 52 N 4.

(b) Civil P. C. (1908), O. 9, R. 6 — Defendant not appearing—Plaintiff to adduce prima facie evidence —Duty of Court in telling plaintiff what is prima facie case.

Where the defendant does not appear and the Court requires the plaintiff to adduce *prima facie* evidence, the Court ought to warn the plaintiff that such evidence as he has adduced is not in the opinion of the Court sufficient to establish a *prima facie* case. Unless this is done it is evident that a plaintiff would be bound to adduce all his evidence and examine his witnesses as fully as he would in a defended case. The whole idea is that the Judge should take just enough evidence to satisfy himself that a *prima facie* case has been established. But in any event the Judge should at least tell the plaintiff how much evidence he requires : 15 A.I.R. 1928 Nag. 165, *Ref.* [Para 5]

Annotation : ('44-Com.) C. P. C., O. 9, R. 6, N. 2, Pts. 5 and 6

(c) Civil P. C. (1908), S. 115 — Interference on question of practice.

High Court is precluded from interference under its revisional powers on ground of mistake of law But it is not so precluded on question of practice which goes to the root of the trial. [Para 5]

Annotation : ('44-Com.) C. P. C., S. 115, Notes 12 and 13.

Case referred :—

1. ('28) 15 A. I. R. 1928 Nag. 165 : 108 I. C. 879, Bhujangrao v. Baliram.

R. S. Dabir — for Applicant.

Order.—The defendant has not appeared to oppose this application for revision. His brother, Babulal, owed the plaintiff money on a pledge of ornaments Babulal died, and after notice to the defendant, the pledged ornaments were sold The proceeds were not sufficient to cover the amount of the debt and so the plaintiff sues the defendant as Babulal's heir for the balance. The plaint sets out that the defendant is Babulal's heir and that he is in possession of the assets of the deceased.

[2] The defendant did not appear and the case proceeded *ex parte*. In his evidence the plaintiff admitted that Babulal and the defendant were joint in estate and that the defendant was in possession of all the joint family property. The learned Judge of the lower appellate Court holds, and holds rightly, that the plaintiff cannot proceed against the joint family property in the defendant's hands after Babulal's death because it survives to the defendant and such interests as Babulal had in his lifetime are extinguished. But the question remains about Babulal's separate estate. The learned Judge states that there is no evidence to show that Babulal had any separate property and that the defendant is in possession of it. I gather he accepts as correct law that had that been established then the plaintiff would have been entitled to proceed against those assets. The question, however, is whether a plaintiff is bound to prove that the defendant is possessed of the deceased's assets at this stage or in execution; also whether it is necessary to adduce evidence when the defendant does not appear.

[3] On the first point there is a difference of opinion. I concede that when a person is not an heir but is sued as a legal representative on the sole assertion that he is an intermeddler in the estate it will be necessary for the plaintiff to establish in the suit itself that there is an estate, that is to say, the plaintiff must prove that the estate which the defendant is said to be intermeddling with belonged to the deceased. Otherwise of course the defendant is not a 'legal representative' and unless it can be established that he is a legal representative no decree can be passed. But when the defendant is proved to be an heir the position is not the same and there a difference of opinion emerges. Some Judges hold that in such a case the plaintiff is entitled to a decree the moment he proves that the defendant is an heir and that the correct stage at which to ascertain whether there are assets is in execution. Others hold that the existence of assets must be disclosed in the trial itself I need not decide this matter in revision. All that it is necessary to state in this case is that there is a difference of opinion on this point which has not been settled in this Province. The practice accordingly varies and litigants are at a loss to know what to do. That being the case I think the plaintiff ought to have been told that he would be required to establish this in the suit and that it would not be enough to leave the matter to the execution stage. I think this was all the more necessary in a case where the defendant did not appear.

[4] In A.I.R. 1928 Nag. 165[1] Hallifax A. J. C. held that where a defendant does not appear a Court is bound to pass a decree at once and that it is not necessary for the plaintiff to adduce any evidence at all. This is one extreme view which has not found general acceptance though there have been obiter dicta from other Judges of this

Court as well to that effect. But without going to these extremes all Courts are agreed that a plaintiff need do no more than establish a *prima facie* case, and as Courts are not agreed whether it is *prima facie* sufficient to prove that a defendant is an heir and leave the question of assets to the execution stage or not I think it would have been fairer to warn the plaintiff that he would be required to prove this matter in the suit itself.

[5] I am careful to state that I am not interfering in this case because of any mistake of law. The Full Bench precludes interference in revision on that ground. I am interfering on a question of practice which goes to the root of the trial. Where the defendant does not appear and the Court requires the plaintiff to adduce *prima facie* evidence I think the Court ought to warn the plaintiff that such evidence as he has adduced is not in the opinion of the Court sufficient to establish a *prima facie* case. Unless this is done it is evident that a plaintiff would be bound to adduce all his evidence and examine his witnesses as fully as he would in a defended case. It is quite evident even on the view which requires *prima facie* evidence in such cases, that the plaintiff need not prove his case in full. The whole idea is that the Judge should take just enough evidence to satisfy himself that a *prima facie* case has been established. But I think in any event the Judge should at least tell the plaintiff how much evidence he requires. Otherwise, as I say, the plaintiff will be bound to adduce all his evidence in every undefended case and proceed as fully as he would have done in a defended action. Also, on doubtful questions like the present a plaintiff is likely to be misled.

[6] In view of the learned Judge's opinion that the existence of assets must be proved in the suit and cannot be left to the stage of execution I remand the case to him with directions to enable the plaintiff to prove the existence of assets, and if he succeeds then to decree the claim to the extent of these assets; if not, again to dismiss the claim. The application is allowed. The order of the lower Court is set aside. There will be no order as to costs because the defendant has not contested the action at any stage and it is the Court and not the defendant which has required the plaintiff to proceed.

R G.D. *Revision allowed.*

A. I. R (35) 1948 Nagpur 170 *[C. N. 60.]*

BOSE J.

Mate Nande & another—*Appellants* v *Dalchand Phadali & another* — *Respondents.*

Second Appeal No. 137 of 1944 Decided on 15-1-1947, from appellate decree of 2nd. Addl. Dist. Judge, Saugor, D/- 16-12-1943.

(a) Civil P. C. (1908), O. 6. R. 4—Pleadings—Fraud—Details of fraud should be given.

No case of fraud can be looked at unless it is pleaded with the utmost particularity and unless it is proved as laid. Merely alleging that the transferee of property got the transfer made by practising fraud on the transferor is not enough. Details of fraud should be given, how and why it was necessary and how it was carried out. [Para 4]

Annotation.—('44-Com.) C. P. C., O. 6, R. 4, Note 2.

(b) Civil P. C. (1908), O. 14, R. 1—Issues framed between co-defendants—Propriety of.

While framing issues the Court should not mix up the cases set up, by other parties against whom the plaintiff claims no relief, with the case set up by the plaintiff. [Para 5]

A filed a suit against *B*, her son *C* and *D*, the mother of *A* for possession of a house, alleged to have been sold by *D* to the husband of *B*. The plaintiff alleged that the sale by his mother was without legal necessity and was effected by the fraud practised upon his mother by the husband of *B*. No particulars of fraud were given. The plea of fraud was not one which a Court of law could accept. In her written statement, *D* had pleaded fraud of the husband of *B* and gave its particulars. Court framed an issue on this plea raised by *D* against whom *A* had claimed no relief:

Held, that the issue should not have been raised on the case set up by *D*. [Para 5]

Annotation.—('44-Com.) C. P. C., O. 14, R. 1, Note 3.

(c) Civil P. C. (1908), S. 100—Question of fact—Legal necessity—Evidence on question of legal necessity mixed up with evidence of fraud—Case of fraud not established—Finding on question of legal necessity, value of.

Question of legal necessity is normally a question of fact, but where the Judge had mixed up the questions of fraud and legal necessity and the evidence thereon:

Held, that if the finding of fraud was not accepted, the finding on the question of legal necessity also could not be accepted. [Para 20]

Annotation.—('44-Com.) C. P. C., Ss. 100-101, Note 45.

R. S. Dabir—for Appellants.

B. L. Gupta—for Respondent No. 1.

Judgment.—This is a defendant's appeal in a suit for possession of a house and for certain injunction. It is admitted that the whole case hinges on the plaintiff's right to possession. If he has no right to possession then he has no right to the injunctions claimed. On the other hand, if he has a right to possession then he is entitled to the injunction. The facts are as follows:

[2] One Balkishan had three sons and a daughter as shown in the following genealogical tree :

BALKISHAN

Fadali w. Mathura (Deft. 3).	Nande w. Mst. Durga (Deft. 2).	Parmanand (P.W. 1)	Mst. Poonabai (3 D. W. 2).
Dalchand (Plff).	Mate (Deft. 1.)		

The plaintiff's father Fadali died on 25-5-1923. Two days later on 27-5-1923, the house in suit was sold by the plaintiff's mother, who is defendant 3 in this case, to the plaintiff's pater-

nal uncle Nande. Nande is the father of defendant 1 and husband of defendant 2. The suit was filed 19 years later on 31-3-1942. The plaintiff was a minor and so gets an extended period of limitation.

[3] Execution of the sale-deed by the plaintiff's mother Mathura is admitted, but the case the plaintiff set out in the plaint was (1) that there was no legal necessity for the sale and (2) that

"there was great friendship between defendant 3 and Nande, and Nande son of Balkishan led away defendant 3 and by practising fraud he obtained a deed of sale of the house and got the same registered. He was placed in possession of the western portion of the house which is shown in red ink in the map."

[4] This is the only allegation regarding fraud in the plaint. No detail is given, nor is it suggested how or why the fraud was necessary, nor is it shown how it was carried out. It has been repeated over and over again by the Privy Council, and by this Court, that no case of fraud can be looked at unless it is pleaded with the utmost particularity and unless it is proved as laid.

[5] Despite this lack of pleading, however, an issue was struck on the point to the following effect:

"Whether the sale-deed dated 27-5-1923 was void on the ground of want of consideration, fraud or misrepresentation as alleged by defendant 3?"

It is to be observed that the issue relates to a case set up by defendant 3. Defendant 1 is not fighting her. He is in possession. The plaintiff seeks for possession as against him. Accordingly, the case he had to meet was the case set up by the plaintiff, and cases set up by other parties against whom the plaintiff claimed no relief ought not to have been mixed up with the plaintiff's case. However, even if it be accepted that the plaintiff intended to rely on the fraud pleaded by defendant 3 (his mother) the position comes to this.

[6] Defendant 3 stated that at the time of her husband's death Nande told her that suits were about to be filed against her in respect of unfinished contracts which her husband had undertaken to complete and had not completed. Nande told her that decrees would be passed in those suits and that the house would be put up for sale in execution. He, therefore, advised the defendant

"to execute a fraudulent deed of sale of the house in favour of the father of defendant 1 and the husband of defendant 2."

The statement then goes on:

"Therefore the deceased Nande being a close relative and on his assuring her that the owner of the house would remain this defendant's son, the plaintiff only and that on the plaintiff's attaining majority the deceased Nande would execute in favour of the plaintiff a deed of return of the deed of sale of the house, this defendant executed a deed of sale in favour of the deceased Nande; and after the registration of the aforesaid deed of sale the deceased Nande took back the amount of consideration of the deed of sale on coming out."

[7] There is no allegation here that Mathura's husband had not left uncompleted works on contracts undertaken by him and that the fears about which Nande is said to have spoken were in fact unfounded. But that apart, the somewhat vague statement made by Mathura amounts to this, that Nande induced her to execute a nominal sale-deed in his favour in order that the property might be protected from Fadali's creditors.

[8] The first Court found against the plaintiff and held that the fraud set up by defendant 3 was not proved.

[9] The lower appellate Court in going behind this well considered finding of the first Court has not given any details of the evidence on which it relies and has instead made a number of vague and general statements which I find it difficult to accept as conclusions of fact.

[10] The learned Judge commences by stating that:

"The main question that arises for determination in this appeal is whether the sale-deed was executed by Mathura Bai in favour of Nande for no conside ation and whether the deed is the outcome of the misrepresentation and fraud alleged to have been practised upon her by Nande."

[11] In para. 8 the learned Judge proceeds to discuss the probabilities, and in para. 9 states that:

"The evidence which has been led in the case goes to show that Fadali was a petty contractor. His income was sufficient to maintain his small family decently."

[12] The learned Judge then proceeds to state:

"On the death of Fadali a list of the moveables in his possession was prepared by the *panchas* It was found that the lady was in possession of ornaments and cash Even the witnesses examined by respondents 1 and 2 say that the lady was in possession of ornaments and cash when the *panchas* prepared the list."

[13] The learned Judge, as I have said, does not tell us what evidence he relies on. So far as the witnesses examined by respondents 1 and 2 are concerned, they do not say that the lady was in possession of any cash when the *panchas* prepared the list or at any other time. That is the only evidence specifically referred to, and on examination it is found that the learned Judge has misread what they stated. Apart from that, the only other evidence is the evidence of Paramanand (P. W. 1), who clearly admits that he was not shown any cash and that, though a list was prepared, no cash was mentioned or shown in the list. He speaks of what Mathura told him. We are not told when she told him this, and for all we know it was after the sale to Nande. That being the case, Nande is not

bound by what she said, and Parmanand's evidence being hearsay is inadmissible.

[14] Then, there is Mt. Mathura (3 D. W. 1). She says that Fadali left Rs. 150 0-0 when he died, and that that was enough for the funeral expenses and for the maintenance of her son, the plaintiff But she is unable to give any explanation as to why she did not disclose this fact about the cash when the list was prepared. She has also made several inconsistent statements and has been disbelieved by the first Court.

[15] The last witness on this point is Mst. Poona, Mathura's sister-in-law, who also says that Fadali left Rs. 150-0-0 in cash when he died. But according to her the *panchas* asked about the cash and were told about this Rs. 150-0-0. This contradicts the other witnesses who are clear that this matter was not disclosed to the *panchas*, and that is why it was not included in the list and, as I have said, Mathura herself is unable to give any explanation as to why the matter about the cash was not included in the list. If what Poona says is true then clearly Mathura could also have disclosed that fact.

[16] Then again, the passage I have quoted from the learned Judge's judgment appears to indicate that the cash is, as a matter of fact, included in the list. I admit this is not clear, but the following passages which follow each other indicate that, to my mind:

"On the death of Fadali a list of the moveables in his possession was prepared by the *panchas*. It was found that the lady was in possession of ornaments and cash."

As I have said, according to Parmanand, no mention of the cash was made at the time of the list and the list does not disclose it, but the learned Judge appears to think that this matter was discovered at the time the list was prepared. That fact, coupled with the obvious mistake where he has misread the evidence of the witnesses examined by respondents 1 and 2—these are the only witnesses specifically referred to—make it impossible for me to accept what would otherwise have been a conclusion of fact.

[17] The learned Judge then concludes that the sale-deed was taken from Mathurabai on misrepresentation and fraud and without any consideration. What the misrepresentation was we are not told, nor is he clear regarding the fraud. He has mixed up the questions of legal necessity and fraud, and on the sort of vague impressions to which he gave utterance in the passages I have quoted he reached the conclusion that there was fraud. As I have said, the plaintiff pleaded no fraud, that is to say, the plea which he made was not one which a Court of law can accept in such a matter. Defendant 3 pleaded one kind of fraud but in the witness-box spoke partly of another. In the witness-box she said that Nande told her that her husband's creditors would take the house and so advised her to transfer it to him, and then went on to say:

"Plaintiff was one year old then and Nande told me that the property of the plaintiff would be lost if I were to run away and so the document of sale in his name be executed."

According to her, each of these reasons induced her to act and each of them constitutes the fraud But she did not set out the latter reason in her written statement, and the learned Judge of the lower appellate Court disbelieves that part of her story.

[18] Then the learned Judge has fallen into error regarding the transfer of possession. According to him, the fact that the plaintiff and his mother were allowed to reside in a part of the house without payment of any rent indicates that the sale was nominal. He does not, however, tell us where he gets the fact that they resided there without payment of rent. On the other hand, Mathura, the plaintiff's mother, tells us as 3 D. W. 1 that she used to pay Rs. 2-0-0 a month to the defendant's mother Durga. I gather this was for the rent. In any event there is no evidence to show that no rent was paid. Then again, the learned Judge has omitted to notice that the portion in which the plaintiff and his mother were permitted to reside is only a small part of the house The bulk of the house was transferred to Nande's possession. That is a fact which the learned Judge has omitted to notice. If transfer of possession is what weighed with the learned Judge then the fact that possession of the bulk of the house was transferred to the vendee tells against his reasoning.

[19] In view of all this, and in view of the fact that the learned Judge has not examined the reasons given by the first Court, nor has he said anything about the witnesses whom the first Court disbelieved, and in view of the fact that fraud was not properly pleaded by the plaintiff, I am unable to uphold the finding regarding fraud.

[20] Next, regarding the question of necessity. That also is normally a question of fact, but here the learned Judge has so mixed the two points that I find it impossible to accept his conclusion As I have said, the learned Judge states that the main question in this case is one of fraud, and then regarding the question of necessity the learned Judge states:

"The evidence in the case and the probabilities leave no manner of doubt that there was absolutely no necessity for the alienation and that the deed was brought into existence for securing a house for the appellant when he came of age."

The probabilities referred to are the ones I have

dealt with above, namely, whether there was fraud practised on the plaintiff's mother or not. If the case of fraud goes then the probabilities on which the learned Judge has relied also fall to the ground, and the evidence in the case is so mixed up with the other matter that the finding regarding this cannot be accepted either.

[21] The evidence turns on whether the widow had cash with her at the time or not. I have already dealt with this and here I uphold the finding of the first Court who, relying on the recitals in the deed and the fact that the cash was not disclosed to the *panchas* when the list was drawn up, concludes that there was no money in the house at the time. It is admitted by the defendant that her husband's ashes were taken to a place outside Saugor and it is also admitted that about 100 of the caste people were fed. Accordingly, these circumstances are sufficient after a lapse of 19 years to support the first Court's finding that there was necessity for the sale. I accordingly uphold that finding

[22] All the circumstances point to the genuineness of the transaction. The sale was executed two days after Fadali's death. Possession was transferred except for the fact that the plaintiff and his mother were allowed to live in a small part of the house *Panchas* were called in and a list of the property was prepared. The existence of the cash was not disclosed to the *panchas*, and it is very unlikely that it would have been suppressed at a time like that. It is equally unlikely that the sale-deed would have been executed unless there was some pressing necessity for it.

[23] As regards the ornaments which Mathura is said to have had, those were on her person and presumably formed part of her "*stridhan*". Therefore, she was not bound to sell them for purposes mentioned above.

[24] It is to be noted that this case has been financed by Mathura, as she herself admits in the witness-box. Also it is to be noted that her story about the transfer of the consideration before the Registrar differs from the story given by her sister-in-law Poonabai In her written statement Mathurabai said that the money was handed over at the time of the registration but was taken back. (Defendants 1 and 2 said that the money was paid to Mathura). In the witness-box she says that the money was not given to her at all. Later, when she was further examined by the plaintiff she said that some part of the money was given into the hands of her sister-in-law Poonabai but not into her hands, and that when this was done the plaintiff Nande explained that the money belonged to her minor son, the plaintiff, and not to her and so should not be kept by her. Poonabai, on the other hand, says that no explanation at all was given regarding the money. Nande merely gave her a bundle of money and then took it back after the registration. The endorsement on the deed shows that the money was handed over to one Nathu. Therefore, all these various stories differ The appeal succeeds. The decree of the lower appellate Court is reversed, and that of the first Court is restored. Costs here and in the lower appellate Court will be paid by the plaintiff-respondent.

R.G.D. *Appeal allowed.*

A. I. R (35) 1948 Nagpur 173 *[C. N. 61.]*

GRILLE C. J. AND PADHYE J.

Shop Baksiram Rodmal Akola—Defendant—Appellant v. *Firm Jasroop Shrinath, Harda and others—Plaintiffs — Respondents*

Second Appeal No. 545 of 1940, Decided on 27.3.1947, from appellate decree of First Addl. Dist. Judge, Hoshangabad, D/. 29-6 1940.

(a) Contract Act (1872), S. 222—It is not necessary that an agent, before he is entitled to be indemnified by the principal, must discharge the liability in cash: 23 A. I. R. 1936 Nag. 37, *Ref.*

Annotation: —('46-Man) Contract Act S. 222, N 1. [Para 9]

(b) Contract — Kachhi and pakki adat — Pakka adtya — Characteristics, rights and privileges of — Dealings carried out under instructions of constituent — Right to recover losses suffered from constituent.

A *pakka adtya* unlike a *kachha adtya* acts as a principal in relation both to his constituent and to the opposite party with whom he deals on the instructions of his constituent: *Case law relied on.* [Paras 10, 12]

He is very like an ordinary '*del credere*' agent, but he is that and more : 19 I. C. 29 (Bom.), *Rel. on.* [Para 10]

On account of the important position held by a *pakka adtya* and as his personal credit is involved in dealings, he has a certain amount of discretion left to him in carrying through the transactions and in acting in a manner so as to minimise the liability for loss. He has a right in exercise of his discretion to keep a contract outstanding till due date or to cover it with a cross contract When he receives a second order from the constituent to enter into a cross contract to cover his first order, he is not bound to carry out the second order and what he is bound to do is to inform the constituent so that he may put through his order through some other pakka adtya. He cannot, therefore, be held liable for every variation with the orders of his constituent. 30 Bom. 205, *Rel on.* [Paras 11, 15]

(*Held*, that the plaintiff acted as a *pakka adtya* of the defendant and he was, therefore, entitled to recover from the defendant the amount of liabilities which he had suffered while settling the dealings which he had carried out in accordance with the defendant's instructions, irrespective of whether the plaintiff had discharged those liabilities or not.) [Para 14]

Cases referred .—

1. ('36) 23 A. I. R. 1936 Nag. 37 : 31 N. L. R. Sup. 154 : 161 I. C. 787, Kodusao Onkarlal v. Surajmal Narayanji.
2. ('13) 15 Bom. L. R. 85 : 19 I. C. 29, Bhagwandas v. Burjorji
3. ('05) 7 Bom. L. R. 57, Kanji v. Bhagwandas.
4. ('06) 30 Bom. 205, Bhagwandas v. Kanji.

5 ('23) 10 A. I. R. 1923 Nag. 324 : 75 I. C. 906, Harnarayan v. Radhakisan.
6. ('40) 27 A. I. R. 1940 Lah. 195 : 189 I. C. 690, Balkrishnan & Co. v. Ram Nath.
7. ('37) I. L. R. (1937) Lah. 683 : 24 A. I. R. 1937 Lah. 581 : 174 I. C 827, Ganpat Mal Sundar Das v. Kehr Singh Balwant Singh & Co.
8. ('06) 30 Bom. 1, Paul Beier v Chotalal Javerdas.
9. ('41) I. L. R. (1941) Bom. 441 : 28 A. I. R. 1941 Bom 211 : 195 I. C. 28, Ulfat Rai Hukumchand v. Nagarmal Gopimal.
10. ('27) 5 Rang. 1 : 8 A. I. R. 1921 P. C. 129 : 63 I. C. 521 (P. C.), Balthazar & Son v. E M Abowath.
11. ('27) 51 Bom. 1 : 13 A. I. R. 1926 P. C. 119 : 53 I. A 241 : 98 I. C. 338 (P. C.), Sobhagmal v. Mukundchand.

A. V. Khare and T. B. Pendharkar—for Appellant.

R. S. Dabir—for Respondents.

Judgment.—This is a second appeal by the defendant against whom the plaintiff's respondents' claim was fully decreed by the trial Court and that decree was maintained by the lower appellate Court only with a slight modification. The plaintiffs' claim was for recovery of Rs 1911 3-6 including interest at 0-7-0 p.c.p.m. till the date of suit. It was based on facts which are very simple, and many of them are undisputed. But as the lower appellate Court correctly pointed out, all rules of pleadings are violated by the parties resulting in huge waste of time and energy of all concerned and in unduly prolonging the duration of the trial.

[2] The relevant facts are that the defendant-firm from Akola dealt at Harda in forward delivery transactions of sales and purchases in cotton seed through the plaintiff firm at Harda. It appears that the defendant firm had such dealings effected through the plaintiff firm even before 1931 32, but the present suit relates only to *Vayda*, i. e. forward delivery transactions, of purchase of 225 manis of cotton seed at different rates between 22nd November 1931, and 10th January 1932, and of sales of 275 manis of cotton seed on 23rd November 1932 and 24th November 1932. The '*Vayda*' or the delivery date of these transactions was 23rd January 1932. The details of the transactions are given below :

	Date	Purchases from	Rate	Date	Sales to	Rates.
1.	22-11-31.	50 manis Raghunathdas Bholaram.	Rs. 19-4.	23-11-31.	100 manis Bajranglal Rameshwardas.	Rs. 20-
2.	7-12-31.	50 manis Gangabisan Laxminarayan.	Rs. 26.	23-11-31.	25 manis Dulichand Hajarilal.	Rs. 20-
3.	7-12-31.	25 manis Baldeo Choteram.	Rs. 26.	24-11-31.	100 manis Radhakisan Jakisan.	Rs. 20-
4.	10-1-32.	100 manis Radhakisan Jaikisan.	Rs. 30-4.	24-11-31.	50 manis Gangabisan Laxminarayan.	Rs. 20-
	Total 225 manis			Total sale 275 manis.		

Deficit 50 manis settled on 23rd January 1932, at the rate of Rs. 30 per mani.

[3] The plaintiffs alleged that the dealings in suit were carried out by them as commission agents for the defendant in accordance with the defendant's instructions received from time to time, and on the '*vayda*' date i. e. 23rd January 1932, the plaintiff firm which was the purchaser from or seller to third parties had to settle all the dealings at the rate of Rs 30 per mani, which was the market rate on that day, and in so doing, it suffered an obligation of Rs. 1603 9 0 including *adat* at the rate of Re. 1-0-0 per 100 manis and this liability was discharged by the plaintiff firm. It therefore claimed this amount from the defendant with an additional amount of Rs 302-10 6 as interest till the date of suit.

[4] The defendant kept on changing his defence from time to time. To begin with he admitted Paras 1 to 4 of the plaint which meant that he admitted all sales and purchases mentioned by the plaintiffs. In the subsequent oral statement he withdrew his admissions and admitted only a part of the dealings and yet in another subsequent oral statement he admitted some other dealings and finally he admitted all purchases. At one stage he denied his liability for interest and other miscellaneous charges, but at a subsequent stage he admitted liability for interest for cash actually spent by the plaintiffs and also for some of the miscellaneous charges including charity. He contended that the commission agreed was at 8 per 100 manis and not at 1 per cent as claimed by the plaintiffs.

[5] The points which arose for determination in the suit were as follows :

(a) Whether the plaintiff-firm entered into transactions of sales and purchases noted above as commission agent for the defendant and whether the defendant accepted and ratified all these transactions. (b) Whether on the '*Vayda*' date i. e. on 23rd January 1932 the plaintiff-firm incurred an obligation of Rs. 1603-9-0 in carrying out the transactions in suit and for '*adat*' and other expenses and whether it is entitled to claim that amount from the defendant-firm together with Rs. 302-10-6 as interest till the date of suit. (c) Whether the plaintiff firm acted as *pakka adiya* for the defendant firm and whether it is entitled to claim the amount of loss suffered

irrespective of the payment of the same to third parties either in cash or by adjustment as alleged by the plaintiff-firm. (d) Whether the plaintiff-firm was liable to the defendant for not carrying out the order of purchase of 250 manis of cotton seed at Rs. 20-0-0 per mani. (e) Whether the plaintiff-firm wrongly sold 275 manis when it was instructed by the defendant-firm to sell only 250 manis. (f) Whether the sale of 275 manis at Rs. 20.0 0 per mani was against defendant's instructions and whether the plaintiff-firm is liable on that account. (g) Whether the plaintiff was entitled to interest and other expenses as charged. (h) What is the effect of the assignment obtained by the defendant from Bajrangilal to whom the plaintiff-firm has to pay Rs. 802 0-0 towards the loss incurred in suit-dealings with him.

[6] The only points which were open for being argued and which were actually argued before us in second appeal were (c), (d), and (h), the others being concluded by the concurrent findings of fact. The points to be decided in this appeal mainly hinge on the character of the '*adat*' or agency of the plaintiff firm. The plaintiff-firm asserted, though at a later stage, that it acted as a *pakka adtya* according to the custom prevalent in the Harda market and was entitled to recover the amount in suit from the defendant irrespective of its payment or satisfaction. The defendant-firm denied that the plaintiff-firm acted as a *pakka adtya* and added that it does not understand the exact import of *pakki adat*.

[7] In a very able and exhaustive judgment, the lower appellate Court found that the plaintiff-firm acted as a *pakka adtya* and could recover the amount in suit whether it satisfied the claims of opposite parties or not. It also found that as a matter of fact the claims of all, except that of Bajrangilal to the extent of Rs. 802 were satisfied either by payment or adjustment with their consent. The lower appellate Court discussed other points and overruled them. It further held that the assignment taken by the defendant-firm from Bajrangilal did not affect the plaintiff's claim. It maintained the decree of the trial Court save that the '*adat*' was reduced from Re. 1 per 100 manis to 8 per 100 manis.

[8] The learned counsel for the appellant challenged seriously the conclusions of the Courts below that the plaintiff-firm acted as a '*pakka adtya*'. He urged that the plaintiff-firm was an agent as defined in the Contract Act with a personal liability to third parties as an agent of an undisclosed principal, contemplated by S. 230, Contract Act. On our view there is no merit in this contention. We, however, wish to make it clear at this stage that if the contention of the appellant as regards the nature of agency were to prevail, it would affect the plaintiffs' claim only to the extent of Rs. 418 and not more.

[9] Out of the dealings in suit the plaintiff-firm had on 22nd November 1931 entered into a transaction of purchase of 50 manis of cotton seed at Rs. 19-4-0 per mani from Raghunathdas Bholaram. On account of this transaction the plaintiff-firm had to receive from him Rs. 550 by way of profit. The said Raghunathdas Bholaram did not pay the amount and the plaintiff had to institute a civil suit (Civil Suit No. 10 I: of 1935) for the recovery of the same. This claim had, however, to be settled for Rs. 200 of which Rs. 50 were actually received in cash. The plaintiff-firm has, however, given credit to the defendant-firm, which as an ordinary commission agent it is not bound to give. The lower appellate Court has, after elaborate discussion, found that the amounts due to all the holders except Bajrangilal were satisfied either by payment in cash or by a valid and binding adjustment which would entitle even an ordinary agent to recover that amount from his principal under S. 222, Contract Act It is not necessary in every case that an agent, before he is entitled to be indemnified by the principal, must discharge the liability in cash. In A. I. R. 1936 Nag. 37[1] an agent who had executed a *sarkat* undertaking to pay personally loans incurred on behalf of his principal was held entitled to be indemnified by the principal. The result is that if the plaintiff-firm is not a *pakka adtya*, it would not be able to recover Rs 802 payable to Bajrangilal, but it would at the same time have to get back Rs. 350 from the defendant-firm, to which it gave credit only because as a *pakka adtya* it was liable to give full credit for the amount recoverable as profits from Raghunathdas Bholaram, though as a fact the claim was settled for Rs. 200 only.

[10] Now to come to the main question, it should be noted at the outset that the term '*pakka adtya*' is nowhere defined in law. In fact, as remarked by Mr. Ramnik Lal, the learned author of the book 'the Law of Pakki and Kachhi Adat,' *pakka adtya*, though a noted personality both in commercial and legal worlds bears such a complex character as to defy exact definition or easy description. The system of *pakka adtya* was brought into existence by the ingenuity of the Bombay merchants and by the exigencies of commerce and commercial convenience, and though it has by now travelled into other markets, and in its minor characteristics is affected by the local customs of an individual market it has throughout maintained its main characteristic, i. e., that a *pakka adtya* unlike a *kachha adtya* acts as a principal in

relation both to his constituent and to the opposite party with whom he deals on the instructions of his constituent. As Beaman J put it in 15 Bom. L. R. 85[2] at page 96, he is very like an ordinary '"*del credere*" agent, but he is that and more'.

[11] Chaudavarkar J., after a critical survey of the evidence of respectable traders at Bombay laid down in a case reported in 7 Bom L R. 57[3] the principal incidents of *pakka adat*. According to the learned Judge, a *pakka adtya* on receiving an order from an up-country constituent can allocate that order to himself or he enters into a contract of sale or purchase in his own name and on his credit with a Bombay merchant He has a right in exercise of his own discretion to keep the contract outstanding till due date or to cover it with a cross-contract When a *pakka adtya* receives a second order from the constituent to enter into a cross-contract to cover his first order, the *pakka adtya* is not bound to carry out the second order, and what he is bound to do is to inform the constituent so that he may put through his order through some other *pakka adtya*. These incidences of a *pakki adat* were substantially agreed to by Sir Lawrence Jenkins in appeal; the appellate judgment is reported in 30 Bom. 205.[4]

[12] The main characteristic of *pakka adtya* that he acts as a principal in relation to his constituent and the opposite party is noted in A. I. R. 1923 Nag. 324,[5] A. I. R. 1940 Lah. 195,[6] I. L. R. (1937) Lah 683,[7] 30 Bom. 1,[8] I. L. R. (1941) Bom. 441[9] and 5 Rang. 1[10] and other decisions. In fact that is the characteristic by which a *pakka adtya* can be unmistakably identified.

[13] The actual evidence on record and specially the acts and conduct of the parties in this case leave no doubt that in the dealings in suit the plaintiff-firm acted as a *pakka adtya* and it consequently dealt with opposite parties at Harda as a principal and not as an agent either of disclosed or of undisclosed principal. It is not the case of the defendant-firm that the Harda merchants that could hold it or actually did hold it liable for losses either exclusively or along with the plaintiff-firm. This itself is sufficient to distinguish the character of the plaintiff-firm from *kachha adtya*, who is described by their Lordships of the Privy Council in 51 Bom. 1[11] at page 13 thus :

"When a Katcha Adatia enters into transactions under instructions from and on behalf of his up-country constituent with a third party in Bombay, he makes privity of contract between the third party and the constituent, so that each becomes liable to the other, but also he renders himself re-ponsible on the contract to the third party."

[14] It is apparent in this case that neither the defendant-firm was liable to the Harda merchants nor were the latter liable to the defendant-firm as there was no privity established between the two either directly or through an agent. The defendant-firm was entitled to recover profits from and similarly was liable to pay losses to the plaintiff-firm, and this clearly establishes that they were dealing with each other as two principals and not as principal and an agent. Moreover, the evidence of P. Ws. 14, 15, 18 and 20, which evidence has been accepted by the Courts below, clearly establishes that all dealings in the Harda market on the instructions of an outsider, i. e., a constituent from outside Harda are done in *pakki adat* We, therefore, agree with the conclusions of the Courts below and hold that the plaintiff-firm acted as a *pakka adtya* and as such, is entitled to recover from the defendant-firm the amount in suit irrespective of whether it paid the amount of loss to the opposite party or not.

[15] As already pointed out above, a *pakka adtya* is not bound to carry out the second order of the constituent to cover the first order. The plaintiff-firm was thus not bound in law to carry out the order of purchase of 250 manis of cotton-seed at Rs. 20 per mani. He was liable only to inform the defendant firm of his inability to do so, and this it did by letters and telegrams. The plaintiff-firm has moreover explained that it could not put through the transaction as there were no traders ready to enter into the transactions of sale in view of the prices of cotton-seed going up. The explanation has been accepted by the lower appellate Court, and we fully agree with it. On account of the important position held by a *pakka adtya* and as his personal credit is involved in dealings, he has a certain amount of discretion left to him in carrying through the transactions and in acting in a manner so as to minimize the liability for loss. He cannot therefore be held liable for every variation with the orders of his constituent. In this case he cannot be held liable simply because he sold 275 manis instead of 250 or that he sold it at Rs. 20 and not at Rs. 20-2-0, per mani.

[16] The only other point which is to be considered is the defendant's defence based on the assignment secured by it from Bajrangilal for the amount of Rs. 802 it had to receive from the plaintiff-firm on account of loss. In para. 4 (c) of the written statement dated 19th July 1935 the defendant-firm claimed an equitable set-off and on 13th July 1937 it valued that claim at Rs. 100 and paid court-fees thereon. On 2nd March 1938, more than three years after the institution of the suit, the defendant-firm put in an additional statement stating that on 17th February 1938 Bajrangilal Rameshwar had

assigned his claim for Rs. 802 against the plaintiff-firm in favour of the defendant and the plaintiff's claim to the extent of Rs 802 and interest thereon should be reduced. It may be noted that no set-off was claimed on the strength of the alleged assignment.

[17] At the outset, it is difficult to see how an assignment got by the defendant from one of the plaintiff's creditors can be a defence in a suit. If the assignment is valid, it may give to the defendant a right of suit or possibly a right of equitable set-off which has not been claimed. The assignment dated 17th February 1938 cannot in our view be of any consequence in this suit, and it cannot affect the plaintiffs' claim. The lower appellate Court has moreover shown that on the date of the assignment dated 17th February 1938 the claim of Rameshwar Bajrangilal against the plaintiff-firm was already barred by time, the cause of action for the same having accrued on 23rd January 1932. Nothing has been shown to convince us that the debt was alive. The lower appellate Court has correctly overruled the defence based on the assignment. The appeal has thus no substance, and it is therefore dismissed with costs.

N.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 177 *[C. N. 62.]*

BOSE J.

Narayan Purushottam Bansod—Plaintiff 1 — Applicant v. *Ramchandra Mudgilji Choudharkar and others—Plaintiffs 2 to 5—Defendants—Non-Applicants.*

Civil Revn. No. 21 of 1946, Decided on 21-3-1947, from order of 3rd Addl. District Judge, Amraoti, D/- 12-9-1945.

(a) Civil P. C. (1908), S. 47 and O. 21, R. 66—Application to set aside sale on ground of want of notice under O. 21, R. 66 lies under S. 47.

Sale can be challenged on grounds other than the ones set out in Rr. 89, 90 and 91 of O. 21. Where an application to set aside a sale is brought not on the grounds covered by Rr. 89, 90 and 91 but on the ground of want of notice under O. 21, R. 66 the application lies under S. 47. [Para 11]

Annotation : ('44-Com.) Civil P. C., S. 47, N. 51, Pt. 3.

(b) Civil P. C. (1908), S. 115 — Material irregularity—Sale without notice under O. 21, R. 66.

The issue of a notice under O. 21, R. 66 touches the jurisdiction of the Court which effects the sale. Hence where a sale has been effected without a notice under O. 21, R 66 the matter is revisable to that extent. Whether notice was issued in fact or not, or whether it was served cannot however be determined in revision. [Para 14]

Annotation : ('44-Com.) Civil P. C., S. 115, N. 12.

(c) Civil P. C. (1908), O. 21, R. 66 (2) — Omission to give notice under R. 66 (2) not curable irregularity—Civil P. C., O. 21, R. 90.

The notice under O. 21, R. 66 (2) is mandatory and the omission to give notice cannot be treated as a curable irregularity, unless of course the judgment-debtor appears without notice because he can waive the notice if he so desires. The omission to give notice under R. 66 (2) cannot be termed an irregularity in the publication : 6 A. I. R. 1919 Nag. 19 and view of Carnduff J. in 18 I. C. 715 (Cal.) and Staples A. J. C. in 16 A. I. R 1929 Nag. 130, *Dissent.*; 16 A. I. R. 1929 Nag. 305, *Approved.* [Paras 15, 17, 18 and 19]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 90, N. 14.

(d) Civil P. C. (1908), O. 21, R. 66—Notice under O. 21, R. 22 — Fresh notice under O. 21, R. 66 not necessary.

Notice through the processes of the Court is not essential. All that the rule requires is that the judgment-debtor should have notice in one way or another. Moreover if the judgment-debtor is noticed under O. 21, R. 22, or appears at a previous stage, then it is not necessary to notice him again under O. 21, R. 66. It is enough that a date of which he has either constructive or actual notice be fixed for the drawing up and issue of the proclamation. [Para 22]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 66, N. 5.

Cases referred :—

1. ('17) 40 Mad. 793 : 4 A. I. R. 1917 P. C. 71: 44 I. A. 261 : 40 I. C. 650 (P. C.), Balakrishna Udayar v. Vasudeva Ayyar.
2. (13) 18 I. C. 715 (Cal), Bipin Behari v. Kanti Chandra.
3. ('20) 16 N. L. R. 72 : 6 A. I. R. 1919 Nag. 19 : 44 I. C. 252, Krishnaji v. Baliram.
4. ('29) 16 A. I. R. 1929 Nag. 305 : 116 I. C. 65, Sunderabai v. Bapuna.
5. ('29) 25 N. L. R. 58: 16 A. I. R. 1929 Nag. 130: 118 I. C. 49, Tukaram v. Sakharam.
6. ('39) 26 A. I. R. 1939 Nag. 17 : 180 I. C. 305, Gowardhan v Hargovind.

G. R. Mudholkar — for Applicant.

M. Adhikari—for Non-Applicants.

Order.—We are concerned here with a Small Cause Court decree passed in the year 1935. As a Small Cause Court cannot attach immovable property this decree was transferred to the regular side for execution and there certain revenue paying land was attached.

[2] Under the rules then in force the civil Court had to transfer such matters to the Collector for sale because the land was revenue paying property. Accordingly the *C* form was prepared and was despatched to the Collector.

[3] For one reason and another which does not concern us now, the matter remained pending before the Collector for merely two years and then, in 1943, before the sale could be effected, the Provincial Government revoked the Collector's powers and directed that all sales, including those of revenue paying estates, should be held by the civil Courts. Accordingly, in accordance with the instructions issued as a consequence of this change the Collector returned the *C* form to the civil Court.

[4] When the case came back from the Collector, the civil Court, on 8-1-1944, directed

notices to issue to the parties and fixed the case for 11-3-1944. These notices did not say what would be done on that hearing. All they said was that the case had been received back from the Collector and that it would be taken up by the civil Court on 11-3-1944. On that date the following order was recorded :

"Issue sale notices and sale proclamation. Sale on 21-6-1944 at 1 P. M. Process fee in 3 days. Sale at Amraoti within Court premises. Report on 29-6-1944."

This order was signed by the Judge.

[5] After this was done (or so the appellate Court finds) the reader added the following :

"Mr. Bancore pleader present for judgment-debtor. Sale notice not necessary."

Because of this addition no notices were issued.

[6] There was some dispute before me as to whether the portion now said to have been added by the reader was actually so added or is part of what the Judge himself wrote, but as this is a revision I must accept the facts which the appellate Court finds. However, this will not make any difference to the result because, even if the Court added this subsequently, Mr. Banoore only represented one of the judgment-debtors, so the effect of a sale without an issue of the sale notices still falls for consideration.

[7] The property was brought to sale on the date fixed namely, 21-6-1944, and was purchased by the decree-holder. The sale was confirmed on 3-8-1944.

[8] On 13-10-1944 the application out of which the present proceedings arise was filed for setting aside the sale. The application is not under O. 21, Rr. 89, 90 or 91 but is for setting aside the sale on the ground that it is a nullity. It is argued that the application lies under S. 47.

[9] The crux of the matter is whether a notice is necessary under O. 21, R. 66 (2), Civil P. C. The rule contemplates a notice and the question is whether an omission to serve one is a curable irregularity or not. But before dealing with this I will get Rr. 89, 90 and 91 out of the way.

[10] It is accepted here that no application was made under these rules and also that no application could have been made under these rules on the grounds on which the sale is now attacked. But reliance is placed by the decree-holder on R. 92 which states that :

"Where no application is made under R. 89, R. 90 or R. 91 . . . the Court shall make an order confirming the sale and thereupon the sale shall become absolute."

It is argued that this leaves no room for any other sort of application, therefore in every case where no application is made, whatever the reason, the sale must be confirmed. With that I do not agree.

[11] I think it is beyond doubt that sales can be challenged on grounds other than the ones set out in Rr. 89, 90 and 91. The cases dealing with this have been collected in Mulla's Civil Procedure Code (Edn. 11) p. 190. No case to the contrary was brought to my notice. If then such challenge is made the matter must fall under S. 47 unless it can be brought under Rr. 89, 90 or 91. As it is agreed that the present application could not have been made under any one of those rules it follows that the matter falls under S. 47, and in any case I so hold.

[12] The only question left is whether an omission to issue the notice which O. 21, R. 66 requires is fatal or is a curable irregularity. The appellate Court holds it is material and has set the sale aside.

[13] That at once raises the question whether I can interfere with this in revision. It is argued that I can because this is a matter which touches the jurisdiction of the Court which effected the sale. It is argued that it is fundamental that certain matters cannot be heard or tried at all until the other side has either been noticed or appears *suo motu* and that it is a material irregularity within the meaning of S. 115 (c) to proceed without giving the other side an opportunity of being heard.

[14] I think the contention is sound. The issue of notices is a fundamental part of the procedure of the Courts in most cases and this touches jurisdiction because, as a general rule, the power and authority to try a case at all does not arise until the other side has been afforded an opportunity of appearing and being heard. There are statutory exceptions. But that is the general rule. Therefore, it is a matter touching jurisdiction in that sense to determine whether this is one of that class of case which requires the issue of notice as a pre-requisite to the authority to try the matter at all. I am of opinion that the matter is revisable to that extent. I am careful however to say to that extent only. I do not mean to lay down that whether notices were issued in fact or not, or whether they were served can be determined in revision.

[15] Now it seems to me that notice under O. 21, R. 66 is mandatory and that the omission to give notice cannot be treated as a curable irregularity, unless of course the judgment-debtor appears without notice because he can waive the notice if he so desires. I reach this conclusion for the following reasons.

[16] Order 21, R. 22, which deals with what one might term the initial issue of notice on an execution application, after stating as a general rule that notice shall be issued (the language is mandatory) goes on to make certain exceptions. One of them is contained in the proviso to sub-r. (1) and the other in sub-r. (2). I can hardly think the rule would have been couched in this form if notice had not been considered a vital

matter, and this is particularly so since, in the opinion of the Privy Council, it is opposed to "natural justice" to try an issue without affording the other side an opportunity of being heard: *see* 40 Mad. 793[1] at p. 799. Therefore, it seems that in general where the Code prescribes for the issue of notice, and particularly where it uses mandatory language, it does not envisage the possibility of its directions being disregarded except when it makes express provisions in that behalf.

[17] Now when we turn to O. 21, R. 66, we find no exceptions to the provisions in sub-r. (2) which requires the issue of notice. The sub-rule runs thus :

"Such proclamation shall be drawn up after notice to the ..... judgment-debtor."

Therefore, contrasting this with R. 22, I am of opinion that the issue of notice is mandatory unless of course the judgment-debtor appears without notice and waives it.

[18] Another reason which leads me to this conclusion is this. Sub-rule (2) of R. 66 requires that the time and place of the sale shall be set out in the proclamation. No one will pretend that an omission to do this could be considered a curable irregularity. The fact that the issue of notice is required in the same sentence as this indicates to my mind that the intention was to place it on a par with the other matter so far as its importance is concerned. This is all the more so when one contrasts the greater flexibility which is permitted in what follows, namely, "and specify as fairly and accurately as possible." On the whole, therefore, I agree with the appellate Court that the issue of notice under O. 21, R. 66 (2) is mandatory and that the defect cannot be cured unless the judgment-debtor appears without notice and waives it.

[19] The next question is whether this is an illegality or a material irregularity within the meaning of O. 21, R. 90. Carnduff J. held in 18 I. C. 715[2] that it was an "irregularity in publishing the sale." His view was that as O. 21, R. 66 (2) requires notice, a proclamation prepared and published without the requisite notice is irregularly published within the meaning of O. 21, R. 90. But Beachcroft J., the other Judge in the case, did not agree though he did not press his point of view as he felt the weight of authority was against him. I prefer his view. In his opinion the word "published" in R. 90 refers back to the word "published" in R. 67, and that a sale cannot be said to have been "published" within the meaning of these rules until a notice has been issued stating the date fixed for the sale and particulars as to the property sold Therefore, at the date of the attachment (and the same would hold good of the notice under O. 21, R. 22 and of any other notice prior to the one contemplated by O. 21, R. 66 (2)), the sale cannot be said to have been "published" if there has been no notice. Accordingly, if notice under O. 21, R. 66 (2), is a pre-requisite of "publication" then an omission to give the necessary notice cannot be termed an irregularity in the publication. One does not get as far as the publication stage until what I might term the notice hurdle has been crossed.

[20] Mitra A. J. C. was of opinion in 16 N.L.R. 72[3] at p. 75, that the provision for notice in O. 21, R. 66, is only directory and not mandatory and that in any event it is a curable irregularity. But Kinkhede A. J. C. held in A. I. R. 1929 Nag. 305[4] that the provisions of O. 21, R. 66 (3), are mandatory and his reasoning regarding this will apply equally to sub-r. (2).

[21] Staples A. J. C. took the same view as Carnduff J. in 25 N. L. R. 58[5] though he did not refer to Carnduff J.'s decision. But the opinion of the learned Additional Judicial Commissioner is *obiter* because it was found as a fact in that case that notice had been served under O. 21, R. 66 (2). Another complication also arose there. An application had actually been made under O. 21, R. 90 and it was dismissed. The judgment-debtor did not appeal and instead filed a separate suit. This would naturally raise an issue of *res judicata* though that was not discussed by Staples A. J. C.

[22] I have no doubt that notice through the processes of the Court is not essential. All that the rule requires is that the judgment-debtor should have notice in one way or another. I held in A. I. R. 1939 Nag. 17[6] at p. 18 that notice of attachment under O. 21, R. 53, is essential but indicated that the notice need not necessarily be through the processes of the Court. I also considered a case of this kind in Miscellaneous Appeal No. 178 of 1937 and held there that a second notice need not be served under O. 21, R. 66 (2). If the judgment-debtor is noticed under O. 21, R. 22, or appears at a previous stage, then it is not necessary to notice him again under O. 21, R. 66. It is enough that a date of which he has either constructive or actual notice be fixed for the drawing up and issue of the proclamation. Had that been done here, or had the notice issued on 8th January 1944 said that the sale proclamation would be drawn up and issued on 11th March 1944, then I would have had no doubt about the validity of the sale. But unfortunately the notice issued by the learned Judge did not state what was to be done on 11th March 1944, therefore the judgment-debtor had no notice that the sale proclamation would be drawn up and issued on that date. Had the learned Judge fixed another date on 11th March 1944 for the drawing up of the sale

proclamation then the position would have been similar to the one in Miscellaneous Appeal No. 178 of 1937. The judgment-debtor would in that event be deemed to have had constructive notice.

[23] The application fails and is dismissed with costs. Counsel's fee Rs 30.

[21] After the draft of this judgment was laid on the table counsel for the applicant contended that the cases cited at page 190 of Mulla's Civil Procedure Code do not apply to this Province because of the local amendment which makes the issue of notice under O. 21, R. 22, curable as an irregularity unless substantial prejudice is established. But that makes no difference to my reasoning. We are concerned here with the notice required by O. 21, R. 66 (2). There is no local amendment to make omission to give the notice a curable irregularity. Seeing therefore that O. 21, R. 22, was altered but not this there is all the more reason to suppose that no alteration of the law was contemplated under O. 21, R. 66 (2). Had there been no local amendment to O 21, R 22, an omission to issue notice would have been fatal. The fact except where dispensed with by the rule that the initial issue of notice has been waived under the local amendment except where substantial injury is established is no reason for concluding that notice at a later stage is also waived. The amendment does not, in my opinion, affect my decision.

D.S. *Application dismissed.*

A. I. R. (35) 1948 Nagpur 180 *[C. N. 63.]*

BOSE J.

Rajaram Kontu — Appellant v. *Rishabha Kumar s/o Mohanlal — Respondent.*

Misc. First Appeal No. 96 of 1942, Decided on 19-12-1946, from order of Addl. Dist. Judge, Saugor, D/- 7-4-1942.

(a) C. P. Relief of Indebtedness Act (14 [XIV] of 1939), S. 6 (3) — Sale taking place before receipt of notice by Court—Validity of sale and its confirmation.

Under S. 6 (3), the stay does not operate until the Court receives the notice. The notice cannot be said to be given until it is actually handed over. It is not enough to sign an order in the Debt Relief Court. That is not giving notice to the Courts. Hence, even if the notice is issued before the sale but the sale is completed before the notice is received by the Court, the sale is valid and cannot be set aside. As the sale is good and cannot be set aside under O. 21, Rr. 89, 90 or 91, Civil P. C., its confirmation made subsequently is also good : 31 A.I.R. 1944 Nag. 195 and 27 A.I.R. 1940 Nag. 372, *Disting.* [Paras 6 and 7]

(b) C. P. Money-lenders Act (13 [XIII] of 1934), S. 11—Applicability—Final decree for sale.

Section 11 has no application once a final decree for sale on a mortgage has been passed : 1942 N. L. J. 150, *Foll.*; 29 A. I. R. 1942 Nag. 88 and 31 A. I. R. 1944 Nag. 289 (F. B.), *Expl., and Disting.* [Para 9]

Cases referred : —

1. ('44) I. L. R. (1944) Nag. 468 : 31 A.I.R. 1944 Nag. 195 : 219 I. C. 415, Krishna Dewaji v. Mithmal Lakhmichand.
2. ('40) 27 A I.R. 1940 Nag. 372 : 193 I. C. 274, Zibal Iswara v. Muka.
3. ('39) 1939 N. L. J. 283 : 26 A.I.R. 1939 Nag. 282 : I. L. R. (1939) Nag. 654 : 189 I. C. 118, Akbar Ali v. Sobharam Motiram.
4. ('44) I. L. R. (1944) Nag 568 : 31 A.I.R. 1944 Nag. 289 (F.B.), Rukhmabai v. Shamlal Surajmal.
5. (42) I.L.R (1942) Nag. 357 : 29 A. I. R. 1942 Nag. 88 : 200 I. C. 709, Dau Balwantsing v. Mt. Bindabai.
6. ('42) 1942 N. L. J. 150, Pratapsingh v. Gopaldas.

A. Razak — for Appellant.

V. V. Kelkar — for Respondent.

Order. — We are concerned here with two applications made by the judgment-debtor (appellant) in the first Court, (1) for setting aside an auction-sale under O. 21, R. 90, Civil P. C., and (2) for instalments under S. 11, C. P. Money-lenders Act. The facts are as follows.

[2] The decree-holder (respondent) obtained a final decree for sale on 15-8-1938 for Rs. 15,880-10-0. The sale was held on 16-1-1940 and realised Rs. 12,500-0-0. It was confirmed on 16-2-1942.

[3] On 14-12-1939, that is to say, after the final decree and before the sale, the judgment-debtor applied to the Debt Relief Court and on 15-1-1940, the Debt Relief Court issued a notice under S. 6 (3), Debt Relief Act for stay. This notice was not received by the civil Court before the sale was held. The exact date on which it reached the civil Court is not clear from the record. The earliest endorsement by the civil Court on the notice is dated 25-1-1940. But whatever the exact date is it is evident that it was not received by the civil Court on or before 16-1-1940, the date on which the sale was held. The question then arises what was the effect of that notice on the sale. The learned counsel for the judgment-debtor (appellant) contends that it has the effect of nullifying the sale, and he relies on I.L.R. (1944) Nag. 468[1] and A.I.R. 1940 Nag. 372.[2]

[4] In my opinion, neither of these rulings has application here, and, in my judgment, the sale was good. So far as the two rulings are concerned, they relate to cases in which the civil Court received notice of stay from the Debt Relief Court before the holding of the sale; for example, in I.L.R. (1944) Nag. 468[1] the notice was received by the civil Court on 8-3-1940, while the sale did not take place till 28-3-1940. The same was the case in the other decision. The notice was received by the civil Court before the sale. Those cases, therefore, have no application to the present where the sale took place before the notice was received by the civil Court.

[5] Section 6 (3), Debt Relief Act, which is the one which concerns us here, is in these terms :

"When an application made under sub-s. (1) is admitted, and *when notice of such admission is given to the Courts concerned*, proceedings, if any, against the debtor ..... pending before a civil Court ..... shall be stayed."

[6] The important part of the section is the portion which I have underlined (here italicized). The word there is that the stay is to operate from the date on which notice is *given* to the Courts. Notice cannot be said to be given until it is actually handed over. The meaning of the Act in my judgment is that the stay is not to operate until the Courts receive the notice. It is not enough to sign an order in the Debt Relief Court. That is not giving. That is only making an order. The act of giving imports delivery of the object given. Accordingly, as the notice did not reach the civil Court before the sale, it cannot be said that the civil Court was given notice of the stay. As the stay only operates from the date on which notice is given to the civil Courts, it is clear that the sale proceedings were valid on 16-1-1940 when the sale was held. Accordingly, the sale must stand, and its confirmation on 16-2-1942 was good.

[7] I say that the confirmation on 16-2-1942 was good because their Lordships of the Privy Council have held that once a sale has taken place then it must be confirmed unless it can be set aside under O. 21, Rr. 89, 90 or 91, Civil P. C. If the matter cannot be brought under any of those rules then the sale cannot be set aside. The same principle applies in this case. The sale was good. The matter cannot be brought under O. 21, Rr. 89, 90 or 91. Therefore, the confirmation also was good : *see* 1939 N. L. J. 283[3] at pp. 285-289.

[8] The next question relates to the application for instalments under S. 11, C. P. Money-lenders Act. The question there is whether S. 11 applies after the stage of final decree. Reliance was placed for the appellant on a Full Bench decision in I. L. R. (1944) Nag 568[4] which overruled I.L.R. (1942) Nag. 357.[5] The lower Court had relied on a Division Bench case in 1942 N. L. J. 150.[6] The Division Bench in that case to a certain extent followed I. L. R. (1942) Nag. 357,[5] and the argument for the learned counsel for the appellant was that inasmuch as I. L. R. (1942) Nag. 357[5] had been overruled it follows that 1942 N. L. J. 150[6] was also impliedly overruled. With that I do not agree.

[9] I. L. R. (1942) Nag. 357[5] as also I. L. R. (1944) Nag. 568[4] which overruled it, were concerned with preliminary decrees. What the Full Bench held was that a preliminary decree, whether for sale or for foreclosure, is a debt within the meaning of s. 2 (d), Relief of Indebtedness Act. Not only did the decision relate to preliminary decrees but it was concerned with the Relief of Indebtedness Act and not with the Money-lenders Act. The Divisional Bench in 1942 N. L. J. 150[6] on which the lower Court relied was concerned with the final decree and related to the Money-lenders Act. The Division Bench drew a distinction between the position before final decree and that after it and held :

"Once this is done (that is once a final decree is passed) the decree ceases to be a decree for payment of a sum of money, or for payment of an amount found due. It does not matter in the least how much was due or was not due once the final decree is passed because that decree directs the sale of property and is no more a money decree than a decree for specific performance which orders the vendor to sell the suit property to the vendee. It is clearly impossible to make a decree which directs sale of a field or house payable in instalments because there is nothing to be paid."

For that reason the Division Bench held that S. 11, C. P. Money-lenders Act has no application once a final decree for sale on a mortgage has been passed. That decision has not been overruled, nor is there anything in the Full Bench decision to indicate that this reasoning is unsound. In any event, I am bound by it, and having been a party to it, I agree with its correctness. Following that decision I hold that the Money-lenders Act has no application to this case because the application under S. 11 was made not only after the preliminary decree but also after it had been partially executed by sale of the property. The appeal fails and is dismissed with costs.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 181 *[C. N. 64.]*

HIDAYATULLAH J.

Mt. Nagi and another, Defendants 3 & 4— Applicants v. *Damodhar Jagobaji Tidke and others, Plaintiffs and others, Defendants 1 & 2 — Non-Applicants.*

Civil Revn. No. 456 of 1945, Decided on 19-11-1946, from order of 2nd Sub-Judge 2nd Class, Nagpur, D/- 25-9-1945.

(a) Civil P. C. (1908), O. 2, R. 3 — Suit for specific performance of agreement for sale of land — Strangers claiming independent title, are not proper parties—Specific Relief Act (1877), S. 27.

Scope of a suit for specific performance of an agreement for sale of land coupled with a prayer for possession cannot be enlarged and the suit turned also into a title suit. Hence strangers setting up an independent title to the land, the subject-matter of the contract of sale are not proper parties to the suit for specific performance. The plaintiffs after perfecting their title by obtaining specific performance against the executants of the agreement would be in a position to bring a fresh suit against anybody who stood in the way of obtaining possession. (1834) 40 E. R. 848 and (1866) 2 Ch. 164, *Rel. on* ; 5 Bom. 177 ; 5 A. I. R. 1918 Mad. 681 (F. B.) and 32 A. I. R. 1945 Cal. 355, *Ref.* [Para 5]

Annotation : ('44-Com.) C. P. C, O. 2, R. 3, N. 8, Pt. 7.

(b) Civil P. C. (1908), S. 115—Jurisdiction, question of — Joinder of causes of action — Civil P. C. (1908), O. 2, R. 3.

If in a suit for specific performance it is not open to join other causes of action and the Court joins, then the action of the Judge is clearly without jurisdiction, and his decision is open to revision. [Para 4]

Annotation : ('44-Com.) C. P. C., O. 2, R. 3, N. 7.

Cases referred :—

1. (1834) 40 E. R. 848 : 5 L. J. Ch. (N. S) 321, Tasker v. Small.
2. (1820) Jac. 490, Mole v. Smith.
3. (1866) 2 Ch. 164, De Hoghton v. Money.
4. ('80) 5 Bom. 177, Luckumsey Ookerda v. Fazulla Kassumbhoy.
5. ('17) 40 Mad. 365 : 5 A. I. R. 1918 Mad. 681 : 40 I. C. 429 (F. B.), Rangayya Reddi v. Subramaniya Ayyar.
6. ('45) 32 A. I. R. 1945 Cal. 355, Prem Sukh v. Habib Ullah.

P. P. Deo — for Applicants.

S. R. Mangrulkar — for Non-Applicants.

Order. — This is an application for revision of the order and the findings given on 25-9-1945 by Mr. S. G. Oke, Second Civil Judge (Class II), Nagpur, in Civil Suit No. 183A of 1943. The facts of the case are that defendants 1 and 2 (non-applicants 5 and 6) executed an agreement of sale of their house in favour of plaintiffs (non-applicants 1 to 4) on 17-7-1941. In that agreement it was provided that the sale-deed would be executed within the time mentioned in it and that if it was not possible to do so, the time would be extended. It was also provided that if any objection was raised on behalf of Balaji Dumnaji Koshti defendants 1 and 2 would be responsible. There were other provisions for damages in case of breach.

[2] Defendants 1 and 2 having failed to implement this agreement, the present suit was launched for specific performance against them. In addition to the relief of the specific performance the plaintiffs claimed possession of the house and in the array of the defendants were included the two widows of Balaji Koshti and possession was also sought against them. It is necessary to examine the pleadings a little closely at this stage. In para. 1 (b) of the plaint added by an amendment it was said :

"The entire house, of which the house in suit forms Eastern portion belongs to Banaji *(sic.)* son of Dumnya Koshti. Half of the Western half portion thereof was in possession of Balaji, the husband of defendants 3 and 4 and the Eastern half was in possession of Banaji. After the death of Banaji 14 years ago, Balaji's *(sic.)* portion of the house, which is now in dispute, was inherited by his daughter defendant 1 and she has been in possession thereof till the date of cause of action."

It was also stated in the plaint "Neither Balaji nor defendants 3 and 4 were in possession of the house in suit and never acquired any title to it by adverse possession."

[3] Defendants 3 and 4 (applicants before me) claimed to be discharged from the suit on the ground that they were not necessary parties and further that they could not properly be joined in this suit for specific performance. The learned trial Judge held that possession was only a consequential relief and as the plaintiffs had alleged collusion between defendants 1 and 2 on the one hand and defendants 3 and 4 on the other it was permissible to join defendants 3 and 4 as defendants in the suit under O. 2, R. 3, Civil P. C.

[4] Against this order the present revision application is filed. Learned counsel for the non-applicants raised a preliminary objection that revision does not lie because no question of jurisdiction is involved. Clearly enough if in a suit for specific performance it is not open to join other causes of action, then the action of the learned trial Judge was clearly without jurisdiction. As I shall show presently the learned Judge's view of the law was erroneous.

[5] It has been laid down by the Chancery Court in (1834) 40 E. R. 848[1] that in a suit for a specific performance it is not permissible to join people who are strangers and whose claim has to be investigated apart from the agreement of which specific performance is sought to be claimed. I refer to the following passage from the judgment of the Lord Chancellor Cottenham:

"It is not disputed that, generally, to a bill for a specific performance of a contract of sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a Court of law, giving damages only for the non-performance of the contract in many cases does not afford an adequate remedy. But, in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it." (p. 851).

It was also said in a later portion of the same judgment :

"In (1820) Jac. 490[2] at p. 494, Lord Eldon says that when a bill is filed for a specific performance it should not be mixed up with a prayer for relief against other persons claiming an interest in the estate ..... It is to be regretted that this opinion will prevent the parties from having the question between them so effectively decided as it might otherwise have been; but I cannot, to avoid an inconvenience in a particular case, sanction a proceeding which I consider to be inconsistent with the rules of pleading, and which, if recognised, might lead to much difficulty and confusion in the proceedings of the Court." (p. 851).

The case in (1834) 40 E. R. 848[1] was followed in subsequent cases and in (1866) 2 Ch. 164[3] at p. 170 Turner, L. J. observed :

"Here again his case is met by (1834) 40 E. R. 848[1] in which case it was distinctly laid down that a purchaser cannot, before his contract is carried into effect, enforce against strangers to the contract equities attach-

ing to the property, a rule which, as it seems to me, is well founded in principle, for if it were otherwise, this Court might be called upon to adjudicate upon questions which might never arise, as it might appear that the contract either ought not to be, or could not be performed."

These cases have been approved and applied in India in connection with S. 27, Specific Relief Act in a large number of cases. A few of them are cited here for reference: 5 Bom. 177,[4] 40 Mad. 365[5] and A. I. R. 1945 Cal. 355.[6] In the Calcutta case it was said :

"The necessary parties in a suit for specific performance of a contract for sale are the parties to the contract, or if they are dead their legal representatives, as also a person who had purchased the property from the vendor after the contract. He is a necessary party as he would be affected, if he is volunteer, or if a purchaser for value, had purchased with notice of the contract. A person who claimed adversely to the vendor is, however, not a necessary party. Where the property stands in the name of a person other than the vendor, and the suit for specific performance is brought by the purchaser, that person may be joined as a defendant as a proper party on an allegation that he is the benamidar of the vendor but if he appears and contends that he is not the benamidar of the vendor the proper procedure would be to discharge him from the suit, leaving it to the plaintiff in the suit for specific performance to institute a suit against him after he had got the conveyance in execution of the decree for specific performance against his vendor. This is on the principle that the scope of a suit for specific performance of a contract for sale ought not to be enlarged and the suit turned also into a title suit between one of either of the parties to the contract and a stranger to the contract." (p. 359).

I respectfully follow these cases and hold in the present case that since defendants 3 and 4 (applicants here) have set up an independent title the proper course for the learned trial Judge was to order that they be discharged. The plaintiffs after perfecting their title by obtaining specific performance against the executants of the agreement would be in a position to bring a fresh suit against anybody who stood in the way of obtaining possession. At the present time it is not possible in this suit to investigate the title which defendants 3 and 4 are setting up. Such a cause of action cannot be joined in a suit for specific performance of contract.

[6] The result is that this application for revision succeeds. The lower Court is directed to discharge Mt. Nagi and Mt. Maina (defendants 3 and 4). Non-applicants 1 to 4 will bear the costs of this revision as incurred by the applicants. Non-applicants 5 and 6 will bear their own costs. Pleader's fee Rs. 25.

R.G.D. *Revision allowed.*

A. I. R. (35) 1948 Nagpur 183 *[C. N. 65.]*

PADHYE J.

Mt. Kulsambi w/o Abdul Karim Khan — Applicant v. Mohammad Abdul Satar s/o Abdul Haq and another—Non-Applicants.

Civil Revn. No. 54 of 1945, Decided on 9th September 1946, from order of Dist. Judge, Nagpur, D/- 25th November 1944.

(a) Charitable and Religious Trusts Act (1920), S. 1—Applicability to wakfs.

The Act applies to all trusts created for public purposes of a charitable or religious nature without any distinction of caste or creed of the author of the trust. The Act is one of the enactments saved by S. 12, Mussalman Wakf Act and applies to trusts by Muslims: *Case law discussed.* [Para 8]

(b) Charitable and Religious Trusts Act (1920), S. 3—Denial of trust.

Jurisdiction to entertain application under S. 3 is not ousted by mere denial of trust or setting up an adverse title by non-applicant : 31 A. I. R. 1944 Nag. 190, *Foll.* [Para 10]

(c) Charitable and Religious Trusts Act (1920), S. 3 — Public trust.

A grant does not cease to be a public grant merely because a care-taker of the property maintains himself out of the income of the grant. [Para 11]

The mere fact that the *mutawalli* was maintaining himself out of the income of the property granted does not make the grant a private or a conditional one. [Para 18]

(d) Charitable and Religious Trusts Act (1920), S. 3—Public grant, if can become private.

A grant which is initially a public grant by the founder cannot be turned into a private grant merely by the wrongful acts of the care-takers or *mutawallis.* [Para 19]

(e) Charitable and Religious Trusts Act (1920), S. 3—Nature and purpose of grant.

The Court has to look to the original grant to determine its nature and purpose; subsequent events and actions or inactions of individuals or of the community cannot change the nature and purpose of the original grant. [Para 20]

(f) Charitable and Religious Trusts Act (1920), S. 5—Nature of inquiry.

The inquiry under the Act is of a summary nature. [Para 21]

(g) Mahomedan law—Wakf—Imam Bara.

Imam Bara unlike a mosque or Idgah is an apartment in a private house or building set apart like a private chapel for religious purposes. [Para 17]

Cases referred :—

1. ('29) 4 Luck. 429 : 16 A. I. R. 1929 Oudh 225 : 117 I. C. 739 (F.B), Shabbir Husain v. Asbiq Husain.
2. ('45) I. L. R. (1945) Bom. 257 : 32 A. I. R. 1945 Bom. 157 : 219 I. C. 449, Mahomed Hussein v. Collector of Broach and Panchmahals.
3. ('32) 7 Luck. 601 : 19 A. I. R. 1932 Oudh 210 : 138 I. C. 725 (F. B.), Mohammad Baqar v. Mohammad Qasim.
4. ('27) 14 A. I. R. 1927 Pat. 189 : 101 I. C. 207, Ali Mahomed v. Collector of Bhagalpur.

5. ('30) 52 All. 167 : 17 A. I. R. 1930 All. 81 : 118 I. C. 717, Na rullah Khan v Wajid Ali.
6. ('44) I. L R. (1941) Nag. 775 : 31 A I.R. 1944 Nag. 190 : 220 I. C. 57, Kubrabi v Shuberati.
7. ('30) 17 A. I. R. 1930 Oudh 32 : 120 I. C. 828, Wajihuddin Ashraf v. Murtaza Ashraf.
8. ('28) 7 Pat. 426 : 15 A. I R 1928 Pat. 441 : 116 I. C. 525, Ali Zamin v. Mahomed Akbar Ali Khan.
9. ('38) I. L. R. (1938) All. 1 : 24 A. I R 1937 All. 786 : 172 I C. 945, Pratap Singh v. Brijnath Das.
10. ('33) 29 N. L. R. 100 : 20 A. I. R 1933 Nag. 115 : 146 I. C 82, Azizuddin v Ramzan Shah
11. ('40) 15 Luck. 1 : 27 A I. R. 1940 P. C. 7 : I L R. (1940) Kar. P.C 25 : 67 I. A. 1 : 185 I. C. 305 (P C.), Bhagwan Din v. Gir Harsharoop.
12. ('25) 21 N. L. R. 1 : 11 A I. R. 1924 P. C. 109 : 51 Cal 446 : 51 I. A. 192 : 80 I. C. 645 (P.C.), Mahomed Raza v. Yadgar Hussain.
13. ('16) 43 Cal. 1085 : 3 A I. R. 1916 P C. 132 : 43 I. A. 127 : 35 I C. 30 (P. C.), Mahomed Ismail Ariff v. Ahmed Moolla Dawood.

Dr. D. W. Kathaley and Imdad Ali — for Applicant.

M. Y. Sharif and A. Ahmad — for Non-Applicants 1 and 2, respectively.

Order. — Against the order passed by the District Judge, Nagpur, under S. 5 (5) Charitable and Religious Trusts Act (14 [XIV] of 1920), Mt. Kulsumbi has filed this revision petition.

[2] The proceedings before the District Judge were started on an application under S. 3 of the aforesaid Act by one Kazi Md. Abdul Sattar (hereinafter called the non-applicant) against three persons viz., Mt. Kulsambi, the daughter and Mt Hasmatbi, the widow of Sk. Ismail, and one another who was the transferee from them, and who was subsequently discharged. Of the remaining two, Mt. Kulsambi (the applicant in this revision) was the only contesting party, the other Hasmatbi had practically joined hands with Kazi Md. Abdul Sattar and is not aggrieved by the order of the lower Court.

[3] Kazi Md. Abdul Sattar's case is that there is an ancient 'Idgah' in mouza Bhankheda which is now a part of Nagpur city built by the Muslim community and is used by the said community for offering two 'Id' prayers annually. It is thus a public religious institution for the use of the Muslim public of Nagpur. The property described in Sch. A to the application consisting of *maufi sarkari* land Nos. 65 and 67 total area 1.36 acres with Idgah building and two houses thereon is according to him a trust property for the upkeep and maintenance of the said 'Idgah' and is held by Mt. Kulsambi and Mt. Hasmatbi as trustees. Kazi Md. Abdul Sattar claims to be interested in this Idgah as Pesh Imam (which position is not disputed before me) and he therefore moved the District Judge for passing an order calling upon the said trustees to furnish particulars and accounts of the trust property

[4] The learned District Judge, appeared on the materials placed before him to be satisfied *prima facie* that the property to which the application related was a trust property and Kazi Md. Abdul Sattar was interested in it. Notices were accordingly issued to the opposite party, and Mt. Kulsambi who was the only contesting party, filed a written statement denying the trust and claiming the Idgah and the property as the private property belonging to her predecessors. According to her the Idgah was constructed by one Bholashah Fakir, her predecessor-in-title who was its proprietor and that the other property described in the schedule was not the trust property for the benefit of the Idgah but the private property of Bholashah, and the two houses now standing were constructed by her father, Sk. Ismail, out of his own private funds She however admitted that annual 'Id' prayers are offered in this Idgah and that the rental collections from the fields which are *maufi* are utilized for the upkeep and white washing of the Idgah. She claims to have inherited this entire property on the death of her father Sk. Ismail on 24th October 1934.

[5] (A) The following genealogical trees are useful to understand at a glance the connection between Bholashah Fakir and Mt Kulsambi.

(i) Bhola Shah Fakir (d. about 1833-34)
|
Sk. Makbul (d. about 1878)
=Bayabi (Makbul's widow who died in 1914)

(ii) X

Bayabi.	Y (sister)=Inayatali (d. 16-11-05)	Z (sister)=Sk. Turab
	Mir Md. Ali.	Sk. Ismail (d. 24-10-34 = Hasmatbi
		Mt. Kulsambi.

(B) The following are the private transfers of the property now claimed to be a trust property. (i) Gift by Mt. Bayabi in favour of Inayatali, her sister's son of the entire property by a registered gift deed dated 18th April 1892 (Ex. N A-4); (ii) Gift of 1/4th part of that property by Mir Md. Ali son of Inayatali in favour of Bayabi by a registered gift deed dated 21st July 1907. (Ex. N. A-3); (iii) A will executed by Mt. Bayabi on 2nd October 1914 in respect of the property gifted in her favour; (iv) Gift deed executed by Sk. Ismail in favour of her daughter Mt. Kulsambi on 1st February 1934 relating to houses (which are most probably the two houses mentioned in Sch. A to the application).

(C) The *maufi* field was originally one field and its number was 21 and area 9.14 acres (*vide* Ex. N. A-5). It appears that a part of this area was acquired under the Land Acquisition Act prior to 1892. In the settlement of 1892 the un-

acquired area out of field No. 21 was given four numbers, viz. 29/1, 56, 57 and 66 with a total area of 7.86 acres. In 1908-09 proceedings were started for acquisition of 6.50 acres out of the aforesaid area for public purposes and the land was acquired and compensation paid in 1912 (vide Ex N. A-16). Thus, what is now left out of the original field No. 21 is only 1.36 acres and in the settlement of 1914 the numbers and area are given as under : No. 65 0.11 acres, No. 67 1.25 acres. This is now the land which is said to be the trust property. The Idgah stands on No. 65 and the two houses described in the schedule stand on No. 67.

[6] After due inquiry the learned District Judge recorded relevant finding in para. 7 of his order in these words :

"From the evidence referred to above I am of opinion that the land attached to the Idgah is not the private property of respondent 1 (Mt. Kulsambi). It is likely that out of the compensation received by Mt. Bayabi some buildings on khasra Nos 65 and 67 were constructed for the benefit of the Idgah. I do not believe the evidence that Sk. Ismail spent any money of his own on the construction of these buildings The evidence however discloses that Mt. Bayabi and Sk. Ismail claimed some sort of interest in the land and thought that they could lawfully appropriate a part of the income for their maintenance. My finding on issue 6 is therefore that the property specified in Sch. A to the petition belongs to the Idgah and respondent 1 is a trustee of that property, but it appears that she has some interest in the property."

[7] The last portion of the paragraph which contains the finding is vague and it is this vagueness which has given rise to several arguments and obliged me to go into the merits of the case.

[8] This revision has been very ably and exhaustively argued on both sides. Dr. Kathaley for Mt. Kulsambi has attacked the jurisdiction of the learned District Judge to decide the matter on several grounds. His first ground is that in view of the Muslim Wakf Act (Act 42 [XLII] of 1923), which was a special Act only for the Muslim community, the general Act, 14 [XIV] of 1920 ceased to apply to trusts by Muslims and the District Judge had therefore no jurisdiction to entertain and decide the application under Act 14 [XIV] of 1920. In my opinion the objection is not sound. The preamble to Act 14 [XIV] of 1920 which is unamended to date makes it quite clear that the Act applies to all trusts created for public purposes of a charitable and religious nature without any distinction of the caste or creed of the author of the trust. The Mussalman Wakf Act (Act 42 [XLII] of 1923) on the other hand by its S. 12 expressly saves all enactments for the time being in force in British India providing for the control and supervision of religious and charitable endowments, and Act 14 [XIV] of 1920 is surely one of the enactments thus saved. In 4 Luck. 429[1] the Full Bench consisting of three eminent Judges of whom two were themselves Musalmans have pointed out the distinction between the aforesaid two Acts and the different spheres of their application. It is clear from the close study of the two Acts that one is not a substitute for the other and further that Act 42 [XLII] of 1923 could not in any event apply to the present case. This Act, as the preamble shows, makes a provision for the better management of the wakf property only. Wakf for the purposes of this Act is defined in S. 2 (e) as a permanent dedication by a person professing the Mussalman faith. It would appear from the history of the grant of the property in question that that was granted in 1818 by the Resident, a British Officer, and this is obviously not a grant by one professing the Mussalman faith. Act 42 [XLII] of 1923 does not provide for any inquiry into the existence or otherwise of the wakf or grant and the Act would obviously cease to apply the moment the wakf is itself denied as was denied in the present case by Mt. Kulsambi : *vide* I. L. R. (1945) Bom. 257.[2]

[9] In 7 Luck. 601[3] out of the three learned Judges two no doubt took the view that the Mussalman Wakf Act of 1923 does not deprive the District Judge from taking proceedings when the alleged wakf is not admitted or is denied but the learned Judge, Shrivastava J. took a contrary view and he was supported in his view by the decisions in A. I. R. 1927 Pat. 189[4] and 52 ALL. 167.[5]

[10] Besides the aforesaid two Acts special Acts have been enacted in the Province of Bengal (Bengal Act 13 [XIII] of 1934), in the Province of the United Provinces (The United Provinces Muslim Wakf Act, 1936, further amended by Act 11 [XI] of 1937) and in the Province of Bombay (Act 18 [XVIII] of 1935). Of these local Acts only the Bengal Act overrides the Charitable and Religious Trusts Act (Act 14 [XIV] of 1920). In I. L. R. (1944) Nag. 775.[6] which arose out of proceedings between the Muslim parties and in relation to a grant attached to a mosque in Nagpur, the learned Judge, Sen J., observed :

"The provisions under the Charitable and Religious Trusts Act are wider than those under the Mussalman Wakf Act of 1923. The jurisdiction of the District Judge to entertain an application under S. 3, Charitable and Religious Trusts Act is not ousted by the mere denial of trust by the non-applicant or by his setting up an adverse title under S. 10, Mussalman Wakf Act 1923."

I respectfully agree with Sen J. and hold that the District Judge acted within his jurisdiction in entertaining and deciding the application under Act 14 [XIV] of 1920.

[11] Dr. Kathalay further urged that even on the finding reached by the learned District Judge, the jurisdiction under Act 14 [XIV] of 1920 was not attracted. According to him, this Act has no application when the grant is not wholly for a public purpose of a charitable and religious nature and according to the District Judge it was not so as he found that Mt. Kulsambi had some interest in the property. Reliance is placed for this proposition on 4 Luck. 429[1] and also on A.I.R. 1930 Oudh 32.[7] Before examining these cases let us see what the learned District Judge really meant by those particular words vaguely used. According to the learned District Judge the property in suit was granted to the Idgah which was not a private institution and it was granted for the repairs and upkeep of the said Idgah. It is a common knowledge that Sadhus and Fakirs are always attached to a Hindu and Muslim public institution of a charitable or religious nature respectively. They manage the preperty attached to that institution and out of the income thereof maintain the institution and also maintain themselves. As care-takers of the institution, they are not paid any fixed salary but are allowed to maintain themselves out of the income of the institution for the services they render. That is the only interest which a care-taker has and that is what in my opinion was indicated by the learned District Judge in para. 7 of his order. The maintenance of the care-taker of a charitable or religious institution is, in my opinion, a legitimate expenditure in the interest of the institution itself. On p. 155 of 'Principles of Mahomedan Law' by the late Sir Dinshaw Mulla (Edn. 12) the author has mentioned some of the objects which are recognized by the Mahomedan Law as religious, pious or charitable objects. The list includes mosques and provision for Imams to conduct worship therein, provision for Professors in Colleges and even provision for camels and *duldul* for religious processions during Muharram : *vide* 7 Pat. 426.[8] It cannot therefore be said that because the care-taker maintains himself or herself out of the income of the grant, that the grant ceases to be a public grant for charitable and religious purposes as contemplated by Act 14 [XIV] of 1920.

[12] In 4 Luck. 429,[1] the particular wakf was by a Mussalman providing for the maintenance of his kindred, dependants and servants, who were in fact the primary and immediate objects of the bounty under the wakf and the question was whether that wakf was for public purposes so as to come within the scope of Act 14 [XIV] of 1920. Their Lordships held that the words public purpose in S. 3 of the Act should not be interpreted in such a sense as to allow a trust which is created or exists for a public purpose in its substance and essence though supplemented by an illusory or wholly trifling provision, the purpose of which may not be public or may be even private, to be taken out of the provisions of the Act of 1920. The real substance of the trust and the primary intention of the creator of trust must be looked at in every case. It would appear from what follows that when this grant was made by the Resident in 1818 it was wholly for public purposes and the maintenance of the Fakir family attached to the Idgah was one of the items of necessary expenses for carrying out the object of the grant. The finding in A. I. R. 1930 Oudh 32[7] that the property was not a wakf property was reached on the evidence in that case. It was held that there was no dedication of the property which on the other hand was always held and enjoyed in private ownership. The following observations of their Lordships are very material :

"However, there is no sufficient evidence in this case to justify the finding that the property in dispute is anyhow dedicated as wakf. The property in dispute was never treated by the parties or their ancestors as wakf property. On the contrary the evidence on the record shows that it was always treated by them as private property. The mere fact that the property was set apart for meeting the expenses of the Dargah would not make it wakf property when the right to assume possession and divide it according to the ancestral shares was reserved in the agreements in question."

[13] The Full Bench case in 4 Luck. 429[1] was considered by the learned Judges of the Allahabad High Court in the case reported in I.L.R. (1938) ALL. 1[9] and at pp. 5 and 6 their Lordships observed :

"The Full Bench must therefore be taken to mean that the Act applies only to cases where the bulk of the income is allotted for public purposes, leaving out of a substantial (I think it should be unsubstantial) amount which may either be illusory or trifling."

In the same case Ganga Nath J. observed at page 10 :

"In the present case there is no doubt that the primary intention of the testator was to create an endowment, with the help of the income of which a *chhetra* and a dispensary would be established and food and medicines supplied free to the needy and the deserving. Only a small part of the income was set apart for religious purposes, namely the maintenance of the temple. The insignificant sum of Rs. 10 was allotted to the widow for her life only as her maintenance allowance, which was to lapse to charity after her death. The other sum of Rs. 12 was also for religious purposes, namely to meet the expenses of a temple of 'Dariya-nath,' which is not suggested before us to be a private temple. We see no reason to hold that the Act of 1920 is not applicable to this trust merely because a small sum was reserved for those purposes which may not be strictly public purposes."

[14] It is necessary at this stage to look to the history of the present grant. This grant, as appears from the earliest available record i. e. Ex. N. A. 5, order of the Settlement Officer, Nagpur, dated 22-12-1858 A. D., was made in or

about the year 1818. There was at that time an Idgah somewhere near the Sitabuldi Fort and Bholashah Fakir was in charge of it. For military purposes, the land with the Idgah was taken over by the then Resident and in lieu of that Bapumiya's Badi (field No. 21) in mouza Hansapuri which had then possibly lapsed to Government and Rs. 2500 were given for construction and maintenance of the 'Idgah'. The Idgah was accordingly constructed over a part of that plot and the Muslim community thereafter began to hold 'Id' prayers in that Idgah. The land was given 'maufi' and still continues to be 'maufi'. It is also clear from that document that the land near the Sitabuldi Fort was also Maufi and that the land granted in lieu of it was specially assigned for the 'urus' (festivity) of the Muslim community. I am told that 'urus' (festivities) are held on the occasion of 'Id' prayers. It is absolutely clear from this document that the grant made in 1818 was a public grant for charitable and religious purposes in the interest of the Muslim community and not a private grant to Bholashah Fakir. It is not disputed before me that this Idgah is used by the Muslim community of Nagpur for offering 'Id' prayers annually. It is further clear from Ex. N. A. 6 (the order of the Settlement Officer dated 19-10-1866) that the *maufi* was for the repairs and cleaning (upkeep) of the Idgah and it was only on that ground that *maufi* was recommended to be continued. It further appears from Ex. N. A. 8 that this *maufi* was sanctioned by the Government of India in 1896. In Ex. N. A. 10 (jamabandi of 1890-91) that Idgah is shown as standing on a portion of this plot which was given No. 57 in that settlement. In the settlement of 1914-15 (*vide* Ex. A-3 and Ex. N. A. 16) this property is recorded in the name of Idgah through *wahiwatdar* Sk. Ismail and in Ex. A-4 and Ex. 5 the name of Mt. Bayabi is shown as *wahiwatdar* of the Idgah. It is thus quite clear that the land was granted for Idgah. Even in the private documents dealing with this property there is a clear mention of the Idgah and of the liability to maintain it out of the income of that property (*vide* Ex. N. A. 4).

[15] There is no doubt that in the settlement papers of 1890-91 and in other documents 'Idgah' is not specifically mentioned and the *maufi* field is recorded in the name of Sk. Makbul son of Bholashah Fakir. This is however not in any way inconsistent with the existence of grant for 'Idgah'. It is yet a moot point if a 'mosque' (which would include an Idgah) is a juristic person (*vide* Mulla's Mahommedan Law p. 189). It is not like a Hindu deity which is well recognised to be a juristic person. There is thus nothing unnatural in the property being recorded in the name of the care-taker of the mosque or 'Idgah'. As observed in 29 N. L. R. 100,[10] the description of a private person as owner in the record-of-rights does not imply that that person is not a *mutawalli*. Anyway that was set right in the settlement of 1914-15.

[16] It was correctly pointed out by their Lordships of the Privy Council in a case reported in 15 Luck 1,[11] that it is quite possible for a Hindu to have a private temple and though it is certainly possible that in the course of years the temple should have been so dealt with as to become dedicated for the benefit of the Hindu public as a public temple, such a dedication requires to be proved. The dedication in such cases cannot necessarily be inferred from the mere fact that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual mela. Worshippers are naturally welcome at a private Hindu temple because of the offerings they bring and the repute they give to the idol; they do not have to be turned away on the pain of forfeiture of the temple property as having become property belonging to the temple. There is however a wide difference between the conception of a Hindu temple and a mosque or 'Idgah'. Muslim religion favours congregational prayers and this is specially true of two important 'Id' prayers offered annually. At p. 393, Mahommedan Law by Syed Ammerali, Vol. 1 (Edn. 4) it is pointed out that Idgah (which is also called 'Masallah') is a place where funeral prayers or the prayers of the two 'Id' are usually offered. In such cases only the place where the congregation gather and the worship is performed is governed by the rules governing a mosque. But a piece of ground may be specifically dedicated for the performance of public prayers and though there is no building thereon, if prayers have been habitually performed thereon, it is wakf and subject to the rules governing a mosque. It is further pointed out that even if a man were to build a mosque inside his house it shall be deemed to be dedicated to public by the very fact that prayers are once offered by the public and it is not necessary to prove express dedication. In the Fatwai-Kazi Khan, it is stated that 'the delivery of possession as regards a masjid is complete when only one person has prayed in it with 'Azan' and 'ikamet'. The 'Id' prayers, as is well-known, are congregational prayers and there is abundant evidence in this case apart from the very admission of Mt. Kulsambi that this particular 'Idgah' was built for the benefit of the Musalman public and was as a fact used by the Mussalman public during all these years. There is thus no doubt that the

grant made in 1818 was a public grant of charitable and religious nature and the learned District Judge acted with jurisdiction in entertaining and disposing the application under ACT 14 [XIV] of 1920.

[17] Relying on the decision of their Lordships of the Privy Council reported in 21 N L R. 1[12] Dr Kathalay contended that the grant in question should at least be construed as a conditional grant, in so far as it imposes a liability to utilize income from the property granted for the upkeep of 'Idgah' and even such grants do not fall within the scope of ACT 14 [XIV] of 1920. Their Lordships were dealing with a grant by a Hindu Raja of Nagpur in favour of a royal physician only so far as the land revenue of a village for the benefit of what appeared to be a private Imam Bara of the physician. Imambara, unlike a mosque or Idgah is an apartment in a private house or building set apart like a private chapel for religious purposes. It is intended for the use of the owner and the incumbents of his family though the public may be admitted with the permission of the owner (*vide* pp 192 and 193 of the Principles of Mahomedan Law by Mulla). The only question before their Lordships was if the plaintiff Muhammad Raza should be recorded as the full 16 anna mokasdar and mutawalli and their Lordships negatived this prayer in view of the finding reached on the terms and conditions of the particular grant that it was not a wakf.

[18] It has already been pointed out above that the grant in this suit was not a grant 'subconditional.' It was out and out a public grant and the mere fact that the mutawalli was maintaining himself or herself out of the income of the property granted does not make it a private grant or a conditional grant. In fact a care taker or a mutawalli is entitled to a reasonable remuneration for the services rendered and the remuneration can be fixed by the founder or by a Court.

[19] Dr. Kathalay then attacked the finding of the District Judge on the ground that there is no evidence of dedication and on the contrary the fact that the property passed from Bholashah Fakir to his heirs and that it was dealt with as a private property and was a subject of several private transfers without any protest from the Muslim community for over 100 years clearly establishes that that was a private grant. It is clear from what is already stated that a grant made in the interest of a community and for the maintenance of an 'Idgah' essentially a public institution cannot possibly be a private grant and if initially it was not a private grant by the founder, it cannot possibly be turned into a private grant merely by the wrongful acts of the care-takers or mutawallis. Indifference of public towards charitable and religious public grants is quite proverbial and in this particular case the community does not appear to have taken much notice of the private transfers because the Idgah was properly maintained, by whosoever it may be It is quite apparent to me, that Bholashah, Sk. Makbul and Mt. Bayabi were mutawallis of this Idgah and in that capacity they managed the property. They never denied the trust except on one occasion to which reference would be made later and executed private transfers under a mistaken notion of their legal powers The transferees and ultimately even Mt Kulsambi have however admitted the liability to maintain the Idgah. It is no doubt true that in the land acquisition proceedings Mt Bayabi and three other persons represented themselves to be the owners of the 6-50 acres of the wakf property and received compensation paid for the acquired property. This selfish act on the part of Mt Bayabi and others does not in my view change the nature of the grant at least in respect of the property i. e. 1.36 acres which is now the only property left unacquired. It is not necessary to establish the fact of dedication or the appointment of a particular person as a mutwalli, by direct evidence. There is voluminous evidence in this case from which the necessary inference supporting the findings of the learned District Judge can be drawn. In EX. D-9 Mt. Kulsambi has described herself as a mutwalli of the 'Idgah' and this admission is in itself sufficient to support the impugned finding.

[20] In the Privy Council case reported in 43 Cal. 1035[13] the original grant of 1862 was by the Government for the purpose of constructing a mosque for the Sunni Mahomedan community. In 1871 five members of that community acquired additional site and dedicated it for the same purpose in 1872. On this entire area the mosque was constructed. The grant of 1862 vested the control and management of the mosque solely in Randherias (Sunni Mahomedans of Randher near Surat). The dispute arose about the management of the mosque and the Court was moved to frame a scheme of management ignoring the right of management vested in favour of Randherias by the original grant of 1862. Their Lordships observed that the transactions which took place in 1871 and 1872 in no way affected the original grant; the mosque remained as before a public mosque and any scheme of management to be framed should be subject to a provision that so long as circumstances do not vary a majority of the managing community should be of Randherias. It is thus clear that a Court has to look to the original grant in order

to determine its nature and purpose; subsequent events and actions or inactions of individuals or of the community cannot change the nature and purpose of the original grant.

[21] It is correctly pointed by the learned District Judge that an inquiry under Act 14 [XIV] of 1920 is after all of a summary nature. Their Lordships of the Privy Council pointed out in 15 Luck. 1[11] that the decision under the Act of 1920 is a decision from which there is no appeal; it is a decision in a summary proceeding which is not a suit and it is not made final by any provision in the Act. It is open for the party aggrieved by the order to file a suit impeaching the order or to raise the question by way of defence in a suit filed by the opposite side. It is a well established rule, though not a rule of law that the High Court is reluctant to interfere with the finding of the lower Court when another remedy is open to the aggrieved party I would have been very slow in this case to interfere with the finding of the learned lower Court assuming I had disagreed with it which I do not. I do by no means lay down that in no case in revision against the order passed under Act 14 [XIV] of 1920 interference is permissible but in my view the present case is not one which satisfies the requirements of S. 115, Civil P. C. and justifies interference in revision.

[22] I do not propose to deal with several other grounds raised in the revision petition but not argued before me. It is not necessary for the applicant in order to invoke the jurisdiction of the District Judge under Act 14 [XIV] of 1920 to allege and prove mal-administration of the trust property. In view of the fact that I agree with the District Judge that the grant in question is a public grant of a charitable and religious nature and that the proceedings in the lower Court were with jurisdiction I dismiss this revision with costs. Counsel's fee Rs. 75 for applicants and non-applicant 1.

G.B. *Revision dismissed.*

A. I. R. (35) 1948 Nagpur 189 *[C. N. 66.]*

BOSE J.

Prayagdas Shankerlal Maheshri and another — Decree-holders — Appellants v. *Mt. Indirabai w/o Vinayakrao Harkare — Judgment-debtor — Respondent.*

Misc. Appeal No. 135 of 1944, Decided on 29 10-1946, from order of Dist. Judge, Wardha, D/- 4-4-1944.

(a) Civil P. C. (1908), O. 21, Rr. 10 and 11 (j)— Application for transfer of decree is not one for execution.

An application which merely asks for transfer of the decree to another Court, or for the sending of a certificate, cannot be said to comply with the requirement of O. 21, R. 11 (j) even if it says that the object is to get property attached hereafter by the other Court. Such application cannot be regarded as an application for execution but is only a step in aid of execution. In order that the other Court may execute the decree either a fresh application for execution or at the least an application for amendment is necessary: Opinion of Grille, J. in 31 A. I. R. 1944 Nag. 80, *Not foll.*; *Case law referred.* [Paras 21, 23]

Annotation: ('44-Com.) C. P. C., O. 21, R. 10 N. 8, Pts. 3 and 4; O. 21, R. 11, N. 12.

(b) Limitation Act (1908, Art. 182 (5) — Execution application defective materially — Application for amendment beyond time—Maintainability.

Obiter. — As it is a rule of practice that fundamental amendments should not be allowed when the matter is beyond time, no application for amendment of an application for execution which is defective in material particulars can succeed if made more than three years from the date on which the original application was disposed of, or more than twelve years from the date of the decree. [Para 23]

Annotation: ('42-Com.) Lim. Act, Art. 182, N. 86a.

(c) Civil P. C. (1908), S. 48 — Fresh application— Later application setting out mode in which assistance of Court is desired—Previous application not setting out such mode.

An application cannot be regarded as an application in revival of a previous application unless it is of the same nature. If any relief different from that claimed in the previous one is asked for, or any new property is sought to be attached or sold, it cannot be treated as a mere revival but is a fresh application within the meaning of S. 48 Therefore if the later application, unlike the previous one, sets out the mode in which the assistance of the Court is desired, it is a fresh application and as such will be beyond time if made more than twelve years after the previous application unless it can be cured by S. 48 (2): 21 A. I. R. 1934 All. 481 (F. B.), *Rel. on.* [Para 26]

Annotation: ('44-Com.) C. P. C., S. 48, N. 7, Pt. 6.

(d) Civil P. C. (1908), O. 21, R. 6 — Act of giving certificate, if ministerial.

The act of giving a certificate incorporating the extent of the decree or of the satisfaction is a judicial one and not merely ministerial. [Para 28]

Annotation: ('44-Com.) C. P. C., O. 21, R. 6, N. 1.

(e) Civil P. C. (1908), S. 48 (2)—Fraud or force — Judgment-debtor contesting execution application to delay execution — Contest upheld by trial Court and High Court Judge.

Fraud, within the meaning of S. 48 (2), must be of a nature which the decree holder is not able to discover at the time and helps the judgment-debtor in deceiving him and gaining time. There can be no fraud unless there is a mistake of fact and the other side is misled by it. On a contest in a Court of law there is no mistake as to fact when the other side knows the facts and contests them, setting out a different set of facts, and is not misled. Therefore, the fact that the judgment-debtor contests the decree-holder's application only with a view to delay the execution of the decree cannot amount either to force or fraud. Nor can a contest which is upheld by the trial Court and also by a Judge of the High Court be termed frivolous so as to amount to fraud: 9 A. I. R. 1922 All. 145, *Dissent.*; 18 A. I. R. 1931 All. 134, *Rel. on*; 22 A. I. R. 1935 Pat. 380, *Ref.* [Paras 32 to 35]

Annotation: ('44-Com.) C. P. C., S. 48, N. 15, Pts. 11 and 15.

(f) Limitation Act (1908), S. 14 (1)—Fundamental position contemplated by sub-section pointed out.

The fundamental position contemplated by S. 14 (1) is that the person seeking to avail himself of its provisions was prosecuting a proceeding founded upon the same cause of action in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it. [Para 36]

Annotation : ('42-Com.) Lim. Act, S. 14, N. 22, Pt. 1a.

(g) Limitation Act (1908), S. 14 — Good faith — Execution application — Omission to set out mode of execution and property to be attached and sold —Limitation Act (1908), S. 2 (7).

An execution application, if it is intended for purposes of execution, cannot be said to have been made with due care and attention and, therefore, in good faith, if it omits to set out the mode in which the assistance of the Court is required and omits to set out the property which the decree-holder wants to be attached and brought to sale. [Para 37]

Annotation : ('42-Com.) Lim. Act, S. 2 (7), N. 1, S. 14, N. 20.

(h) Limitation Act (1908), S. 15—Applicability — Execution application not executable but pending.

Where the application for execution filed on 18-1-1934 could not be executed between 15-9-1938 and 9-4-1942 because of judgment of a single Judge of the High Court upholding the decision of the lower Court that the application was barred by time but the matter was still pending because a Letters Patent appeal was allowed, and when the Division Bench reversed the decision of the single Judge on 9-4-1942 it was open to the decree-holder to continue with his original application, but that application was useless for purposes of execution because of the defects therein and, therefore, he was compelled to file a second application :

Held, that the second application could not be given the benefit of S. 15, and as regards the former application there was no question of S. 15 because it was still pending on 9-4-1942 when the Division Bench gave its judgment. [Para 38]

Annotation : ('42-Com.) Lim. Act, S. 15, N. 15.

Cases referred :—

1. ('43) I. L. R. (1943) Nag. 734 : 31 A. I. R. 1944 Nag. 80 : 212 I. C. 592, Prayagdas v. Mt Indirabai.
2. ('98) 20 All. 78, Sundar Singh v. Doru Shankar.
3. ('89) 16 Cal. 744, Nilmony v. Biressur Banerjee.
4. ('95) 22 Cal. 921, Suja Hossein v. Manobur Das.
5. ('11) 35 Bom 103 : 8 I. C. 168, Jeewandas Dhanji v. Ranchoddas Chaturbhuj.
6. ('12) 34 All. 396 : 14 I. C. 172, Khetpal v. Tikam.
7. ('36) 17 Lah. 13 : 22 A. I. R. 1935 Lah. 508 : 158 I. C. 127, Devi Das v. Mahamed Akbar Khan.
8. ('34) 56 All. 791 : 21 A. I. R. 1934 All. 481 : 148 I. C. 1017 (F. B.), Shiva Shankar Das v. Yusuf Hasan.
9. ('95) 19 Bom. 34, Shakaram Chand v. Ghelabhai Chakaldas.
10. ('30) 32 Bom. L. R. 1368 : 18 A. I. R. 1931 Bom. 128 : 129 I. C. 159, Sakkargauda v. Bhimappa.
11. ('25) 12 A. I. R. 1925 Cal. 1135 : 93 I. C. 364, Bahadur Singh Dugar v. Basiruddin Ahmmad.
12. ('23) 2 Pat. 909 : 11 A. I. R. 1924 Pat. 120 : 74 I. C. 753, K. B. Dutt v. Taraprasanna Roy.
13. ('22) 44 All. 319 : 9 A. I. R. 1922 All. 145 : 65 I. C. 877, Lalta Prasad v. Suraj Kumar.
14. ('31) 53 All. 419 : 18 A. I. R. 1931 All. 134 : 129 I. C. 716, Bandhu Singh v. Kayastha Trading Bank Ltd., Gorakhpur.
15. ('35) 14 Pat. 816 : 22 A. I. R. 1935 Pat. 380 : 156 I. C. 297, Bishwanath Prasad v. Lachhmi Narain.

V. V. Kolkar — for Appellants.

M. Adhikari — for Respondent,

Judgment. — The question here is whether the respondent's application for execution dated 9-1-1943 is in time. This depends upon the validity of the previous application dated 18-1-1934. The respondent's contention is that the application of 9-1-1943 is not a fresh application but is one seeking revival of the application of 18-1-1934, which, according to the respondent, is still alive.

[2] It will be necessary to trace the history of these executions from the outset. The decree was passed on 23-12-1926 in favour of the respondent's father against Balkrishna and Sadasheo with whom we are no longer concerned.

[3] The first application made in the execution Court (the second Sub-Judge, Second Class, Wardha) was dated 1-2-1927. All it asked was that :

"Defendants are at Warud . . . District Yeotmal .... therefore certificate may be sent to the Court at Yeotmal for (illegible) immovable property."

It set out no details of property. It asked for no attachment, nor did it suggest any mode of execution. The certificate was sent to Yeotmal on 23-2-1927 and the Wardha Court wrote in its order sheet : "Struck off by transfer."

[4] After this the judgment-debtor Balkrishna died sometime in November 1928 and the decree-holders applied on 16-3-1929 to have his widow Indirabai substituted. This was done on 5-7-1929. All this occurred in the Wardha Court. The certificate was recalled from Yeotmal. It was corrected, and was sent back to Yeotmal on 5-7-1929. No further steps were taken in Yeotmal and so the Yeotmal Court returned the certificate to the Court at Wardha on 21-3-1930.

[5] In the meanwhile the judgment-debtor Indirabai, who had been substituted in place of the original judgment-debtor Balkrishna, died. An application was made in the Wardha Court on 17-4-1930 to bring on record her legal representative, another Indirabai (wife of one Vinayakrao). This is the Indirabai we are concerned with here. She is respondent 1 to this appeal. This application was allowed and the substitution was made on 29-8-1930.

[6] On the same day, 17-4-1930, and in the same application, the decree-holders asked, as before, that the certificate be sent to Yeotmal. This part of the application was dismissed for default on 26-9-1930.

[7] Thereafter, another application was made on 14-10-1930 with the same prayer that it be sent to Yeotmal. This time the application added:

"Immovable property in the Yeotmal district belonging to the defendant is to be attached and hence certificate may be prepared and sent to . . . Yeotmal."

But no list of property was set out. The certificate was sent on 25-10-1930.

[8] After this, on 21-2-1931, the decree-holders again applied to have the present Indirabai (wife

of Vinayakrao) substituted in place of the deceased Indirabai and asked that the certificate be recalled from the Yeotmal Court. This was done but only to discover on 8-4-1931 that the substitution had already been effected. Accordingly the certificate was returned to Yeotmal on the same date, 8-4-1931.

[9] After this, Shankerlal, one of the decree-holders died and an application for substitution was made in the Wardha Court on 17-8-1931. The substitution was effected on 24-9-1931. The Civil Court registers were corrected and intimation was sent to the Yeotmal Court on the same date.

[10] On 3-11-1933 the Yeotmal Court returned the certificate to Wardha as barred by time.

[11] Then comes the application with which we are concerned. It was made in the Wardha Court on 18-1-1934. It set out the various deaths and the steps taken for substitution and concluded :

"Therefore an order to call the certificate and send it after amending it may be passed."

The Wardha Court granted the prayer so far as it asked for the certificate to be sent to Yeotmal, and on 20-4-1930 directed that it be sent there. (It will be recalled that the previous certificate had been returned on 3-11-1933 and so on the date of this application there was no certificate in Yeotmal).

[12] On 23-7-1935 one of the decree-holders, Prayagdas, attained majority, and asked in the Wardha Court that he be shown as major, and further asked that intimation of this fact be sent to the Yeotmal Court for transmission to the Court at Chandur in the Yeotmal District.

[13] Before any steps could be taken on this the other decree-helder Govindlal died and so an application was made in Wardha on 18-10-1935 for substitution.

[14] These two applications were dismissed on 8-2-1936 along with the parent application dated 18-1-1934 on the ground that the parent application was barred by time.

[15] I upheld this order in second appeal on the ground that the application of 17-8-1931 for substitution was not a step-in-aid and consequently the application of 18-1-1934 was beyond time. My decision was reversed on Letters Patent appeal and the Division Bench held that the application of 18-1-1934 was in time The Letters Patent decision is reported in I. L. R. (1943) Nag. 734.[1]

[16] The questions which now arise are, (1) whether the application of 18-1 1934 is an application for ex cution and (2) whether it is still alive. The application of 9-1-1943 is more than twelve years from the date of the decree and so unless there is fraud within the meaning of S. 48 (2), Civil P. C. it is barred by time. The decree-holders contend there was fraud but that is an alternative case. Their main contention is that the application of 18-1-1934 had not been disposed of and so is still alive and the application of 9-1-1943 must be regarded as one seeking revival of the former application.

[17] It is to be observed that the present point was not raised in either of the lower Courts. The application of 9-1-1943 alone was pressed as a fresh and independent application for execution. However, as the question is one of law, I allowed it to be argued here.

[18] It will have to be accepted, after the Letters Patent appeal, that the application of 18-1-1934 was within time, but the question now arises whether it is a valid application for execution. Grille J. (as he then was) evidently considered that it was because at p. 737 dealing with a prior application of 14-10-1930 which was substantially the same as the one of 18-1-1934, he said:

"In my opinion there was an execution application pending, namely that of 14-10-1930. The application was in proper form . . . and the application was transferred to the Yeotmal Court."

Now the application of 14-10-1930 merely said :

"Immoveable property in the Yeotmal District belonging to the defendant in the above suit is to be attached and hence certificate may be prepared and sent to . . . Yeotmal."

The application of 18-1-1934 asked no more. It merely asked that the certificate be sent to Yeotmal after amending it.

[19] Grille J. held as to this that :

"No authority has been advanced for the proposition that when a decree has been transferred for execution from one Court to another that application loses its force and does not become an application for execution until a further application for execution is made in the Court to which the application has been transferred."

Pollock J. expressed no opinion on this point and said :

"It does not seem to me to be material whether there was an application for execution pending or not."

Therefore, I am not bound by Grille J.'s opinion on this point it not being the decision of the Bench. All that binds me is that the application of 18-1-1934 was in time.

[20] With the utmost respect to Grille J. his opinion seems to overlook O. 21, R. 10, Civil P. C., which says :

"Where the holder of a decree desires to execute it, he shall apply . . . if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court . . . "

Sir Dinsha Mulla says as to this in his Civil Procedure Code, Edn. 11, p. 203 :

"An application to transfer a decree to another Court for execution is not an application for execution,"

it is only a step-in-aid, and the learned author relies on 20 ALL. 78,[2] 16 Cal. 744,[3] 22 Cal. 921,[4] 35 Bom. 103,[5] 34 ALL. 896[6] and 17 Lah. 13[7] to which 56 ALL. 791[8] can be added.

[21] The ingredients which an application for execution should contain are set out in O. 21, R. 11, namely—

"(j) the mode in which the assistance of the Court is required,"

and five different modes are set out in detail. It is difficult to see how an application which merely asks for transfer of the decree to another Court, or for the sending of a certificate, can be said to comply with this requirement even if it says that the object is to get property (which incidentally is not specified) attached hereafter by the other Court.

[22] In 19 Bom. 34[9] an application which did not specify the mode in which the assistance of the Court was required was rejected and in 32 Bom. L. R. 1368[10] an application of that kind was held not to be one in accordance with law within the meaning of Art. 182, Limitation Act. The Calcutta High Court took the same view in A. I. R. 1925 Cal. 1135.[11] B. B. Mitra has collected a number of cases round the same point in his Limitation Act, Edn. 11, p. 949 and says that it is not in accordance with law

"if the defects in the application are of a *material* character and the Court cannot proceed to execution unless they are amended (e. g., if the application does not comply with the requirements of O. 21, Rr. 11-14)."

[23] With the utmost respect, I fail to see how any Court could execute the decree on either the application of 14-10-1930 or of 18-1-1934. It is evident to me that a further application would have to be made, either a fresh application for execution or at the least an application for amendment. No application for amendment has been made up to the present moment and as it is a rule of practice that fundamental amendments should not be allowed when the matter is beyond time, it is clear that no application for amendment could succeed if made now. Any such application would be beyond time for two reasons. First, because it would be more than three years from 3-11-1933, the date on which the application of 3-11-1933 was disposed of, and second because it would be more than 12 years from the date of the decree. Therefore, even if the application of 18-1-1934 be treated as within time (and that of course it must now be) and even if it be treated as an application for execution, it is one only for the limited purpose of taking the first step, namely to get the decree transferred to another Court. My own view is that it cannot be regarded as an application for execution. It is only a step-in-aid of execution. It only asks that the decree be transferred to another Court to enable it to be executed. It does not in itself ask for execution.

[24] But even if it be regarded as an execution application, it cannot be carried further than its substance warrants; therefore, as the decree cannot be executed on the application as it stands, a further application would be necessary, and as that application would be infructuous because of limitation, I hold that the application has expended itself and therefore the lower Courts were right in directing the papers to be filed.

[25] It was held in 2 Pat. 909[12] that if an application merely asks for transfer of a decree it cannot be regarded as an application for execution and that a fresh application would be necessary in the transferee Court, but if it sets out in addition the mode in which the assistance of the Court is required, then no fresh application need be made in the transferee Court. That is a matter on which I express no opinion and of course if Grille J. was limiting his remarks to that it would not be necessary for me to dissent, at any rate in this case, but as I see it he considered that the application of 14-10-1930 was in proper form as an execution application and that therefore no further application was necessary in the transferee Court. That is where, with the utmost respect, I am compelled to differ.

[26] Now as regards the application of 9-1-1943 it cannot, in my opinion, be regarded as an application in revival of the application of 18-1-1934 unless it is of the same nature. And as to that I agree with Sulaiman C. J. in Allahabad Full Bench, 56 ALL. 791[8] that

"if any relief different from that claimed in the previous one is asked for, or any new property is sought to be attached or sold, it cannot be treated as a mere revival but is a fresh application within the meaning of S. 48, Civil P. C."

Therefore, if the application of 9-1-1943 sets out the mode in which the assistance of the Court is desired, it is a fresh application and as such is beyond time unless it can be cured by S. 48 (2). If, on the other hand, it does no more than ask for a transfer of the decree to another Court, then it is not competent as an execution application for the same reasons as apply to the applications of 18-1-1934 and 14-10-1930. As a matter of fact that is all it does except for one matter which does not touch the decree of 23-12-1926. It is true it says that "Property in Chandur has been attached," but we know that that is inaccurate. We are now in possession of all the facts and it it clear that there has not been any attachment and that in point of fact nothing is pending in either the Chandur or the Yeotmal Court so far as this decree is concerned.

[27] It was argued on the strength of 2 Pat. 909[12] that these matters should not be considered at this stage. It was said that when a Court transfers a decree for execution from one Court to another, it is only performing a ministerial act which can even be done *ex parte*. Therefore, all that can be done in the present case is to

transfer the decree for execution to Yeotmal and leave the Yeotmal Court or the Chandur Court to work out these problems if and when they arise.

[28] I do not agree. Order 21, R. 6, requires the Court which passed the decree to certify certain matters to the Court to which the decree is to be transferred for execution, among them the fact that satisfaction has not been obtained or that it has been obtained in part. Now this is not a mere ministerial act. It may be necessary in certain cases to determine either the extent of the decree or the extent of the satisfaction. Such matters are constantly being debated in the executing Courts and they have to be decided judicially and not ministerially. Therefore, the act of giving a certificate incorporating these facts is a judicial one and not merely ministerial. Now it is well settled that a Court will not order things which are unnecessary or which are bound to be infructuous in the end. They will not unnecessarily prolong litigation. Therefore, it is the duty of the Court which passed the decree to satisfy itself that the decree it is transferring is a live decree which is still capable of execution. One aspect of this is reflected in O. 21, R. 6. If the decree has been fully satisfied, obviously the Court which passed the decree cannot transfer it. It cannot give a certificate of full satisfaction and leave the second Court to determine its accuracy. The transferee Court is bound by the certificate and cannot go behind it. In the same way, if the decree is dead for other reasons, the Court which passed it should, in normal circumstances, determine the matter. It certainly has jurisdiction to do so. It may be proper in certain cases to leave the matter open but in a case like the present the matter ought, in my opinion, to be decided at the outset.

[29] I will now deal with the alternative case of force or fraud under S. 48 (2), Civil P. C, which was argued before me. The matter was pleaded in the petition of the decree-holder dated 19th April 1943. The only details of the force or fraud given are these.

[30] In para. 4 of the petition the decree-holder stated that after 23rd June 1942, which is the date on which the decree-holder's application was struck off,

"the applicant Misrilal approached the judgment-debtor for payment and she agreed to make payment by 15th December 1942 to the decree-holder. For this the decree-holders agreed. But as no payment was made by her the decree-holder has filed this petition. The talk took place with Mr. V. S. Harkare at Varud in Yeotmal District."

[31] This plea was found by the trial Court to be false, and in view of Misrilal's evidence, there can be no doubt about the correctness of that finding. Misrilal was examined as A. W. 1 and he stated that the talk referred to in the above paragraph took place after 9th January 1943. That knocks the bottom out of the case set out in the petition, namely, that it took place before the decree holder filed the petition and that consequently he was misled, thinking in good faith that she would fulfil her promise and pay the decree. This aspect of the fraud was given up in this Court.

[32] The other details regarding the fraud are simply that the judgment-debtor has been contesting the decree-holder's applications only with the view to delay the execution of the decree. It is urged that that is either force or fraud, and reliance is placed on 44 ALL. 319.[13]

[33] With the utmost respect to the learned Judges who decided that case, I am unable to see how a contest which the law permits and which is carried out in open Court can amount either to force or to fraud. This decision was not approved in a later Allahabad decision, namely, 53 ALL. 419[14] at p. 421. I respectfully agree with the learned Judges in the later case that :

"Fraud must be of a nature which the decree-holder is not able to discover at the time and which helps the judgment-debtor in deceiving him and gaining time."

The previous Allahabad decision was also not followed in 14 Pat. 816[15] at p. 822. Wort J. holds there that it is neither force nor fraud when the judgment-debtor takes advantage of the procedure allowed by the law and contests an execution application.

[34] It was said that that may be the case when there is substance in the contest, but when the objections made are frivolous then they must be regarded as fraud. Again, I am unable to agree. There can be no fraud unless there is a mistake as to fact and the other side is misled by it. In a contest in a Court of law there is no mistake as to fact when the other side knows the facts and contests them, setting out a different set of facts. He is not misled, and as regards the law, every one is taken to know the law and consequently, whatever legal propositions are set up, there is no fraud ; again, the other side is not misled because he contests and contends that the law is otherwise. There can be no fraud when a person is not deceived and knows the facts.

[35] But that apart, the objections taken here can hardly be described as frivolous. The trial Court upheld them and so did I in second appeal. The District Judge took the other view and so did the Division Bench in the Letters Patent appeal, and of course the decision of the Division Bench must prevail. but a contest which is upheld by the trial Court and also by a Judge of this Court can hardly be termed frivolous. I hold that there was neither force nor fraud

within the meaning of S. 48 (2) and that therefore the decree-holder cannot get the benefit of that sub section.

[36] The decree-holder then fell back on S. 14, Limitation Act, but that, in my opinion, has no application because the fundamental position there is that the person seeking to avail himself of its provisions was prosecuting a proceeding founded upon the same cause of action in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it. The only applications germane to this question which were presented in the lower Courts at all relevant times were petitions for transfer of the decree from the Wardha Court to the Yeotmal Court. These applications were in every case allowed. The Courts had jurisdiction to entertain them and therefore the fundamental position contemplated by S. 14 (1) does not arise. No application for execution was ever made to the Yeotmal Court and, as I have already held, it was impossible for any Court to execute the decree on these applications for transfer. The mode in which the assistauce of the Court was sought was not set out, the property to be attached and sold was not mentioned, nor were any of the other matters which form the essentials of an execution application set out therein. Consequently they were incapable of execution and therefore are not founded on the same cause of action as the present application which we are considering.

[37] That apart, the application must have been prosecuted in good faith. Good faith is defined in S. 2, Limitation Act to require due care and attention. An execution application, if it is intended for purposes of execution, cannot be said to have been made with due care and attention if it omits to set out the mode in which the assistance of the Court is required and omits to set out the property which the decree-holder wants attached and brought to sale. Therefore on all grounds S. 14 has no application.

[38] As regards S. 15, Limitation Act, which was also relied on, there was no stay either by injunction or order of any Court. It is true that the application of 18th January 1934 could not have been executed between 15th September 1938 and 9th April 1942 because of my judgment, but the matter was still pending because a Letters Patent appeal was allowed, and when the Division Bench reversed my decision on 9th April 1942 it was open to the decree-holder to continue with his original application. But, as I have already held, that application is useless for purposes of execution because of the defects I have set out above. Therefore he was compelled to file a second application. The second application cannot be given the benefit of S. 15, and as regards the former application, there is no question of S. 15 because it was still pending on 9th April 1942 when the Division Bench gave its judgment. I am of opinion that the execution application we are considering is barred by time.

[39] This, however, concerns the matter only in so far as the application applies to the decree of 23rd December 1926. But it also refers to the decree for costs of the High Court in Letters Patent appeal dated 9th April 1942. In so far as it seeks execution of that decree it is competent. It is within three years of the decree and so is in time. The lower Courts were therefore wrong in refusing to proceed with the application in so far as it relates to the High Court's decree for costs.

[40] The result is that the orders of the lower Courts are upheld so far as they relate to the decree of 23rd December 1926. They are, however, reversed in so far as they relate by implication to the decree of the High Court.

[41] As regards costs, the decree-holder has been extremely dilatory and did not raise most of the present contentions in the lower Courts, nor did he separate the application of 9th January 1943 into two parts as he has done here. Also the success is small as compared to the failure so I think it right that the appellants should pay the respondent's costs hitherto incurred in all three Courts. Costs subsequent to this will be as directed by the Court or Courts concerned. Counsel's fee Rs. 25.

V.R. *Appeal partly allowed.*

A. I. R. (35) 1948 Nagpur 194 *[C. N. 67.]*

NIYOGI AND SEN JJ.

Bhiwaji Chunilal Shop — Decree-holder—Appellant v. *Raje Chainsing Raje Gumansing—Judgment-debtor—Respondent.*

Misc. Second Appeals Nos. 150 and 151 of 1941, Decided on 8th July 1946, from order of Dist. Judge, Akola, D/- 3rd May 1941.

Civil P. C. (1908), S. 60 (g) — Jagir with annual compensatory allowances not burdened with condition of service but resumable — Allowances, if attachable.

A jagir and certain annual money allowances (forming part of the jagir grant) granted *inter alia* by way of compensation on account of forest dues if not burdened with any condition of service, must be treated as personal property of the holder and there is nothing in S. 60 to exempt the amount of allowance from attachment while it is in the hands of the Government and before it reaches the hands of the judgment-debtor, in execution of a decree against the holder of the jagir : 8 A. I. R. 1921 Mad. 292 ; 14 A. I. R. 1927 Mad. 140 and 19 A. I. R. 1932 Mad. 417, *Rel. on.* [Paras 6, 12]

Even if the jagir and the allowances are absolutely inalienable, the inalienability attaches only to the right

to receive the allowances and not to the specific amount as it accrued due every year. [Para 7]

The annual payment constitutes a debt payable by the grantor to the grantee every year even though the amount is payable on a future date. It may be that for a breach of the condition of loyalty laid down in the *sanad* the whole jagir as well as the allowances which are liable to be resumed, would be liable to be withheld. But until that is done the grantee would be perfectly free to enjoy the amount that he receives every year in any way he chooses : *Case law referred.* [Para 11]

Annotation : ('44-Com.) C. P. C., S. 60 N. 14.

Cases referred :—

1. ('30) 17 A. I. R. 1930 Nag. 134 : 120 I. C. 405, Ramprasad v. Kodu.
2. Misc. Appeal No. 249 of 1937, Govindram v. Raje Chainsingh.
3. ('21) 44 Mad. 632 : 8 A. I. R. 1921 Mad. 292 : 62 I. C. 625, Venkatarama Ayyar v. Chandrasekhara.
4. ('27) 50 Mad. 441 : 14 A. I. R. 1927 Mad. 140 : 99 I. C. 452, Vaidyanatha Aiyar v. Yogambal Ammal.
5. ('32) 19 A. I. R. 1932 Mad. 417 : 137 I. C. 799, Rama Rao v. Srinivasiah.
6. (1900) 27 Cal. 38, Haridas Acharjia v. Baroda Kishore.
7. ('05) 9 C. W. N. 703, Maharani Dambar Koeri v. Sham Kissen Das.
8. ('01) 23 All. 164, Har Shankar Prasad v. Baijnath Das.
9. ('70-72) 14 M. I. A. 40 : 7 Beng. L. R. 183, Tuffazal Hossein Khan v. Raghunath Prasad.
10. ('41) 28 A. I. R. 1941 Rang. 256, Burma Oil Subsidiary Provident Fund (India) Ltd. v. Dadibhai Singh.
11. ('42) 29 A. I. R. 1942 Lah. 275 : I. L. R. (1943) Lah. 17 : 203 I. C. 462 (F.B.), Mela Ram & Sons v. Firm Ram Das Joshi & Sons.
12. ('43) 30 A. I. R. 1943 Bom. 258 : 209 I. C. 588, Ramrukh Marwadi v. Madhavrao Ganpatrao.
13. ('04) 8 C. W. N. 665, Jiban Krishna Ghosh v. Sripati Charan.
14. ('32) 59 Cal. 1 : 18 A. I. R. 1931 P. C. 160 : 58 I. A. 215 : 132 I. C. 727 (P. C.), Nawab Bahadur of Murshidabad v. Karnani Industrial Bank Ltd.

A. V. Khare and T. B. Pendharkar—for Appellant.
M. Adhikari — for Respondent.

Judgment. — This appeal and Miscellaneous (Second) Appeal No. 151 of 1941 arise out of two execution proceedings started by two creditors separately against the respondent Raje Chainsing. Both the creditors applied for a prohibitory order by way of attachment of the sum of Rs. 2210-5-7 which the respondent receives every year from the Government through the Divisional Forest Officer, Akola. That amount is payable every year as an allowance by way of compensation for forest dues under a *sanad* granted to the respondent's ancestors by Government on 28th October 1896. The executing Court held that the allowances which are payable to the judgment-debtor were not liable to attachment. The lower appellate Court, agreeing with the executing Court, dismissed the appeal. This order governs the disposal of both the appeals.

[2] Three contentions are put forward on behalf of the appellants decree-holders: (1) That the contention as to the attachability or otherwise of the amount in the hands of Government is barred by virtue of two decisions, one reported in A. I. R. 1930 Nag. 134[1] and another Misc. Appeal No. 249 of 1937 ;[2] (2) That the respondent had himself paid the amounts of Rs. 400 and Rs. 200 out of the amount under consideration in the previous execution applications so as to preclude him from pleading that it was unattachable ; (3) That the condition of inalienability imposed by the *sanad* related to the right to receive the allowance and not the allowance as it became actually payable every year.

[3] The first two points are devoid of any substance. There was no plea that the decision in A. I. R. 1930 Nag. 134[1] operated as *res judicata* obviously because the parties there were different. Nor can the decision in Misc Appeal No. 249 of 1937[2] do so as the learned Chief Justice himself made it clear, in rejecting a review application in his order refusing leave to file Letters Patent appeal, that anything decided by him was not of a binding nature since the money had already been received by the judgment-debtor before the attachment.

[4] The second point had been abandoned in the lower appellate Court, and it is in itself devoid of force as the payments made in the previous executions cannot possibly operate as estoppel against the respondent.

[5] That leaves only the last point which involves the consideration of the question whether the money, while it is in the hands of the Government and before it reaches the hands of the judgment-debtor, is liable to attachment. For the proper appreciation of the point in issue it is necessary to state that under the *sanad* issued to the ancestor of the respondent by the Resident at Hyderabad under the authority of the Government of India, four villages, namely, Anar, Rohin Khirkhi, Salwan and Khardeo, were granted as a Jagir along with certain money allowances *inter alia* by way of compensation on account of forest dues amounting to Rs. 1561-15-7 which were payable annually subject to the following conditions among others :

"That the said Jagir and the said allowances, viz. Jaglia cess and compensation for forest dues, being service grants shall on no account be alienated by the said Raja or his successors either by sale or mortgage or in any other manner without the previous sanction of the Resident in writing."

[6] The learned counsel for the appellant conceded that for the sake of argument the allowances may well be regarded as forming part and parcel of the Jagir grant. It is on this footing that he based his argument that although the *sanad* described the Jagir and the allowances as service grants there is no obligation imposed upon the grantee to perform any public service. It was in reality a grant for the maintenance of

the grantee and his successors. In 44 Mad. 632[3] it was held that unenfranchised *inam* lands granted not for future public or private services but as a matter of favour for the maintenance of the donee and his heirs are liable to attachment and sale in execution of a decree against the holder of the *inam*. It was there pointed out that any condition prohibiting alienation of the *inam* was merely intended to indicate that the Government had the right of resumption in consequence of the prohibited alienation. That condition relating to prohibition was held as not based on any ground of public policy except the protection of the right of the grantee. The same view was taken in 50 Mad. 441[4] and A. I. R 1932 Mad. 417.[5] As the Jagir is not burdened with any condition of service it must be treated as personal property of the holder and there is nothing in S. 60, Civil P. C., to exempt it from attachment.

[7] Even on the assumption that the Jagir and the allowances were absolutely inalienable the inalienability would attach only to the right to receive the allowances and not to the specific amount as it accrued due every year. The attachment in the present case is not directed against the incorporeal right to receive the allowances but against a particular sum which the respondent is entitled to receive from the Government. It is not contended, as it could not well be done in view of A. I. R. 1930 Mad. 134,[1] that the allowances constituted a pension. But it is urged that it could not constitute a debt as under the terms of the *sanad* it was liable to be withheld by the Government for the breach of any of the conditions laid down in the *sanad*. The only important condition is that the tenure of the grant is made dependent on the loyalty to the British Government. But that is a condition which is attached ordinarily to all such grants. The right of the grantee to enjoy the income of the jagir or the allowances as they accrue every year would not be jeopardised until he has committed a breach of the fundamental condition of the tenure of the grant and there is no plea that on account of the breach of condition the Government have withheld or intended to withhold the allowance. The annual allowances stand on the same footing as income from the Jagir.

[8] It is, however, contended that the respondent's right until the money is actually paid to him is an inchoate and contingent right like the right of a person entitled to periodical maintenance. Strong reliance is placed on 27 Cal. 38[6] in support of the argument. That case is clearly distinguishable on its facts. In that case half of the maintenance allowance which accrued due for the period extending from September 1888 to November 1890 was attached in anticipation on 5th August 1887. The attachment was held to be invalid as it was not an attachment of any existing debt but was of an anticipatory character. The amount, which was intended to be attached, could not become a debt if the maintainee had died before September 1888 as the maintenance allowance had been granted only for life. This case is wholly inapposite for the obvious reason that the respondent in the present case is entitled to receive the allowance by way of compensation for the loss of certain dues from the forest which, before the *sanad*, his ancestors were levying The allowance is of the nature of a proprietary right and not a personal right as the allowance would be payable by Government even after the death of the respondent to his heirs 27 Cal. 38[6] was distinguished on this ground in 9 C. W. N. 703[7] as also in 23 ALL. 164.[8] In the latter case the judgment-debtor had sold his property to the Court of Wards for consideration part of which was received by him in cash and part of which was left as an annuity payable to him. In the sale deed there was a condition whereby the judgment-debtor was not to alienate such annuity. The learned Judges who decided the case distinguished the case in 27 Cal. 38[6] and held that the annuity was in the nature of deferred payment and as such was not exempt from attachment. The learned Judges referred to 14 M.I.A. 40[9] as the authority for the proposition that even future maintenance could be attached.

[9] The learned counsel for the respondent has invited our attention to A. I. R. 1941 Rang. 256,[10] A I.R. 1942 Lah. 275[11] and A I.R 1943 Bom. 258.[12] These cases are in no way helpful to him. In the Rangoon case the question arose in regard to an amount in the Provident Fund which was not payable until the death of the subscriber. In the Lahore case there was an attachment of certain sum which the vendor had left with the vendee for payment to his creditors, and it was held that unpaid purchase price left with the vendee was a debt due by him to the vendor and that it was liable to attachment in execution of a money decree. In the Bombay case the amount which was payable as remuneration by the Collecter of Nasik to the *Inamdar* for some specified services which he was bound to render to the Government was held not attachable on the ground of public policy. The reason given was that if the moneys due to the *Inamdar* in the hands of the Government can be attached before they are paid over to the *Inamdar* the object of the grant would be defeated because there would be nothing to ensure that the *Inamdar* would be in a financial position to enable him to carry out his services. As has been al-

ready shown above there are no services attached to the grant in the present case.

[10] A case which comes very near the present one is to be found in 8 C.W.N. 665.[13] In that case there was a grant of an annual sum made by Government as a compensation for the loss sustained by the grantee on account of the resumption of the grant of the rent-free lands which formerly belonged to the grantee. The contention was raised that it was in the nature of pension and therefore, unattachable. That contention was overruled and it was held that the allowance was not exempt from attachment under the Civil Procedure Code.

[11] It is manifestly unreasonable to say that a specific cash allowance which has accrued or is to accrue due is inalienable. The cash payment could not be intended for any purpose other than personal use of the grantee. It is inconceivable that a specific sum which accrues due every year could ever be intended to be inalienable as it would run counter to the very purpose for which the money is payable. In the present case the annual payment is made in recognition of a proprietary right which the grantee's ancestor's enjoyed and the amount as it accrues due every year would certainly constitute debt payable by the grantor to the grantee every year even though the amount is payable on a future date. It may be that for a breach of the condition of loyalty the whole Jagir as well as the allowances which were liable to be resumed would be liable to be withheld. But until that is done the grantee in the present case would be perfectly free to enjoy the amount that he receives every year in any way he chooses. The mere existence of a condition prohibiting alienation of the corpus of an incorporeal right does not affect in any way the disposing power of the grantee over the usufruct arising periodically from it. That seems to be the principle of the decision in 59 Cal. 1[14] which was followed by Stone C. J. in Misc. Appeal No. 249 of 1937.[2]

[12] For the foregoing reasons we dissent from the lower appellate Court and hold that the allowance was not exempt from attachment. We accordingly allow these appeals with costs in all the Courts. Counsel's fees in each case Rs. 40.

V.B.B. *Appeals allowed.*

A. I. R. (35) 1948 Nagpur 197 *[C. N. 68.]*

HIDAYATULLAH J.

Sheolal Ramlal — Decree-holder — Appellant v. *Ramrao Balasaheb—Judgment-debtor — Respondent.*

Misc. First Appeal No. 293 of 1941, Decided on 12-12-1946, from order of Sub-Judge, 1st Class, Chhindwara, D/- 12-8-1941.

(a) Limitation Act (1908), Art. 182 — Step-in-aid of execution — It is not necessary that execution should be pending before action by decree-holder can be described as step-in-aid of execution : *Case law relied on.* [Para 4]

Annotation :—('42-Com.) Limitation Act, Art. 182, N. 99, Pt. 9.

(b) Limitation Act (1908), Art. 182 — Step-in-aid of execution—Application for transfer of decree to another Court is step-in-aid of execution : 26 A.I.R. 1939 All. 67; 35 All. 389 and 27 A.I.R. 1940 Cal. 557, *Rel. on.* [Para 4]

Annotation :—('42-Com.) Limitation Act, Art. 182, N. 121, Pt. 1.

(c) C. P. Debt Conciliation Act (2 [II] of 1933), S. 23 — "Proceeding under the Act" — Proceeding wrongly begun before Board.

A proceeding wrongly begun before the Board is no less a proceeding under the Act, and the time spent before the Board can be deducted : 31 A.I.R. 1944 Nag. 247, *Rel. on.* [Para 5]

(d) Limitation Act (1908), S. 19 — Acknowledgment in application before Debt Conciliation Board.

(Obiter.) An acknowledgment of liability in the application before the Board established under the C. P. Debt Conciliation Act gives a fresh start of limitation : *Case law relied on.* [Para 6]

Annotation : — ('42-Com.) Limitation Act, S. 19, N. 46, Pt. 17.

Cases referred :—

1. ('22) 45 Mad. 466 : 9 A.I.R. 1922 Mad. 79 : 70 I. C. 324 Kuppuswami Chettiar v. Rajagopala Aiyar.
2. ('46) 1946 A. L. J. 268 : 32 A. I. R. 1945 P. C. 176 : I. L. R. (1946) Mad. 142 : I. L. R. (1945) Kar. P. C. 393 : 72 I. A. 296 (P. C.), Annamalai Chettiar v. Valliammai Achi.
3. ('27) 50 Mad. 49 : 13 A. I. R. 1926 Mad. 1178 : 98 I. C 156, M. Krishna Pattar v. Seetharama Pattar.
4. ('45) I. L. R. (1945) Mad. 468 : 32 A. I. R. 1945 Mad. 139 (F. B.), Ayi v. Solai.
5. ('39) I. L. R. (1939) All. 728 : 26 A.I.R. 1939 All. 483 : 183 I. C. 685, Risal Singh v. Lal Singh.
6. ('28) 7 Pat. 708 : 15 A.I.R. 1928 Pat. 612 : 113 I.C. 582, Jagdeo Narain Singh v. Bhubaneshwari Koer.
7. ('43) I. L. R. (1943) Nag. 734 : 31 A. I. R. 1944 Nag. 80 : 212 I C. 592, Prayagdas v. Indirabai.
8. ('39) I. L. R. (1939) All. 97 : 26 A. I. R. 1939 All. 57 : 180 I. C. 403, Sita Ram Rai v. Madhao Prasad.
9. ('13) 35 All. 389 : 19 I. C. 664, Todar Mal v. Phola Kaur.
10. ('40) I. L. R. (1940) 2 Cal. 252 : 27 A. I. R. 1940 Cal. 557 : 191 I. C. 574, Ram Narayan Jagan Nath v. Radha Govinda Deo Nath.
11. ('44) I. L. R. (1944) Nag. 244 : 31 A. I. R. 1944 Nag. 247, Ghanshyam v. Girijashankar.
12. ('41) I. L. R. (1941) Nag 761 : 27 A.I.R. 1940 Nag. 214 : 190 I. C. 818, Jawanmul v. Akaji.
13. ('46) I. L. R. (1946) Nag. 493 : 33 A. I. R. 1946 Nag. 344 : 225 I. C. 340, Bhalchandra Rao v. Brijlal.
14. ('41) 1941 N. L. J. 134 : 28 A. I. R. 1941 Nag. 95: 194 I. C. 120, Udhao Nanaji v. Narayan.

A. V. Khare — for Appellant.

M. R. Bobde and P. R. Padhye — for Respondent.

Judgment. — This is a miscellaneous (First) appeal against the order of Mr. Adharsinha, Subordinate Judge, First Class, Chhindwara, in Execution Case in Civil Suit No. 8-B of 1934 passed on 12-8 1941.

[2] The facts are quite simple. The appellant (decree-holder) obtained a decree against the res-

pondent (judgment-debtor) on 16-8-1934 in Civil Suit No. 8 of 1934. On 6-8-1937 the decree-holder applied for transfer of the decree from Chhindwara to Nagpur and on 13-8-1937 the decree was ordered to be transferred and a certificate of non-satisfaction was also granted. In the meantime, the judgment-debtor had applied for instalments and a stay order was passed by this Court on 21-9-1937. On this the Court recalled the certificate on 27-9-1937. The judgment-debtor was asked to furnish security but he failed to do so and on 5-11-1937 the Court ordered that the certificate be sent again for necessary action. Thereafter the decree-holder applied for transfer of the decree on 26-9-1940 and on 12-8-1941 the application was dismissed by the learned Judge as being barred by limitation.

[3] The decree-holder tries to save limitation in various ways. His first contention is that from 20-4-1938 till 25-12-1938 the matter was pending before the Debt Conciliation Board and hence under S. 23, C. P. Debt Conciliation Act that period must be excluded. He further says that the judgment-debtor in his application to the Board had shown this decretal amount as being due and this amounts to an acknowledgment under S. 19, Limitation Act and gives a fresh period of limitation from 20-4-1938, which is the date of the application before the Board Ex. C-4 He also says that on 30-9-1937 the counsel for the judgment debtor admitted the liability for the decretal amount in his memo of appeal before the High Court and therefore that too gives a fresh start of limitation and the present application of 26-9-1940 would be within 3 years from that date. It is obvious that even if one of these contentions is correct the limitation is saved and the execution is competent.

[4] Mr. Bobde who appeared for the respondent attacked the first application for transfer of the decree and said that that application did not save limitation because it cannot be said to be 'a step-in-aid of execution' because before there can be a step-in-aid of execution, there must be an execution pending. He relied on 45 Mad. 466[1] in support of his contention. There is a considerable difference of opinion on the question whether the phrase 'step-in-aid' of execution postulates that there must be an execution pending. Even in the Madras High Court the decisions are not uniform and very recently their Lordships of the Privy Council noted this difference of opinion though it was not necessary in that case to pronounce any opinion. *See* 1946 A. L. J. 268.[2] The view expressed in 45 Mad. 466[1] was doubted in 50 Mad. 49[3] and so far that High Court is concerned the matter is now settled by the Full Bench decision in I. L. R. (1945) Mad. 468[4] which expressly overrules 45 Mad. 466.[1] It is, therefore, not necessary that there must be an execution pending before action by the decree-holder can be described as a step-in-aid of execution. This is also the view expressed in I. L. R. (1939) ALL. 728,[5] 7 Pat. 703.[6] A similar view appears to have been taken by Pollock J. in I. L. R. (1943) Nag. 734.[7] These cases have my respectful concurrence and I am of opinion that a step-in-aid of execution can be taken before an application for execution of the decree has been made in Court. It has been held in a large number of cases that an application for the transfer of a decree to another Court is a step-in-aid of execution. *See* I. L. R. (1939) ALL. 97,[8] 35 ALL. 389,[9] I. L. R. (1940) 2 Cal. 252[10] and the cases cited therein. I respectfully agree with those decisions and hold that the application dated 6-8-1937 and the order dated 13-8 1937 on it were steps-in-aid of execution and therefore the execution is not barred as contended by the respondent.

[5] Learned counsel for the respondent next argued that S. 23, C. P. Debt Conciliation Act applies only when the application has been properly made to the Board and the Board has jurisdiction to entertain it. Learned counsel says that the important words in S. 23 of the Act are "proceedings under the Act" and action on an application filed before the Board which could not lie there, is not a proceeding under the Act. This is sufficiently answered by Pollock J in I. L. R. (1944) Nag. 244.[11] It is to be remembered also that the application was filed by the judgment-debtor to get the decree suspended and now having got his objective he is turning round and avoiding S. 23. However, the legal position under S. 23 is clear and a proceeding wrongly begun before the Board is no less a proceeding under the Act, and the time spent before the Board can be deducted.

[6] This is sufficient to dispose of the present matter before me and it is not necessary to discuss the other grounds on which limitation is sought to be saved. Even there the judgment-debtor is perhaps not in a better position. In I. L. R. (1944) Nag. 244[11] and I. L. R. (1941) Nag. 761[12] Pollock J. held that an acknowledgment of liability in the application before the Board gives a fresh start of limitation and these cases were approved in I. L. R. (1946) Nag. 493.[13] The contrary view in 1941 N. L. J. 134[14] was doubted by Pollock J. in I. L. R. (1944) Nag. 244[11] and was doubted by Grille C. J. and Puranik J. in I. L. R. (1946) Nag. 493.[13] Since it is not necessary to decide this point I say no more about it nor do I think it is necessary to decide the question whether the memorandum of appeal signed by a counsel can amount to an acknowledgment of liability under S. 19, Limitation Act.

[7] The result is that the appeal succeeds and is allowed with costs throughout.

N.S.D. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 199 *[C. N. 69.]*

BOSE AND HIDAYATULLAH JJ.

Om Prakash Mehta and others — Applicants v. *Emperor.*

Misc. Criminal Appln. No. 26 of 1947, Decided on 1-4-1947.

(a) Interpretation of statutes — Question as to powers of Legislature to enact—Correct method of approach stated.

Whenever the powers of a Legislature are brought into question, the correct method of approach is to look to the Constitution Act and to find out what it provides and what it prohibits. It is then necessary to examine the pith and substance of the impugned legislation critically to find out whether all that it provides falls within the powers granted by the Constitution Act and then to find out whether it transgresses any prohibition contained therein: (1878) 3 A. C. 889, *Rel. on.* [Para 7]

(b) Interpretation of statutes — Preamble containing less or more extensive expressions in import than those in other parts — Intention of legislature how to be gathered.

Although the preamble of a statute is the key to its interpretation the intention of the legislature is not necessarily to be gathered from the preamble taken by itself. In fact the intention can only be gathered from the Act taken as a whole. If the Court finds in the preamble any expression not so large and extensive in its import as those used in other parts of the Act and upon a view of the whole Act the Court can collect from the more large and extensive expressions used in other parts the real intention of the legislature it is the duty of the Court to give effect to the larger expressions. This applies equally to those Acts where the preamble goes further than the Act itself. [Para 8]

(c) Interpretation of statutes — Constitution Act how to be construed — Entries in lists in Sch. 7, Government of India Act (1935)—Interpretation of.

In interpreting a Constitution Act a wide meaning should be given to the words which confer on a legislature the power to legislate on certain topics and within the ambit of the words the most sovereign powers must be understood to be given to the legislature. The entries in the Constitution Act have always been given a large and liberal interpretation as the allocation of the subjects in the list is not by way of scientific definitions but by way of a mere *simplex enumeratio* of broad categories: 26 A.I.R. 1939 F. C. 1, *Rel. on.* [Para 11]

(d) C P. and Berar Maintenance of Public Order Act (15 [XV] of 1946), S. 2 (1) —Act whether repugnant to existing Indian Law—Government of India Act (1935), S. 107 and entry No. 1 of list II and entry No. 29 of list III of Sch. 7.

The Act has for its purpose the maintenance of public order and though incidentally it touches upon the subject of strikes and trade disputes, it does so merely because strikes promoted solely for the sake of causing unrest among workmen, lead directly or indirectly to a subversion of public order. Since the entire subject of the Act falls within entry No. 1 of list II of Sch. 7, Constitution Act, and not within entry No. 29 of list III of the Schedule, no question of repugnancy either directly or indirectly to an existing Indian Law arises. [Paras 13 and 14]

(e) Government of India Act (1935), S. 59 (1) — Sub-section whether mandatory.

(Quære). Whether S. 59 (1) is mandatory or merely directory and whether the sub-section is a condition precedent to the application of the bar contained in sub-s. (2). [Para 21]

(f) Government of India Act (1935), S. 59 (2) — Orders authenticated by Chief Secretary by order of Governor—Validity.

Where orders under S. 2 (1), C. P. and Berar Maintenance of Public Order Act (XV of 1946), are authenticated by the signature of the Chief Secretary and shown to be "By order of the Governor" the authentication follows the business rule correctly. Under S. 59 (2) this authentication is sufficient and the validity of the orders cannot be called in question on the ground that the orders were not made by the Governor. [Para 20]

(g) C. P. and Berar Maintenance of Public Order Act (15 [XV] of 1946), S. 2 (1) — "Provincial Government"—Meaning of—Presumption about orders passed under the section.

When S. 3 (43a), General Clauses Act (1897), has defined the words "Provincial Government" and the orders made under S. 2 (1), C. P. and Berar Maintenance of Public Order Act (15 [XV] of 1946), use this phraseology, the meaning given to these words in the General Clauses Act must equally be held applicable to the same words used in the orders. In view of the fact that the C. P. and Berar Maintenance of Public Order Act uses the terms which have special meaning given to them for all purposes by the General Clauses Act the Court is entitled to presume, till the contrary is established, that the correct authority named in the Act had in fact passed the orders. [Para 21]

(h) Government of India Act (1935), S. 59 (1) — Scope of—Special enactment passed by competent legislature—Powers invested in Provincial Government—Exercise of.

Section 59 (1) deals with the normal executive activities of Government which are not covered by statute. It does not purport to limit the scope and extent of any special enactment passed by a competent legislature and within its province. When the legislature has chosen to invest the Provincial Government with certain powers the Provincial Government is the proper body to exercise these powers and when the orders purport to have been made by the Provincial Government it matters little whether the Provincial Government means the Cabinet, or the Ministry, or a particular Minister or the Governor. [Paras 21 and 22]

(i) C. P. and Berar Maintenance of Public Order Act (15 [XV] of 1946), S. 2 (1)—"Is acting" meaning of — Past action.

Since the Act seeks to restrict the liberty of the subject it must be strictly construed. Construction which secures the liberty of the subject is to be preferred to one which curtails it. The Act in S. 2 (1) uses the words "is acting". There are no words in the Act which make it retrospective. Detention cannot, therefore, be ordered on the basis of past actions and some activity of the type contemplated by the Act must be shown to have continued after the Act came into force. [Para 26]

(j) Government of India Act (1935), S. 52 — Special responsibilities of Governor — Scope of — Impingement upon legislative functions of legislature.

The special responsibilities of the Governor under S. 52 really arise in the ministerial field when executive powers are either abused or not used by the appropriate authority. They do not ordinarily impinge upon the legislative function of the legislature so as to

trench upon the legislative list. The Legislature has plenary powers on all the topics contained in the list. The Courts are precluded by S. 53 (2) from investigating the question whether the Governor ought not to have assented to a certain bill dealing with matters within the sphere of his special responsibilities.

[Para 17]

Cases referred :—

1. (1878) 3 A. C. 889 : 4 Cal. 172 : 5 I. A. 178 : 3 Sar. 834 (P.C.), The Queen v. Burah.
2. (1828) 108 E. R. 863 : 6 L. J. K. B. (O.S.) 162, Doe v. Brandling.
3. ('39) 1939 F. C. R. 18 : 26 A. I. R. 1939 F. C. 1 : I.L.R (1939) Kar. (F.C.) 6: 180 I.C. 161 (F.C.), Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, In the matter of.
4. (1930) 1930 A.C. 124 : 99 L. J. P C 27 : 142 L. T. 98, Henrieta Muir Edward v. Attorney-General for Canada.
5. Reported in ('47) 34 A.I.R. 1947 P. C. 60 : 74 I. A. 23 : 230 I C 337 (P.C.), Prafulla Kumar v. Bank of Commerce Ltd , Khulna.
6. ('40) 1940 F. C R. 188 : 28 A. I. R. 1941 F. C. 47: I. L R. (1941) Kar. F. C. 25 : 192 I C. 225 (F.C.), Subramanyan Chettiar v. Muttuswami Goundan.
7. Reported in ('47) 34 A.I.R. 1947 P. C. 72 : 74 I. A. 12 : 229 I. C. 577 (P.C.). Megh Raj v. Allah Rakhia.
8. (1863) 10 H. L. C. 367 : 32 L. J. Ch. 585 : 8 L. T. (N. S.) 839 : 11 W. R. 823, Walsh v. Secy. of State for India.
9. (1932) 1 K. B. 688 : 102 L. J. K. B. 91, Marshall v. Blackpool Corporation.
10. (1884) 12 Q B. D. 224 : 53 L. J. Q. B 165 : 50 L. T. 312 : 32 W. R 452, Hough v. Windus.
11. (1935) 2 K.B. 257 : 104 L. J K. B. 455 : 153 L. T. 183, Druce & Co v. Beaumont Property Trust, Ltd.
12. ('43) I. L. R.(1943) Nag. 154 : 30 A.I.R.1943 Nag. 26: 44 Cr.L.J. 345: 205 I. C. 5, Prabhakar v.Emperor.

M. A. Adhikari (in Nos. 13, 14, 16 and 22); R. M. Hazarnavis (in No. 15) and S. P. Kotval (in Nos. 17, 19 to 21 and 23 to 26)—for Applicants.

T. L Shevde, Advocate-General, B. L. Gupta, Govt. Pleader and W. B. Pendharkar, Additional Govt. Pleader—for the Crown.

Order.— These are 12 applications by persons detained by the Provincial Government under S. 2 of the Central Provinces and Berar Maintenance of Public Order Act, 1946 (ACT NO. 15 (XV) of 1946). This Act was brought into force on 21st November 1946 and is to remain in force for one year from that date. The detenus challenge their detention on various grounds and the present applications being under S. 491 of the Criminal P. C. are in the nature of petitions for issue of a writ of habeas corpus.

[2] The first ground on which detention is challenged is that the Act as a whole or at least in part is ultra vires the Provincial Legislature. It is convenient before discussing this question to analyse this Act to find out what its pith and substance is. The operative part is contained in S. 2 (1) which reads thus :

"The Provincial Government if satisfied that any person is acting in a manner prejudicial to the public safety, order, or tranquillity, or is fomenting or inciting strikes with intent to cause or prolong unrest among any group or groups of employees may if it considers such order necessary make an order (a) directing that he be detained."

Under sub-section (2) of this section, District Magistrates have been invested with similar powers but under S. 3 their power to detain persons is limited to a period of 15 days. The Provincial Government under the same section can detain a person for 3 months. Under S. 5 the detenu is communicated the grounds on which he is detained to enable him to make representations to the Provincial Government against his detention. Under S. 11 there is an indemnity for and protection of action taken bona fide under the Act. Under S. 12 the application of other laws is declared to be not barred. It is convenient to reproduce S. 12 because some argument was based upon it. Section 12 reads thus :

"The provisions of this Act shall be in addition to and not in derogation of any other Act, Ordinance or Regulation for the time being in force."

[3] The detenus were arrested and lodged in the jail and were duly furnished the grounds of their detention. These grounds of detention have been tendered in evidence by the detenus and they have sworn affidavits either to deny or to explain the circumstances mentioned in the grounds of detention. It may be said here that no material other than these grounds has been adverted to by the Provincial Government and in fact the affidavit of the Chief Secretary says that the grounds of detention clearly make out a case for detaining these persons. The question of the suffiiciency of the grounds on which detention has been ordered in these cases will be taken up later.

[4] The first question is, is the Act ultra vires the Provincial Legislature? The argument on behalf of detenus is that S. 2 as well as the preamble of the Act clearly show that the Act was intended to prevent strikes and this makes the Act fall within the legislative powers granted by item 29 in List III of the Seventh Schedule to the Government of India Act, 1935. Entry NO. 29 of the concurrent legislative list deals with "trade unions and industrial and labour disputes." Since the carrying on of a strike in a lawful manner is permitted by the Trade Unions Act and the Trade Disputes Act, the impugned Act is repugnant to existing Indian Law and under S. 107 of the Constitution Act is void because no sanction of the Governor-General was admittedly obtained. It is contended that the impugned Act seeks to negative what the Trade Disputes Act permits, and in so far as the present legislation is contrary to the existing provisions of the two Acts mentioned above, it is void.

[5] The argument on behalf of the Provincial Government is that the power to enact the impugned Act is to be found in entry NO. 1 of List II which runs thus :

"Preventive detention for reasons connected with the

maintenance of the public order; persons subject to such detention."

It is also contended that the Act also falls within the general heading "Public Order" in the same entry. Reliance is also placed on S. 12 of the impugned Act which speaks of this Act as being in addition to the existing Indian Law.

[6] It is convenient to begin with S. 12. If the legislative competence to enact the present law be wanting, the Act must be regarded as void. Similarly if repugnance is established between the pres nt Act and existing Acts of the Indian Legislature, the enacting of Section 12 would not save the impugned legislation. Section 12 is merely an expression of opinion put in *ex abundanti cautela* so that no dispute as to the intention of the Legislature may arise. The question of the validity of the impugned Act, however, will have to be judged on its own merits and S. 12 would not help if the Act is found to be *ultra vires* on any ground. Section 12 of the Act, therefore, is inconclusive and ineffective in so far as the validity of the Act or any of its provision is concerned.

[7] Whenever the powers of a Legislature (whether central or provincial) are brought into question the correct method of approach is to look to the Constitution Act and to find out what it provides and what it prohibits It is then necessary to examine the pith and substance of the impugned legislation critically to find out whether all that it provi les falls within the powers granted by the Constitution Act and then to find out whether it transgresses any prohibition contained therein. Their Lord-hips of the Privy Council have clearly indicated this in the leading case in (1878) 3 A. C. 889[1] at pp. 904, 905 in the following words:

"The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course be included any Act of the Imperial Parliament at variance with it) it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

[8] The petitioners contended that the field in which the impugned Act lies is clearly indicated by the preamble and the title of the Act. They urge that the intention of the Legislature and the scope of the Act must be gathered from the preamble and emphasis is laid by them on the words "the prevention of the fomenting or incitement to strikes in the Central Provinces and Berar" which are to be found in the preamble as well as the title of the Act. Since the subject of strikes relates to Trade Unions and Industrial and labour disputes, the Act, according to the petitioners, seeks to legislate upon the field indicated by item No. 29 in the concurrent legislative list and in so far as the field as already occupied by the Trade Disputes Act, it is void. It is true that the preamble of a statute is the key to its interpretation but the intention of the legislature is not necessarilly to be gathered from the preamble taken by itself. In fact the intention of the Legislature can only be gathered from the Act taken as a whole. In the leading case in (1828) 108 E R 863[2] at p. 870 Lord Tenterden C. J said:

"In construing Acts of Parliament we are to look not only at the language of the preamble, or of any particular clause, but at the languge of the whole Act. And if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect, from the more large and extensive expressions used in other parts, the real intention of the Legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause".

These observations apply equally to those Acts where the preamble goes further than the Act itself.

[9] In the operative portion of the present Act the detention is for two purposes. A person can be detained if a person is acting in a manner prejudicial to public safety, order or tranquillity, and in connection with strikes it is said that he may also be detained if Provincial Government is satisfied that the fomenting or inciting of strikes is with the intention of causing or prolonging unrest amongst any group or groups of employees. Now the entry No. 1 in List II allows preventive detention to be ordered, subject however to the qualifications that the preventive detention must be "for the reasons connected with the maintenance of public order". The short question, therefore, is whether the detention which is authorised under the impugned Act is for reasons connected with the maintenance of public order.

[10] Section 2 (1) of the impugned Act is divisible into two parts. The first part definitely falls within the powers granted to the Legislature by entry NO. 1. That part provides that a person may be detained if he is acting in a manner prejudicial to the public safety, order or tranquillity. Public safety and public tranquillity are inextricably bound up with the existence of public order. If public tranquillity and safety are disturbed the necessary consequence would be the breach of public peace and order. There can be no doubt that the first part of S. 2 (1) of the impugned Act is entirely within the competence of the Provincial Legislature.

[11] The only dispute really is with regard to the second part. Certain considerations must be

borne in mind in approaching this subject. It is well known that in interpreting a Constitution Act a wide meaning should be given to the words which confer on a Legislature the power to legislate on certain topics, and within the ambit of the words the most sovereign powers must be understood to be given to the Legislature. The entries in the Constitution Act have always been given a large and liberal interpretation. The reason is manifest. The allocation of the subjects in the list is not by way of scientific definitions but by way of a mere *simplex enumeratio* of broad categories. As said by Jayakar J. in 1939 F C R 18[3] at p. 96.

"That the provisions of an Act like the Government of India Act, 1935, should not be cut down by a narrow and technical construction, but considering the magnitude of the subjects with which it purports to deal in very few words, should be given a large and liberal interpretation . . . . . "

See also 1930 A. C. 124[4] at pp. 136 and 137. It is also to be borne in mind that the legislative lists in Sch. 7, Constitution Act, are not always mutually exclusive. In spite of the fact that an effort has been made to keep all the three lists distinct, there is an overlapping of the jurisdictions conferred by the rival lists. This was held in P. C. Appeal No. 19 of 1946, D/- 11-2-1947[5] by their Lordships in the following terms:

"It is not possible to make so clean a cut between the powers of the various legislatures: they are bound to overlap from time to time."

Their Lordships also cite with approval the observations of Gwyer C. J. in 1940 F. C. R. 188[6] at p. 201 which read:

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its "pith and substance", or its "true nature and character" for the purpose of determining whether it is legislation with respect to matters in this list or in that . . . ."

Again in the same case their Lordships of the Privy Council say:

"Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficient legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with.

Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

This view places the precedence according to the three lists in its proper perspective.

No doubt where they come in conflict List I has priority over Lists III and II and List III has priority over List II, but, the question still remains, priority in what respect? Does the priority of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view."

[12] It will be noticed that it is not the fomenting or inciting of a strike of any kind which is hit by S. 2 (1) of the impugned Act. If the Provincial Legislature had intended that the labourers and employees of Trade Unions should not go on a strike at all the Act may conceivably be said to come into clash with existing Indian legislation. The emphasis in the present Act is not so much on strikes as such as on the maintenance of public order. A person is liable to detention who in the opinion of the Provincial Government is fomenting or inciting strikes with intent to cause or prolong unrest amongst any group or groups of employees. The creation of unrest amongst labourers is something more than the carrying on of bona fide trade disputes. The promoters of bona fide trade disputes are not intended to be hit; nor is the person promoting a legal strike without causing unrest among employees liable to detention. It is the causing or prolonging of unrest among workmen and employees which is the real reason of the detention. If a large and liberal interpretation is placed upon entry No. 1 it cannot be gainsaid that the causing or prolonging of unrest is a reason at least connected with the maintenance of public order. The entry itself speaks not of the maintenance of public order simpliciter but of public detention for reasons connected with the maintenance of public order. The phraseology used in the entry is extensive in its meaning and the Legislature has been given wide powers to decide what is connected with the maintenance of public order in a particular area. The pith and substance of the impugned Act is preventive detention for reasons connected with the maintenance of public order and not industrial and labour disputes.

[13] The present legislation cannot be described as colourable nor can the Legislature be said to be doing indirectly what it cannot do directly. It is obvious that the Provincial Legislature cannot repeal the Trade Unions Act and

the Trade Disputes Act unless the Governor-General or His Majesty signify their assent, nor can it frame any laws which are repugnant to these enactments. In our opinion the enacting of the present Act does not indirectly do any of these two things. It does not trench upon the field occupied by the Indian Legislature. The present Act has for its purpose the maintenance of public order and though incidentally it touches upon the subject of strikes and trade disputes it does so merely because strikes promoted solely for the sake of causing unrest among workmen lead directly or indirectly to a subversion of public order.

[14] Since the entire subject of the present Act falls within entry 1 of List II, Sch. 7, Constitution Act, no question of repugnancy either directly or indirectly arises. No sanction of the Governor-General was necessary because all the powers for the enactment of the impugned Act are to be found in the Provincial legislative list and it is not necessary to go to the concurrent legislative list at all. If on an examination of the pith and substance of the impugned legislation it is found to fall fully within the Provincial legislative list, it does not matter if it incidentally touches some matters included in the first and the third list. *See* P. C. Appeal No. 13 of 1940, D/- 5-2-1947.[7]

[15] The learned Advocate-General further argues that the Trade Unions Act and the Trade Disputes Act do not apply to the strikes which have been incited by the present petitioners because they do not relate to any trade or industry. According to him these so-called trade unions are not trade unions in the strict sense of the term, as defined in the Trade Unions Act because the persons who have registered themselves are not employed in any trade or industry. According to him the provisions of Trade Unions Act and Ss. 3, 15 and 16, Trade Disputes Act do not, therefore, apply to the petitioners and they cannot challenge the validity of the impugned Act. It was urged on behalf of the petitioners that the strikers belong to groups which in most cases hold certificates of registration as trade unions under the Trade Unions Act and that S. 10 of that Act prohibits the Court from enquiring as to whether they are duly registered or not. It is urged that so long as the certificate is not cancelled the right of the holders of the certificate to carry on a trade dispute and a legal strike cannot be questioned inasmuch as the Trade Disputes Act applies to their case. It is urged that the petitioners thus have a right to challenge the validity of the present legislation by the Provincial Government.

[16] There is a complete misapprehension as to the manner in which the legality of an Act of the Provincial Legislature is to be challenged. The legality of the impugned Act or its repugnancy to existing Indian Law is not to be judged on the ground of the applicability of existing Indian Law to any special case. We have indicated above the correct method of approach to such a problem. The Trade Disputes Act provides for the regulating of trade disputes and strikes. Certain strikes are declared illegal and made punishable under the Act. The present Act deals with the incitement of a strike not with a view to carrying on of genuine trade disputes but with the ulterior motive of creating unrest and turmoil so as to affect public order. We have shown above that there is no repugnancy between the two Acts and the whole of the impugned Act lies within the powers granted to the Provincial legislature by entry No. I of List II. It is, therefore, not necessary for us to enter too largely into a discussion as to whether we are entitled to question the registration of these bodies of men under the Trade Unions Act. *Prima facie*, the certificate of registration would be conclusive evidence that they are trade unions duly registered. We, however, express no definite opinion on this matter because it is not germane to the present discussion.

[17] The argument of Mr. Hazarnavis that the legislative powers of the Provincial Legislature are subject to the special responsibilities of the Governor under S. 52 of the Government of India Act, 1935, may be disposed of here. The argument is that the special responsibilities under this section embrace "the prevention of any grave menace to the peace or tranquillity of the province or any part thereof" and that the Governor could not delegate these functions to the Legislature to legislate upon. It was contended that the legislative powers granted by entry No. I of List II must be read as being subject to the powers of the Governor and that to that extent the Governor alone could legislate upon these topics. The argument is intricate and somewhat difficult to follow. The Legislature has been given plenary powers on all the topics contained in the List. The special responsibilities of the Governor really arise in the ministerial field when executive powers are either abused or not used by the appropriate authority. The manner in which the Governor exercises his special responsibility is indicated in the Instrument of Instructions. The special responsibilities of the Governor do not ordinarily impinge upon the legislative functions of the Legislature so as to trench upon the legislative list. The Governor has an overriding executive power under S. 52 which he can exercise in his individual judgment and one of the aspects of it is the maintenance of public order. He can take

action in his individual judgment and even contrary to the advice of his ministers. Under S. 50 of the old Government of India Act, the Governor could overrule his Executive Council in this matter. The same obtains in a large measure under S. 52 of the present Constitution Act. The Governor not having chosen to exercise his individual responsibilities it is not open to the Court to sit in judgment over him. Similarly, the argument that the Governor ought not to have assented to the bill which deals with matters within the sphere of his special responsibilities is not for a Court of law to investigate. The Courts are precluded from such an enquiry by S. 53 (2), Government of India Act, 1935.

[18] In our opinion none of the grounds urged to challenge the authority of the impugned Act are effective. We, therefore, hold that the Act is *intra vires* and is not repugnant to the Trade Unions Act or the Trade Disputes Act.

[19] It was next urged on behalf of the petitioners that the orders were on their face defective as it is the Provincial Government which has been shown to have taken action. It was contended that there was nothing to show that the Governor had acted as required by S. 2 (1) of the present Act, read with S. 3 (43), General Clauses Act. No presumption, it was argued, can be drawn because S. 59 (1), Constitution Act, has been infringed. According to this section, all orders of the Government of the province have to be expressed in the name of Governor and the impugned orders do not say so. It was submitted that these orders cannot be taken to be the orders of the Governor, nor has any affidavit been sworn in this behalf.

[20] As to the affidavit it is clear to us that as there was no allegation in the petitions that the Governor had not passed these orders, there was no need for the Crown to make any statement on the point in their return. We have been assured by the learned Advocate-General that the final orders were in fact passed by His Excellency the Governor in each case. But that apart, the orders are authenticated by the signature of the Chief Secretary and shown to be "By order of the Governor." The authentication follows the business rule correctly. Under S. 59 (2), Constitution Act, this authentication is sufficient and the validity of the orders cannot be called in question on the ground that orders were not made by the Governor. Against this, it was contended that sub-s. (1) of S. 59 speaks of the recitals in an order or instrument, and sub-s. (2) of that section speaks of the authentication and that the condition precedent to the application of the bar under sub-s. (2) of S 59 is that the order must show on its face that it was made by the Governor. Reference was also made to S. 49 (1) which it was pointed out provides that the executive authority of the province shall be exercised by the Governor in the name of His Majesty. It was argued that S. 59 (1) is mandatory and must be followed and that the petitioners were entitled to challenge the orders.

[21] Section 49 (1) deals with the revesting of executive authority in relation to a province resumed by His Majesty under S. 2, and, in our opinion, is not relevant in this context, Under S. 49 (1), the Provincial Legislature may invest a subordinate authority with such functions which it deems proper. In our opinion when the General Clauses Act has already defined the words "Provincial Government" and the orders use this phraseology, the meaning given to these words in the General Clauses Act must equally be held applicable to the same words used in the orders. In view of the fact that the Act uses the terms which have special meaning given to them for all purposes by the General Clauses Act we are entitled to presume, till the contrary is established, that the correct authority named in the Act had in fact passed the orders. *Omnia praesumuntur rite esse acta.* We have no difficulty in applying this presumption in the present cases as we have been assured by the learned Advocate-General that the orders were in fact passed by His Excellency the Governor in each of these cases and that if this fact had been challenged earlier, an affidavit would have been filed in reply. In our opinion it is unnecessary in view of this assurance to decide whether S. 59 (1) is mandatory or merely directory and further whether that sub-section is a condition precedent to the application of the bar contained in the sub-section which follows it. There is yet another answer to this argument. Section 59 (1), Constitution Act, deals with the normal executive activities of Government which are not covered by statute. It does not purport to limit the scope and extent of any special enactment passed by a competent Legislature and within its province.

[22] The impugned Act has also purported to confer these powers of detention upon the District Magistrate, and there can be little doubt that the District Magistrate can exercise them in the same way as District Magistrates now take preventive action under S. 144 and other sections of the Criminal Procedure Code. The District Magistrate can make the orders and they would be promulgated in the manner normal in such cases. Equally the Legislature can, provided the measure is within its competence, invest any other person or body with this authority. In the present case it has chosen to invest the Provincial Government with these powers. and that being so the Provincial Government is the proper body to make these orders of detention. It

matters little, *so far as the present cases are concerned*, whether the Provincial Government means the Cabinet, or the Ministry, or a particular Minister, or His Excellency the Governor, because the order purports to have been made by the Provincial Government and the detenus have not shown that the authority which made this order is not the authority invested with the requisite powers under the Act. The order is valid on the face of it, and in summary proceedings of this nature where the burden is on the detenu it is not permissible for us to presume that the order is invalid. There must be material before us which will lead us to infer the contrary. There is no such material. Not one of the affidavits states who actually passed these orders. Not one of them states that it was not the authority contemplated by the Act.

[23] As regards the promulgation of the order it has been promulgated by order of the Governor and this is the normal means of promulgating all orders of Government made either at ministerial or gubernatorial level.

[24] The broad question was next debated as to whether we are at liberty to question the reasons on which the Provincial Government has acted in these cases. We are relieved from the duty of deciding this matter in these cases because both sides have placed before us the material on which detention had been ordered in these cases. Since no secret was made of these reasons nor was any claim of privilege advanced on behalf of the Crown we do not consider it necessary to decide this vexed question. There are certain differences between emergency legislation passed during the period of war and legislation passed during times of peace. Ordinarily the action of the executive is always open to challenge in a Court of law. We express no definite opinion on this matter because as we have said Government has already put the grounds of detention into the hands of these detenus under S. 5 of the Act and has stated in this Court that these, in fact, were the grounds on which action was taken. In view of the fact that the material is already before us for scrutiny, we see no reason to enter into a discussion of the rights and privileges of the detenus vis a vis the Provincial Government Similarly in these cases we do not see any necessity to call for any evidence in support of the affidavits filed either by the Provincial Government or the detenus. Section 491, Criminal P C., lays down a summary procedure to secure the liberty of the subject. It does not require that Courts should enter upon lengthy enquiries into allegations of fact. We express no definite opinion as to the powers of this Court to order an enquiry. We are, however, satisfied that in these cases no enquiry in fact is necessary. The material placed before us is sufficient for us to judge whether there has been any fraud upon the statute or not, because if there is no fraud, the detention (the Act being valid) cannot be challenged. Ordinarily it is for the Provincial Government to satisfy itself as to the sufficiency of the material. Beyond this we do not express any opinion on this point.

[25] There was considerable argument as to whether detention could be ordered on the basis of past actions. The words in S. 2 of the Act are "is acting." These words were compared with those used in R. 129 of the Defence of India Rules to show that the latter enactment clearly spoke of past actions It was argued that the present Act must be held applicable only to activity of the kind prohibited, if indulged in after the date of the passing of the Act.

[26] Since Act 15 (XV) of 1946 seeks to restrict the liberty of the subject it must be strictly construed. It is an accepted rule of interpretation that the construction which secures the liberty of the subject is to be preferred to one which curtails it. In Maxwell's Interpretation of Statute Edn. 9, p. 289 the following passage occurs :

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights : Lord Westbury : (1863) 10 H.L.C. 367[8] at p.386, (1932) 1 K B. 684,[9] (1884) 12 Q.B.D. 224,[10] (1935) 2 K. B. 257[11] at p. 264."

If it was intended that the detention could be ordered on the basis of past actions nothing was easier than to say this. There are no words which make this Act retrospective so as to enable past actions to be visited with detention. The Act uses the words "is acting" and since an Act operates from the time it becomes law some activity of the type contemplated by the Act must be shown to have continued after the Act came into force. This, in our opinion, is clearly the meaning behind these words. There would otherwise be no *locus poenitentiae* for any person, however much he may desire to act in accordance with law. Section 2 (1) of the Act requires "satisfaction" of the fact that the person concerned "is acting" in one or other of the ways specified. That imports continuity of action sustained on and after the passing of the Act. It is not enough that he should have acted in the past. There must be material to indicate that he continued so to act after the Act was passed and that, but for his apprehension, he would be likely to go on doing so. As there was no material to indicate this in three of the cases we directed the release of those detenus on the dates of argument. The material furnished by Government in those cases showed that the satisfac-

tion was as regards past acts and there was nothing to indicate that the acts continued after the date of the Act. The detenus denied that there was such action after the Act. The affidavits of Government did not counter this.

[27] The orders of detention use the language "has been acting", "has been inciting" and "has been fomenting". It was argued that they are defective for the reasons set out above. But here we think it necessary to construe the real meaning of the orders in the same manner as one considers the pith and substance of an Act. There is no need to copy the words of a statute slavishly in the order provided its essentials are complied with. Indeed slavish rubber-stamp orders have been condemned by this Court in the past. In the present case each detenue was in custody at the date when the orders were made by the Provincial Government. It is obvious that the language "is acting" would have been inappropriate—and that was one of the objections taken. It was argued that as the detenus were in jail when the orders were passed they could not have been acting in the manner contemplated by the Act at the date when the orders were made. In our opinion the orders, therefore, quite properly use the phrase "has been acting" etc., in place of the words "is acting". But of course what we have to see is whether the orders convey the sense of continuity at the time which the Act requires. We think they do in the cases which now remain.

[28] In each of these cases the order sets out the satisfaction of the Provincial Government regarding the fact of acting in one or other of the manners contemplated by the Act and proceeds to enumerate in brief the 'actings'. The bulk of the acts which are said to constitute the "acting" consist of past acts, but in each case (except the three in which we have passed orders of release) there is included some overt act done after 21-11-1946 on which date the Act came into force. The series of acts so set forth convey the sense of continuity which the Act requires and the inclusion of an overt act done after 21-11-1946 imports that the said acting was continued after the datum line. These statements, combined with the reference in the order to S. 2 (1) (a) of the Act, are sufficient to show that the "satisfaction" relates to a continuous course of conduct which was persisted in after the coming into force of the Act.

[29] Now, we have already held that there were no powers of detention in respect of past acts—by which we mean acts committed before 21-11-1946, but as we have already remarked references to such acts are relevant to disclose continuity of action. It is true that up to 21-11-1946 persistence in such acts would not have led to detention. Up to that date such a course of conduct was unobjectionable from the point of view of the present Act — (we say from the point of view of the present Act with deliberate intent because we do not mean to imply that none of the acts complained of contravene other laws. But with such other laws, if there be any, we are not concerned). If, therefore, the "objectionable" conduct ceased on or before 20-11-1946 there would be no power of detention. But if the same conduct were to be persisted in on or after 21-11-1946 then at once that which was "unobjectionable" before that date would immediately become "objectionable" and the necessary continuity of conduct being present the "offender" would be liable to detention under the Act. We now turn to the individual cases.

[30] In Miscellaneous Criminal Case No. 13/47, Dashrathlal Choube, the grounds of detention allege acts of incitement and instigation committed in the months of June, October and December 1946. They further allege an actual riot in October 1946 and an actual strike in December 1946. The petitioner's affidavit does not deny the commission of the acts; all he states is that he was within his legal rights and therefore the acts complained of do not amount to either instigation or incitement. But that is not an answer to the return. A riot relates to public disorder and strikes causing unrest among workmen are prone to result in public unrest which in turn often leads to public disorder.

[31] The application is dismissed.

[32] The case of *S. K. Mukerji* Misc. Cri. Case No. 17 of 1947 is similar to that of *Dashrathlal Chobe*. He is also from Raipur. The grounds of detention disclose prejudicial activities in August, September, October and December 1946. One part of the allegations against him is made in the following words :

"That between October and December 1946 you have been inciting the municipal sweepers to strike and brought about a strike by them".

The affidavit also states that Mukerji was

"directly responsible *for instigating* municipal sweepers".

The facts of instigation and incitement have not been denied in Mukerji's affidavit. In his first affidavit he states that no sweepers' strike took place at Raipur till the day of his arrest. But that is no answer to the allegation that he instigated a strike and continued to do so down to December 1946. In his second affidavit he said that he did not bring about a sweepers' strike at any time. But we are not here to judge that issue. The fact remains that they did strike when he was arrested and that they demanded his release. Obviously they would not do that unless he was intimately connected with them. Also, although he says he was not in Raipur when the

Jubilee Hospital workers struck and the Bidi workers struck he admits he was elected President of the Hospital Workers Union in his absence and admits that in both cases his good offices were availed of to bring about a settlement. These afford grounds for the necessary "satisfaction". As we have said, we cannot enquire into the sufficiency of the grounds provided some grounds exist.

[33] The application is dismissed.

[34] We come next to the Nagpur detenus. *Shyamlal Roy's case*, Misc. Cri. Case No. 14 of 1947. The allegations against him are that he incited strikes in August 1946 (railway coolies), also employees of the Nagpur Improvement Trust and Government peons on and off from before September 1946 and was present and spoke at a meeting of the Government peons at the Town Hall in December 1946.

[35] Here also the fact of instigation has not been denied. All he says is that he did not ask the peons to strike at the Town Hall meeting. So also, as regards the coolies, what he says is that the strike was settled in one day and that no call for a strike was given by him. But it is one thing to call for a strike and another thing to incite or instigate a strike to cause unrest among employees without calling for one; also *A* can incite or instigate and *B* make the call. Equally one can instigate and yet not make a call because the time is not yet ripe. It is no use calling for a strike until the ground work has been laid. These evasive replies are not a good answer to the return. Here also we hold there was material for the satisfaction required.

[36] The application is dismissed.

[37] In *A. B. Bardhan's case*, Misc. Cri. Case No. 20 of 1947 the allegations cover prejudicial activities in January, July and December 1946. There is here a denial regarding the allegations relating to the January incident, but none regarding the two incidents in July and the one in December. On 11th July 1946 he is said to have instigated school and college students to strike. He denies that he instigated the school students but does not deny the allegation regarding the college students. These strikes led to two public fights. As regards the postal workers' strike the allegation is that he went round in a van with a loudspeaker and called on them to strike. He does not deny this but says he was not concerned with the strike "called by their Union." That is not the allegation made against him. Then he was arrested in the Town Hall in Dec. 1946 where the Government Peons had assembled. He admits he spoke but says he only moved a resolution condemning the arrest of three members of the Communist Party. It is evident then that he was using this meeting for a political purpose not connected with the grievances of the peons. Whether he actually incited the peons to strike in the Town Hall or not his presence there, coupled with his previous activities, one of which led to public disorder, furnishes material on which satisfaction can be based.

[38] The application is dismissed.

[39] As regards *B. N. Mukerji*, Misc. Cri. Case No. 21 of 1947, his prejudicial activities range from March 1946 to December 1946 and consist of urging a mass agitation against the reduction in rations, protest meetings against the Trade Disputes Bill and the projected Government Peon's strike in December 1946.

[40] He admits he delivered a speech against the rations cut in March 1946 and also that he issued a statement against the Trade Disputes Bill and spoke in a public meeting against the Bill. He does not deny that he urged a mass agitation against the rations cut. All he says is that his object was not to disturb public tranquility. The two are not the same. One's object in hitting a man over the head may be to reform him, the effect may be that he dies, but the concrete fact for investigation would be was he hit over the head. So here the question is did Mukerji urge a mass agitation and that is not denied.

[41] As regards the Government peons, Mukerji has denied that he incited them to strike and that he organized the procession but he admits his presence at the meeting "as one interested in the working class movement in general.".

[42] As we have said, we cannot judge the sufficiency of the grounds for satisfaction but have merely to see whether grounds on which action could be taken exist. The facts we have referred to, in our opinion, afford such material.

[43] The application is rejected.

[44] In the case of *H. K. Vyas*, Misc. Cri. case No. 22 of 1947, the grounds allege prejudicial activities in January 1946 (textile workers) March 1946 (reduction of rations), July 1946 (postal workers), September 1946 (Government Press employees), October 1946 (textile workers and rikshaw men) and December 1946 (Government peons).

[45] In the case of the postal workers there is said to have been actual obstruction by Vyas directed against men who refused to go on strike and again in the case of the Government Press employees.

[46] Activities in connection with the rations cut are admitted and there is no denial that the speech fomented public discontent. All that is said is that they were normal activities and that he did not urge the people to break the peace and that his activities were not prejudicial to public tranquillity and order.

[47] It is admitted that clashes occurred among the textile workers as a result of the decision to go on strike and it is not denied that he incited them to strike. All he says is that he did not speak at any meeting. So also the fact of obstruction in the case of Government Press employees is not denied. It is also not denied that he organised the procession of the Government peons in December 1946. We need not go deeper. We find there is material on which satisfaction can be based in this case also.

[48] The application is rejected.

[49] In *Mustaque Hussain's case*, Misc. Cri. Case NO. 24 of 1947, the allegations are that he instigated a strike by the licensed railway coolies in July 1946, instigated and fomented the strike by the employees of the Government Press (September 1946) and

"that you have instigated the strike contemplated by the municipal sweepers in Nagpur this month (January 1947)"

that is to say, activities ranging from July 1946 to January 1947 are disclosed.

[50] It was argued in this case that as the applicant was arrested on 21st December 1946 he could not have instigated the strike of January 1947. That of course does not follow. The groundwork of a strike is usually prepared well ahead of time and there is no denial in the affidavits of activities regarding this between the 21st November and the 21st December. The affidavit says there was no instigation in either December 1946 or January 1947. It is silent regarding instigation between the 21st November and the end of that month. The burden in these cases is on the applicant and the burden is a heavy one as this Court, the Privy Council and the House of Lords have all stated from time to time: *See* for example, I. L. R. (1943) Nag 154[12] at pp. 159, 173. We are bound to assume a return accompanied by an affidavit and grounds of detention and which is prima facie in order, to be good until the contrary is established When the affidavit in reply is evasive, as here, and has the lacuna which we have indicated then the return must be accepted.

[51] The application is rejected.

[51a] In *D. L. Jayawant's case*, Misc. Cri. Case NO. 25 of 1947, the allegations are that

"you, as secretary of the unauthorised peons and other Allied Workers Union, have been inciting these groups of employees to strike, and delivered a speech at the Town Hall at Nagpur on 21st December 1946, inciting the Government Peons to strike."

The question of continuity was raised in this case. It was argued that as only one specific overt act is referred to, namely, the speech at the Town Hall, the necessary continuity is lacking. But we think that the grounds do indicate continuity of action. The allegation is not that there was one isolated act of instigation but that there was continuous conduct culminating in this act when the arrest was made. Jayawant s affidavit supports this view.

[52] The Union came into existence in July 1946, and as Jayawant was elected its Secretary it is reasonable to suppose that he had some hand in bringing the Union into being. A call for a strike was issued in August and was not withdrawn till September because a relief committee was appointed. This committee granted relief but the recommendations were considered inadequate and so the meeting of December 1946 was called to continue the agitation. We find that the necessaay continuity of action is present in this case and also that there are materials on which action could be taken.

[53] The application is rejected.

[54] The last of the Nagpur cases is that of *Om Prakash Mehta*, Misc. Cri. Case NO. 26 of 1947. The arguments on the merits were not pressed in this case because he is now detained in connection with other charges and so the matter has become purely academic so far as he is concerned. His application is accordingly rejected.

[55] From here we turn to *Gulabchand Agarwal of Mandla*, Misc. Cri. Case NO. 19 of 1947. The charges against him relate to inciting the Mandla municipal sweepers to strike in January 1946, the postal workers to strike in July 1946, and the sweepers to issue a notice of a second strike in January 1947.

[56] This detenue was arrested on 27th December 1946 and the same argument was used in his case as in the case of *Mustaque Hussain* For the reasons given there, we hold that this detenue has not shown the return to be bad.

[57] The affidavits of the detenue do not deny the allegations of incitement in regard to any of the three strikes. What is contended is that they were legitimate activities. But that relates to the sufficiency of the grounds and not to their existence.

[58] The application is rejected.

[59] The remaining detenus have already been released. They are : *Dr. D. K Diwanji*, Misc. Cri. Case NO. 23 of 1947, *Dhanraj Acharya*, Misc. Cri. Case NO. 16 of 1947 and *Ganesh Mote*, Misc. Cri. Case NO. 15 of 1947.

D.H. *Applications rejected*

A. I. R. (35) 1948 Nagpur 209 *[C. N. 70.]*

HEMEON J.

Mohammad Akbar s/o Mohammad Saheb and others—Accused—Applicants v. *Emperor.*

Cri. Revn. No. 206 of 1947, Decided on 24-9-1947, from order of Sessions Judge, East Berar, Amraoti, D/- 27-3-1947.

Criminal P. C. (1898), S. 540 — Chalan citing certain witnesses against accused—Only some of them examined prior to framing of charge — After end of examination of defence witnesses case closed for arguments — On date of judgment Magistrate in pursuance of defence complaint issuing process for attendance of remaining witnesses given up by prosecution — Action of Magistrate held legal.

Certain accused were undergoing prosecution for certain offences. In the chalan 13 witnesses were cited against them. Only 4 of these were, however, examined prior to the framing of the charge. After the charge had been framed and certain prosecution witnesses had been further cross-examined, the prosecutor stated that he did not want other prosecution witnesses to be examined. When the examination of the defence witnesses had ended the case was closed for arguments. Arguments were duly heard but on the date fixed for the delivery of judgment the Magistrate in pursuance of the defence complaint that the prosecution had deliberately withheld evidence issued process for the attendance of the remaining nine witnesses given up by the prosecution.

Held that the Magistrate was legally entitled to act as he did act under S. 540 and it could not be said that he acted in order to fill up lacuna in the prosecution case. High Court would not interfere with the discretion exercised by the Magistrate: 15 A. I. R. 1928 Lah. 647; 5 A. I. R. 1918 Oudh 142 and 11 A. I. R. 1924 Mad. 587, *Ref.* [Para 5]

Annotation :—('46-Com.) Cr. P. C., S. 540 N. 4.

Cases referred :—

1. ('28) 15 A. I. R. 1928 Lah. 647: 29 Cr. L. J. 740 : 110 I. C. 676, Mangat Rai v. Emperer.
2. ('18) 5 A. I. R. 1918 Oudh 142 : 19 Cr. L. J. 630 : 21 O. C. 95 : 45 I. C. 678, Gur Bakhsh Tewari v. Emperor.
3. ('24) 11 A. I. R. 1924 Mad. 587 : 25 Cr. L. J. 354 : 77 I. C. 290, In re P. C. Perumal.

Fida Hussain — for Applicants.

R. Kaushalendra Rao, Government Pleader — for the Crown.

Order. — The 17 applicants are undergoing prosecution in the Court of the First Class Magistrate, Amraoti, under Ss. 148, 188 and 337, Penal Code, in respect of disturbances which took place in Amraoti on the night of 8th September 1946 and in the chalan 13 witnesses were cited against them. Only 4 of these were, however, examined prior to the framing of the charge; and on 20th November 1946 the District Police Prosecutor intimated that a prima facie case had been established and that he would examine the remaining prosecution witnesses if necessary after the framing of the charge. After the charge had been framed and 3 of the prosecution witnesses had been further cross-examined, the District Police Prosecutor stated that he did not want other prosecution witnesses to be examined.

[2] On 11-2-1947, when the examination of the defence witnesses had ended the case was closed for arguments 2 days later. Arguments were duly heard but on 22-2-1947, the date fixed for the delivery of judgment, the Magistrate in pursuance of the defence complaint that the prosecution had deliberately withheld evidence issued process for the attendance of the nine witnesses given up by the prosecution as well as for that of the Additional District Magistrate, Deputy Superintendent of Police and City Inspector.

[3] The applicants went up in revision against this order but their application was summarily rejected by the Sessions Judge, East Berar, and they have now moved this Court to have the order set aside on the ground that it favoured the prosecution and was not in the interests of justice.

[4] In A. I. R. 1928 Lah. 647[1] the Magistrate, after the defence was closed and the arguments were heard, felt on the records as they stood that some points had been left obscure and that in order to elucidate them it was necessary to recall certain witnesses and to examine a new witness; Tek Chand J. held that there was no illegality in the procedure adopted by the Magistrate. In 19 Cr. L. J. 630[2] it was held that it was not proper for the High Court to interfere in revision in a case in which the Magistrate after the evidence of the defence was closed examined certain witnesses for the prosecution and gave at the same time full liberty to the accused to cross-examine them. In A. I. R. 1924 Mad. 587[3] Odgers J. decided that even after both parties closed their cases it is open to the Court to summon any person as a witness if his evidence appears to it to be essential to the just decision of the case.

[5] The trial Magistrate was legally entitled to act, as he did act, under S. 540, Criminal P. C., and the fact that he had not so acted in order to fill up lacuna in the prosecution case was clear from the contents of the order-sheet, dated 22-2-1947, in which he mentioned that he was issuing summonses to the 9 witnesses because of the defence complaint in argument that their evidence had been deliberately withheld. This indicated that the defence counsel were of the view that this evidence might have supported their case, and at this stage it is not open to me to assume that their evidence will be adverse to the accused and in favour of the prosecution. If that evidence is prejudicial to the accused, the question can be re-agitated in due course by them, but as things stand it would not be proper for this Court to interfere with the discretion of the trial Magistrate. The application is dismissed.

D.S. *Application dismissed.*

A. I. R. (35) 1948 Nagpur 210 *[C. N. 71.]*

HEMEON J.

Chironjilal s/o Dinaram — Accused — Applicant v. *Emperor.*

Criminal Revn. No. 110 of 1947, Decided on 29-8-1947, from order of the Extra Addl. Sessions Judge, Bilaspur, D/- 24-2-1947.

Defence of India Rules (1939), R. 81 (4) — Prosecution started for contravention of price control order before expiry of Defence of India Act—It can be lawfully continued after expiry of Act.

The amendment to sub-s. (4) of S. 1, Defence of India Act, made by Ordinance, XII of 1946 would save prosecutions against breaches of orders for acts or omissions committed prior to the expiration of the Act. So also in view of the words "things done or omitted to be done" in S. 102 (4), Government of India Act, offences committed before the expiration of the six months' period after the ceasing of the proclamation of emergency can be prosecuted after the expiration of that period and proceedings instituted before its expiry can be lawfully prosecuted to a conclusion: Criminal Appeals Nos. 1 and 2 of 1947 (F.C.) and 34 A. I. R. 1947 Mad. 325, *Foll.* [Paras 6, 7]

Cases referred :—

1. 5 Jurist 1064, Stevension v. Oliver.
2. ('45) I. L. R. (1945) Nag. 867 : 33 A. I. R. 1946 Nag. 106, Provincial Government v. Sayed Ali.
3. (1945) 63 T. L. R. 6, Wicks v. Director of Public Prosecutions.
4. ('47) 34 A. I. R. 1947 Mad. 325 : 48 Cr. L. J. 403 : 229 I. C. 469, In re Karumuthu Thiagarayan Chettiar.

Dr. T. J. Kedar—for Applicant.

W. B. Pendharkar, Addl. Govt. Pleader — for the Crown.

Order.—The applicant, Chironjilal of Lormi, Mungeli Tahsil, Bilaspur district, was convicted and sentenced to undergo 3 months rigorous imprisonment under R. 81 (4) of the Defence of India Rules by the First Class Magistrate, Bilaspur, and his appeal was dismissed by the Extra Additional Sessions Judge, Bilaspur. He has now come up in revision to this Court.

[2] The prosecution case against him was, briefly stated, to the effect that he, a licensed sugar dealer, had, on 10-2-1946, at Lormi sold 6 maunds 15½ seers of sugar to Putu (P. W. 1) and Bacholi (P. W. 2) at the rate of Re 1/- per seer in contravention of the price-control order dated 28-1-1946 of the District Magistrate, Bilaspur, by which the maximum retail price of sugar was fixed at Rs. -/8/3 per seer. Putu is Bacholi's uncle and, according to them, they had purchased the sugar for the preparation of sweets which they were to sell at Belpan where there was a big mela. The 4 bags containing the sugar were loaded in Sarha's (P. W. 3's) cart, an operation which was witnessed by Sewakram (P. W. 4), Gumashta Mukaddam, who questioned Putu and Bacholi and passed the information gained by him to the police with the result that the cart was intercepted by Shivsahai (P. W. 7) Head-Constable at a distance of about one mile from Lormi on the way to Belpan.

[3] The applicant in examination denied that he had sold any sugar to Putu and Bacholi and claimed that on the day in question 6 maunds 15½ seers of sugar were not in stock. He also implied that he was not aware of the District Magistrate's price-control order. The defence and the evidence thereto were not accepted by the Court below for adequate reasons with which I am in agreement.

[4] I am also of the view that their finding on the merits vis-a-vis the prosecution case was correct and that the applicant had clearly contravened the price-control order dated 28-1-1946 of the District Magistrate, Bilaspur, by charging Re 1/- per seer for the sugar instead of -/8/3 per seer.

[5] It was, however, strenuously urged that the conviction registered on 3rd of December 1946 was illegal, inasmuch as the Defence of India Act and the Rules framed thereunder had ceased to be in force on that date and there was no other law which authorised the continuance of the trial after 1-10-1946. It was further claimed that the Defence of India Act being a temporary statute expired automatically and lapsed without repeal by any statute, that S. 6 of the General Clauses Act had no application and that proceedings instituted before the expiry of the Defence of India Act could not be legally continued after its expiry. These contentions were repelled by the learned Extra Additional Sessions Judge who relied on a dictum of Alderson, B. in 5 Jurist 1064[1] which was followed in I. L. R. (1945) Nag. 867.[2] The question in that case was, however, different and distinguishable.

[6] The matter has now been set at rest by their Lordships of the Federal Court in Criminal Appeals Nos. 1 and 2 of 1947, dated 11-4-1947, in which it was held that the amendment to sub-s. (4) of S. 1 of the Defence of India Act made by Ordinance XII of 1946 would save prosecutions against breaches of orders for acts or omissions committed prior to the expiration of the Act. Their Lordships relied on (1945) 63 T. L. R. 6[3] which was under the English Emergency Powers (Defence) Act, 1939.

[7] In A.I.R. 1947 Mad. 325,[4] it was also held that in view of the words "things done or omitted to be done" in S. 102 (4), Government of India Act, offences committed before the expiration of the six months' period after the ceasing of the proclamation of emergency can be prosecuted after the expiration of that period and proceedings instituted before its expiry can be lawfully prosecuted to a conclusion.

[8] The applicant's contentions must, therefore, fail and, as adumbrated, the conviction which was in order is maintained. As to sentence, the Courts below have given satisfactory

reasons for awarding jail punishment. The quantity of sugar involved was appreciable and the profit illegally made by the applicant was substantial. The fact that he is 55 years of age does not operate in his favour, inasmuch as his age should have prevented him from committing the grave anti-social offence in question. The application is dismissed.

S.C. *Application dismissed.*

A. I. R. (35) 1948 Nagpur 211 *[C. N. 72.]*

FULL BENCH

HEMEON, SEN AND HIDAYATULLAH JJ.

Sewakram Chandridutt — Defendant — Appellant v. *Nakchhed Madhoram and another — Plaintiffs — Respondents.*

Letters Patent Appeal No. 1 of 1943, Decided on 25-9-1947, from judgment of Puranik J., in S. A. No. 512 of 1940, D/- 16-11-1942.

C. P. Debt Conciliation Act (2 [II] of 1933), S. 7— Notice under S. 7 (2) is not *sine qua non* of admission of application: I.L.R. 1941 Nag. 732: 29 A. I. R. 1942 Nag. 3: 198 I. C. 268, and Civil Revn. No. 673 of 1941, OVERRULED.

The notice under S. 7 (2) is merely an intimation of the facts that the application was dismissed or that the application would be considered on the date named in the notice. The notice under S. 7 (2) is not the *sine qua non* of the admission of the application and has nothing to do with the admission of the application. Hence where notice required by S. 7 (2) is not given the proceedings cannot be treated as if the application had never been admitted : I. L. R. 1941 Nag. 732: 29 A.I.R. 1942 Nag. 3 : 198 I. C. 262 and Civil Revn. No. 673 of 1941, *Overruled.* [Paras 25 and 26]

Cases referred:—

1. ('41) I. L. R. (1941) Nag. 732: 1941 N. L. J. 220: 29 A. I. R. 1942 Nag. 3: 198 I. C. 262, Nanhoo v. Zillimul.
2. Civil Revn. No. 673 of 1941, D/- 28-9-1943, Ghevarchand v. Budhoosingh.
3. ('42) 1942 N. L. J, 194, Bhupsingh v. Hiragir.
4. ('45) I. L. R. (1945) Nag, 260: 31 A. I. R. 1944 Nag. 235, Kalyansingh v. Horilal.
5. Second Appeal No. 896 of 1944, D/- 27-3-1945, Yadoprasad v. Suryabhan.
6. Civil Revn. No. 487 of 1944, D/- 27-2-1946, Madhavrao v. Sadasheorao.

M. R. Bobde and K. G. Chendke— for Appellant.:

B. R. Mandlekar, G. R. Deo, N. B. Chandurkar and M. R. Mandlekar— for Respondents.

Judgment.— This is a Letters Patent appeal against the judgment and decree of Puranik J. in Second Appeal No. 512 of 1940. Since an important question of law was involved which required the consideration whether I. L. R. (1941) Nag. 732[1] lays down correct law, the appeal was referred by the Honourable the Chief Justice to this Full Bench.

[2] This appeal arises out of a suit instituted by the plaintiffs Nakchhed and Bisahuram (respondents here) for recovery of Rs. 1,680 on bonds executed by Sewakram defendant (appellant here). Sewakram admitted the bonds but pleaded that he had applied to the Debt Conciliation Board, Bilaspur, for the conciliation of his debts including the debts in suit. The Board sent notices to these creditors, one of whom, Nakchhed, appeared before the Board on the 5th January 1938 but no statement of debt was submitted by him as required by Section 8 (1), Central Provinces Debt Conciliation Act, nor were the original bonds produced before the Board. Sewakram contended that the debts were discharged under S. 8 (2) of the Act and under Section 9 (3) the bonds were not admissible in evidence. It was also pleaded that inasmuch as Nakchhed was the *karta* of the family he effectively represented the other creditor and the whole of the debt was discharged.

[3] The plaintiffs denied that they had been served with any notices. They further pleaded that Nackchhed was present on 5th January 1938 not because he had received any notice but because he had some other work. The plaintiffs denied that Nakchhed was the *karta* of the family and he pleaded that there was a partition between the two brothers in 1936.

[4] The trial Judge and the first appellate Judge have held that Nakchhed was the *karta* of the family and that he had appeared before the Board on 5th January 1938. As to the service of the notices, the two Courts held that the evidence given by the plaintiffs was insufficient to displace the presumption that the Board had acted according to law.

[5] It was, therefore, held that the plaintiffs had no right to bring the suit which was accordingly dismissed. The second appeal was heard by Puranik J. who held, following I. L. R. (1941) Nag. 732[1] that inasmuch as no notice was sent under S. 7 (1) of the Act, the proceedings before the Board must be treated as without jurisdiction and hence as null and void. On the question whether notices under S. 8 (1) were served or not the learned Judge was inclined to remand the case for evidence but as he had already held that the proceedings before the Board were null and void, he did not see any need of ordering an inquiry as the result thereof would not have made any difference in the case. The case was thus sent back to the trial Court to be heard and decided on merits. The learned Judge, however, granted leave to the respondent and hence this appeal was filed.

[6] When this appeal first came up for hearing it was apparent that it might be necessary to consider whether I. L. R. (1941) Nag. 732[1] laid down correct law. Since, in referring the appeal, no question has been framed and referred to this Bench we understand the order to mean that the whole of the appeal has been referred to us

for decision and we have, therefore, pronounced judgment instead of recording opinions.

[7] It has now been admitted that no notice was sent to the creditors as required by S. 7 of the Act. Similarly, it has been admitted by the appellant that there is no proof that notices under S. 8 had been served upon the creditors, it being conceded that all that can be said is that there is a presumption that the correct procedure was followed in the case. It is also no longer in dispute that Nakchhed was the karta of the family.

[8] Puranik J. has followed I.L.R. (1941) Nag. 732[1] and naturally much of the argument was about the correctness of that ruling. Mr. Bobde who appeared for the appellant drew our attention to the record of the case and said that the summary of facts in I. L. R. (1941) Nag. 732[1] was incomplete and the head-note did not correctly represent the decision in the case.

[9] The facts were that the appellant Nanhoo was not an agriculturist because according to the first two Courts he did not earn his livelihood mainly by agriculture. This is, however, clear from para. 2 of the judgment at p. 733 of the report.

[10] *Prima facie* a valid objection to the jurisdiction of the Board could have been raised by the creditor Zillimul because under S. 4 of the Act only debtors of a restricted class could apply to the Board. Zillimul would have been entitled to show that the debtor was not an agriculturist. By not sending the notice to him the creditor was in the dark and was deprived of this opportunity. The Divisional Bench, however, held as follows :

"It is said nevertheless that the Board has come to the conclusion that a notice was served under S. 8, that the creditor in question has not filed the statement required and therefore pursuant to S. 8 (2) the debt in question must be deemed to be duly discharged.

Further it is said that in fact, whether rightly or wrongly, the Board did receive an application under S. 4, did admit it, that the creditor did not, within the 30 days allowed by S. 7A, take an objection against its being admitted and therefore the jurisdiction of the Board cannot now be questioned.

We are of the opinion that this is fallacious. The Debt Conciliation Act is now time expired and we do not propose to examine at length the various difficulties of construction that it raises. It is, in our opinion, sufficient to say that where an Act requires a tribunal to give notice that it is about to enter upon the determination of point A it cannot effectively decide point A without giving notice and in the absence and behind the back of the person affected. Accordingly in this case this Board never effectively admitted the application. The fact that thereafter it acted as if it had admitted the application is neither here nor there. It is merely another case of a Debt Conciliation Board proceeding under the mistaken belief that it has admitted an application when it has done no such thing."

It is said that the law laid down by the Divisional Bench goes much further than the Act envisages. Reference was made to other cases which we shortly review here. Support for the view expressed in I.L.R. (1941) Nag. 732[1] is to be found in the opinion of Bose J. in Civil Revn. No. 673 of 1941[2] where he says:

"One of the fundamentals of jurisdiction in the case of a Debt Conciliation Board is admission of the application. This cannot be done behind the back of the other side. Section 7 (2) expressly says that it shall not be. It requires notice to be served *under S. 7 (1).* If this notice is not served then service of notice under S. 8 (1) will not do, because that can only be done at a later stage when the Board is properly seized of the matter. It is not so seized until the question about the admission of the application is heard and decided in the presence of the parties, or after notice *under S. 7 (1).*

If the other side appears without notice and takes no objection to the entertainment of the application that is another matter. It would be pointless to go through the formality after appearance, and if no objection is taken then the question of notice will be deemed to have been waived. That was the position in 1942 N.L.J. 194[3] at p. 195. But if the creditor does not appear and no notice is issued under S. 7 (1) then S. 8 (2) cannot come into operation however many notices may have been issued under S. 8 (1)."

[11] A similar view was expressed in I. L. R. (1945) Nag. 260[4] by Grille C. J. and one of us (Sen J.) in the following words:

"A notice of the order under S. 7 (1) was to be sent by registered post to the debtor or the creditor, as the case may be. In this case no notice as required under S. 7 (2) was sent. Where notice under S. 7 of the Act is not given, the proceedings must be treated as if the application had never been admitted. The Board's subsequent decisions are not final: *See* 1941 N.L.J. 220."

The remark is *obiter* because the decision in the case did not turn on this point and the learned Judges have said so at the end of the paragraph from which the extract last quoted above is taken.

[12] In 1942 N. L. J. 194[3] at p. 195 the matter was dealt with in a different way. It was there held :

"The other point was under S. 7, Debt Conciliation Act. This point was taken relying on a Bench decision of this Court in I.L.R. (1941) Nag. 732.[1] There is, however, a difference because in that case the absence of the notice resulted in the absence of the contestants at a particular stage of the enquiry. Here the contestants were all present. Moreover this point is not taken in the memorandum of appeal."

[13] There are two other cases in which the same distinction was made. In Second Appeal No. 896 of 1944,[5] it was held that if a creditor appears, though no notice under S. 7 is issued to him, and enters into the agreement drawn up and registered under S. 12, he is bound by it. I.L.R. (1941) Nag. 732[1] was distinguished.

[14] Similarly in Civil Revn. No. 487 of 1944[6] the case in I. L. R. (1941) Nag. 732[1] was distinguished. In this case the creditor in response to a notice under S. 8 (1) of the Act appeared before the Board and filed a statement but did not accept the offer made and a certificate was granted against him. When the creditor after

obtaining his decree sought to execute it, the judgment-debtor objected pleading the certificate. The creditor contended that the proceedings of the Board were null and void as owing to its failure to issue a notice under S. 7 (2) of the Act, it had acquired no jurisdiction.

[15] It was held in the case that since the creditor had appeared before the Debt Conciliation Board in response to the notice under S. 8 of the Act and had filed his statement of debt in writing and thus submitted to the jurisdiction of the Board, he was debarred, in view of the principle underlying S. 7-A (3) of the Act.

[16] It would thus appear that the extreme view propounded in I. L. R. (1941) Nag. 732[1] did not find favour in the subsequent cases. In fact, except for I. L. R. (1945) Nag. 260[4] there has been a tendency to distinguish the case. We do not consider that Civil Revn. No. 673 of 1941[2] adds anything to I. L. R. (1941) Nag. 732[1] as Bose J. was a party to the latter decision.

[17] It is not necessary to consider the position prior to the introduction of S. 7-A in the Act because in this case the application was made after that section was introduced. To begin with it must be noticed that under S. 4 the application to the Board to effect a settlement between the debtor and his creditor or creditors could be made either by the debtor or the creditor. By sub-s. (2) of S. 4 if the debtor and the creditor applied simultaneously the application of the creditor merged in that of the debtor. These facts, which have not been stressed before us, explain the meaning of S. 7 and must, therefore, be borne in mind. Section 5 merely dealt with verification of the application. Section 6 was in two parts. Sub-section (2) applied to applications by the creditor and the particulars required were: (a) the place of residence of the debtor, (b) the amount and particulars of the creditor's claim. Sub-section (1) dealt with the application of the debtor and in addition to the statement that he was unable to pay his debts, the debtor was required to give his place of residence, the particulars of all claims against him together with the names and addresses of his creditors, and the list of all his property together with its valuation and location. A glance at Form I will show that the creditor was required to complete paras. 1 and 4 of the form and leave out paras. 2 and 3 while the debtor was required to complete the entire form.

[18] Under S. 7 (1) on receipt of these applications the Board could, (a) dismiss the application if it thought that it was not desirable to attempt to effect a settlement or (b) entertain the application for hearing and for this purpose it had to fix a date and place for hearing the application. The Board in either of the two cases had to pass an order, notice of which had to be sent to the debtor or the creditor as the case may be.

[19] Section 7 (2) was as much applicable to an application by the creditor as to an application by the debtor. The Board had to do the preliminary scrutiny without hearing the applicant and to make up its mind as to the desirability of proceeding with the application. If it dismissed the application summarily, notice of the dismissal was sent to the applicant. There would be no point in sending the notice to the other side and if the application was by a creditor, there was hardly any material on which to send notice to the other creditors whose very existence was not disclosed in the application. Form No. 3 devised under R. 14 could not have been of use because that Form gave notice of further consideration of the application and would have been most inappropriate if the notice was one of dismissal of the application. It is, therefore, fair to infer that Form 3 was to be used only if the Board proceeded to consider the application, and if it dismissed the application it had to devise the manner in which to send intimation of its order to the applicant.

[20] The Board could dismiss the application on various grounds. Jurisdiction to entertain the application (i. e. the want of it) was one such ground. If the application was dismissed, the aggrieved party could move the Board objecting to the dismissal within 30 days. Prior to the amending Act XIX of 1939 time ran from the date of the order, but by the amendment under this amending Act time began from the date on which the intimation was sent by registered post under S. 7 (2).

[21] It is now necessary to reproduce S. 7-A. This section was introduced by Act XV of 1936, S. 2. It originally read as follows :

"7-A. (1) If, on receipt of an application under S. 4, the Board admits the application as being within its jurisdiction or, under sub-s. (1) of S. 7, dismisses it on the ground of want of jurisdiction, a debtor or his creditor may, *within thirty days from the date of admission or of the order of dismissal, as the case may be*, make an objection in writing to the Board against such admission or dismissal.

(2) On receipt of an objection under sub-s. (1), the Board shall make such order thereon as it thinks fit and it shall be final.

(3) If no objection is made under sub-s. (1), or if an objection is made and decided under sub-s. (2), the jurisdiction of the Board shall not be questioned in any civil Court."

The underlined *(here italicised)* words in sub-s. (1) were substituted by the following words under Act XIX of 1939 :

"—within thirty days from the date on which intimation of admission or dismissal, as the case may be, is sent to him by registered post—"

We may say at once that this amendment of 1939 merely gives the *terminus a quo* to the

period of 30 days which but for this amendment was the date of the order under S. 7 (1).

[22] Now it is obvious that the principle underlying S. 7A (3) is to make the Board's decision on questions of jurisdiction final and to bar interference by any Civil Court. But the operation of sub-s. (3) is dependent upon two conditions. The first condition is that the aggrieved party did not make any objection and the second condition is that the party made the objection but the Board decided it against him.

[23] It is one of the fundamental principles of administration of justice that a person must be heard before any decision is given against him. It is also equally true that Civil Courts have jurisdiction to enquire into any matter unless such jurisdiction is expressly taken away. It appears to us that if the aggrieved party was not informed of the order, his right to challenge the jurisdiction of the Board remained and consequently interference by Civil Courts was not barred. It is true that S. 7A (1) as originally drafted was defective, inasmuch as it did not correlate the period of 30 days with the sending of the notice. The amendment in 1939 served to remove this defect. Even so it could never have been intended that the rights of debtors and creditors were concluded even though the Board had sent no notice as required by S. 7 (2) of the Act. In our opinion in such a case the Civil Court would be entitled to question the jurisdiction of the Board.

[24] It appears to us that the spirit of S. 7 is brought into relief by the subsequently added S. 7A. To this extent we are entitled to consider S. 7A though subsequently added to the Act. The admission or dismissal of the application was not stayed pending the reply to the notice issued under S. 7 (2). In fact, if one reads Ss. 7 and 8 together (ignoring for the nonce, S. 7A) the opening words of S. 8 fit in with the provisions of S. 7 (1). Piecemeal legislation is never good and the introduction of S. 7A created difficulties which have led to conflicting decisions. Even at the end there was a lacuna in the Act. It arises in this way. Suppose the application was by a creditor and the Board decided to entertain the application. Suppose also that the notice was sent to the debtor and he failed to appear. Section 8 required that the action under that section should be taken after examining the debtor. The notice sent under S. 7 (2) was merely an intimation and not a process compelling attendance of the debtor in such a case. Of course, the Board could utilise S. 11 of the Act, but that was another matter. There was nothing compelling about the notice under S. 7 (2).

[25] In our opinion notice under S. 7 (2) was merely an intimation of the facts (a) that the application was dismissed or (b) that the application would be considered on the date named in the notice. This is clear from the manner in which S. 7A (particularly the amendment introduced by Act XIX of 1939) is worded.

[26] We are of opinion, therefore, that the notice under S. 7 (2) was not the *sine qua non* of the admission of the application. In fact the application was admitted or dismissed as the case may be under sub-s. (1) prior to the stage contemplated by sub-s. (2). This is stated in so many words by S. 7A, particularly after the amendment by the amending Act, XIX of 1939. The notice in question had nothing to do with the admission of the application, and we respectfully disagree with the contrary opinions expressed in I. L. R. (1941) Nag. 732[1] and Civil Revision No. 673 of 1941.[2] As a corollary the matter of jurisdiction must be held to be at large if the opportunity afforded to the aggrieved party in S. 7A was not given, and both before the Board itself or before a Civil Court the question could be agitated afresh as the bar of S. 7A (3) would apply only if the Board had strictly complied with law.

[27] The creditors were not shut out in Civil Court from raising the objection as to the jurisdiction of the Board. We closely questioned learned counsel for the respondents as to what they have done to establish want of jurisdiction. We were referred to para. 7 of the written statement, dated 26-9-1939, filed as a rejoinder by the plaintiffs. That paragraph reads as follows :

"7. That the defendant is the resident of mouza Meau tahsil Jangir. That he purposely and deliberately made the application to the Debt Conciliation Board, Bilaspur, so that these creditors may not be able to be present before the Debt Conciliation Board, Bilaspur, and that their debt will be discharged. That the defendant has played a fraud on the creditors and the Debt Conciliation Board, Bilaspur."

It is to be noticed in this connection that the defendant had made a specific pleading that he had lands in Bilaspur tahsil and was therefore entitled to make an application to that Board. This is what he said :

"1. That the defendant having a tenancy holding of Rs. 96 rental of holding in mauza Gatora in Bilaspur tahsil and being a permanent resident of that place applied to the Debt Conciliation Board, Bilaspur, for the conciliation of the debts in suit."

The plaintiffs did not at any stage specifically deny this fact. Their rejoinder is disingenuous on this point. They only said :

"That the plaintiff had no knowledge or information that the defendant had any lands in tahsil Bilaspur."

In our opinion this is not a denial of the statement made by the defendant (appellant). It is true that the defendant did not lead any evidence and mere pleading is not evidence. He is, however, entitled to show that the plaintiffs' own witness Jogoram (P. W. 3) proves the case inas-

much as he stated that the defendant is a tenant of mouza Gataura and goes there often. In our opinion the statement of the defendant remained untraversed and is proved by the evidence led by plaintiffs themselves. The plaintiffs have failed to prove want of jurisdiction in this case. They had a chance to do so in the Civil Court but they failed to allege or prove this aspect of the case. The decision of the Board cannot therefore be challenged on the ground of want of jurisdiction.

[28] It only remains to consider if the plaintiffs are estopped from pleading that they had not received the notices. In this case one of the creditors appeared before the Board on 5-1-1938 but it is a matter of some doubt whether he did so in answer to the summons under S. 8 or had some other work. The creditors have led evidence to show that they were not served at all. For the reasons given by Puranik J., which have been set out with extreme cogency by him, we are also not prepared to draw a presumption under S. 114, Evidence Act, in favour of the debtor and would remand the case for further inquiry which Puranik J., contemplated.

[29] We accordingly set aside the decree passed by Puranik J., and order that the case be sent back to the trial Court to give a finding after due inquiry whether the notices issued under S. 8 of the Act had been served or not. For this purpose parties may be allowed to lead further evidence if they so desire.

[30] The parties are directed to appear before the trial Court on 14-10-1947. The findings be certified to this Court as soon as practicable and the parties will be entitled to file objections within 15 days of the receipt of the findings in this Court.

D.S. *Case remanded.*

A. I. R. (35) 1948 Nagpur 215 *[C. N. 73.]*

FULL BENCH

GRILLE C. J., SEN AND PADHYE JJ.

Wasudeo Keshao Khandelkar — Appellant v. Devidas Govindrao Ganorkar and another —Respondents.

First Appeals Nos. 119 and 121 of 1940, Decided on 14th October 1947.

Provincial Insolvency Act (1920), S. 28 (2)—Hindu father's insolvency—Father's power to sell interests of his sons in joint family property for his untainted debts vests in Court or Receiver.

The power of a Hindu father to sell the interests of his sons in the joint family property for the discharge of his antecedent debts which are not tainted with illegality or immorality vests, on his adjudication as an insolvent under the Provincial Insolvency Act, in the Insolvency Court or the Receiver appointed by the Court and the Court or the Receiver, as the case may be, has a right to sell the interests of the sons of the insolvent for the satisfaction of the debts of the insolvent: 29 A.I.R. 1942 Mad. 682 (FB), *Dissent.*; 20 A.I.R. 1933 Nag. 150 ; 24 A.I.R. 1937 Nag. 31 and 30 A.I.R. 1943 Nag. 101, *Affirmed*; *Case law discussed.* [Paras 12, 19]

Cases referred:—

1. ('25) 6 Lah. 1 : 12 A. I. R. 1925 P. C. 18 : 52 I. A. 22 : 84 I. C. 883 (P. C.), Sat Narain v. Behari Lal.
2. ('36) 17 Lah. 644 : 23 A. I. R. 1936 P. C. 277 : 63 I. A. 384 : 164 I. C. 6 (P.C.), Sat Narain v. Sri Kishen Das.
3. ('33) 29 N. L. R. 159 : 20 A. I. R. 1933 Nag. 150 : 143 I. C. 769, Kanhaiyalal v. Dablia Bari.
4. ('37) I. L. R. (1937) Nag. 512 : 24 A.I.R. 1937 Nag. Nag. 31 : 168 I. C. 895, Jansa v. Ramkrishna.
5. ('43) I. L. R. (1943) Nag. 390 : 30 A. I. R. 1943 Nag. 101 : 205 I. C. 279, Laxminarayan v. Dinkar.
6. ('26) 49 Mad. 849 : 13 A. I. R. 1926 Mad. 994 : 97 I. C. 825 (F.B.), Seetharama Chettiar v. Official Receiver, Tanjore.
7. ('32) 13 Lah. 464 : 19 A. I. R. 1932 Lah. 151 : 135 I. C. 217, Gori Shankar v Official Receiver, Delhi.
8. ('31) 53 All. 239 : 18 A.I.R. 1931 All. 162 : 135 I.C. 119 (F.B.), Ananda Prakash v. Narain Das Dori Lal.
9. (26) 5 Pat. 476 : 13 A. I. R. 1926 Pat 438 : 98 I. C. 364, Chairman District Board, Monghyr v. Sheodutt Singh.
10. ('37) 16 Pat. 60 : 24 A. I. R. 1937 Pat. 185 : 167 I. C. 765 (F. B.), Biswanath Sao v. Official Receiver.
11. ('36) 15 Pat. 363 : 23 A. I. R. 1936 Pat. 115 : 161 I. C. 167, Nilkantha Narayan v. Debendra Nath.
12. ('37) I. L. R. (1937) 2 Cal. 675 : 24 A. I. R. 1937 Cal. 517 : 172 I. C. 914, Indu Bala Dasee v. Bakkeshwar.
13. ('43) I. L. R. (1943) Mad. 83 : 29 A. I. R. 1942 Mad. 682 : 203 I. C. 507 (F. B.), Ramasastrulu v. Balakrishna Rao.
14. ('44) I. L. R. (1944) Mad. 212 : 30 A. I. R. 1943 Mad. 652 : 211 I. C. 21, Virupaksha Reddi v. Siva Reddi.
15. ('42) I. L. R. (1942) 2 Cal. 413 : 29 A. I. R. 1942 Cal. 533 : 203 I. C. 154, Bijay Kumar v. Rama Pati Basu.
16. ('23) 46 Mad. 54 : 10 A. I. R. 1923 Mad. 55 : 68 I. C. 898, Official Assignee of Madras v. Ramachandra.
17. ('24) 47 Mad 87 : 11 A. I. R. 1924 Mad. 411 : 80 I. C. 108 (S. B.), In re Sellamuthu Servai.
18. ('22) 44 All. 316 ; 9 A. I. R. 1922 All. 79 : 64 I. C. 976, Bawan Das v. Chiene.
19. ('25) 47 All. 263 : 12 A. I. R. 1925 All. 221 : 84 I. C. 790, Sita Ram v. Beni Prasad.
20. ('83) 7 Bom. 438, Fakirchand Motichand v. Motichand Hurruckchand.

G. R. Mudholkar—for Appellant.

D. T. Mangalmurti and N. B. Chandurkar — for Respondents.

ORDER OF REFERENCE.

This judgment governs two first appeals, First Appeal No. 119 of 1940 and First Appeal No. 121 of 1940.

[2] Both these appeals involve only one question of law which may be stated thus:

"Whether the power of a Hindu father to sell the interests of his sons in the joint family property for the discharge of his antecedent debts, which are not tainted with illegality or immorality vests, on his adjudication as an insolvent under the Provincial Insolvency Act in the Insolvency Court or the Receiver appointed by the Court and whether the Court or the Receiver, as the case may be, has a right to sell the interests of the sons of the insolvent for the satisfaction of the debts of the insolvent."

[3] It appeared at one time that the High Courts in India were unanimous in the answer to this question, the answer being that the undivided shares of the sons do not vest in the Receiver but the father's power of disposal over those shares vests in him. The decisions of their Lordships of the Judicial Committee in 6 Lah. 1[1] and 17 Lah. 644[2] were not regarded in any way inconsistent with the aforesaid answer. The Court of the Judicial Commissioner, Nagpur, as well as this Court consistently took this view as appears from the reported decisions in 29 N. L. R. 159[3] I. L. R. (1937) Nag. 512[4] and I. L. R. (1943) Nag. 390[5] The last case was decided after considering both the decisions of the Judicial Committee referred to above. The other High Courts in India also took the same view as is clear from the cases reported in 49 Mad. 849,[6] 13 Lah. 464,[7] 53 ALL. 239,[8] 5 Pat. 476,[9] and 16 Pat. 60.[10] The learned Judges of the Patna High Court had no doubt taken a different view in 15 Pat. 363,[11] but that case was overruled by a subsequent Full Bench decision of that High Court. The Full Bench decision is reported in 16 Pat. 60.[10]

[4] In I. L. R. (1937) 2 Cal. 675,[12] which was a case of a Dayabhaga Hindu joint family, the learned Judges of the Calcutta High Court expressed a doubt regarding the correctness of the above view though they did not think it necessary in that case to express a definite opinion, as the decision turned on another ground viz., the effect of the attachment of the son's share, which according to the learned Judges put an end to, or at any rate suspended the powers of, the *karta* or the managing member to deal with the attached property. We are not concerned with that aspect in the appeals before us.

[4A] The learned Judges of the Madras High Court doubted the correctness of the decision in 49 Mad. 849[6] in view of the reasoning of their Lordships of the Judicial Committee in 17 Lah. 644[2] and referred the question to a Full Bench. In the Full Bench decision which was reported in I. L. R. (1943) Mad. 83[13] it was pointed out that in both the cases before the Judicial Committee their Lordships had to consider the effect of the insolvency of the father in a Mitakshara joint family, under the Presidency Towns Insolvency Act, 1909, and in particular in the light of S. 52 (2) (b) of that Act. Their Lordships have made it clear that they were deciding that question on the wording of the Presidency Towns Insolvency Act, 1909.

[5] There is no provision in the Provincial Insolvency Act corresponding to S. 52 (2) (b), Presidency Towns Insolvency Act, 1909. The decisions under the Provincial Insolvency Act are based on the interpretation and the effect of S. 2 (d) which, defines 'property,' and S. 28, the vesting section, for which the corresponding provisions in the Presidency Towns Insolvency Act are S. 2 (e) and 17 respectively.

[6] In I. L. R. (1943) Mad. 83[13] the learned Judges of the Madras High Court were dealing with the case of a manager who was not the father of the Mitakshara joint family in the light of the provisions of the Provincial Insolvency Act, and they distinguished the case of a father-manager on the ground that his powers were greater than the powers of a manager who is not the father. The relevant extract from the judgment of the Full Bench delivered by Leach C. J. is as under :

"The Judicial Committee in both the Lahore cases were interpreting the Act governing the law of Insolvency in the Presidency Towns of India, and when, as we have here, decisions of the highest tribunal construing S. 2 (e) and S. 17, Presidency Towns Insolvency Act, the same interpretation must be placed on identical provisions in the Provincial Insolvency Act unless the Act it-elf contains some additional provision running counter, which is not the case ..... If the power of the father is not property under the Presidency Towns Insolvency Act, it cannot be regarded as property under the Provincial Insolvency Act, and, and if the father's power is not property, the power of the manager who is not the father cannot be property."

The decision of the Full Bench was that the Official Receiver had no power to sell the undivided share of a coparcener who is not a manager and that the assignee from the Receiver acquired only the interest of the insolvent manager in the properties in suit.

[7] The effect of the insolvency of the father in a Mitakshara joint Hindu family was directly in issue before the Divisional Bench of the Madras High Court in I. L. R. (1944) Mad. 212.[14] The learned Judges observed that the decisions of the Judicial Committee were based on S. 52 (2) (b), Presidency Towns Insolvency Act, for which there was no corresponding provision in the Provincial Insolvency Act. The learned Judges further pointed out that on the reasoning contained in the two decisions of the Judicial Committee the power of the insolvent father to dispose of the entire family property for his personal debts was not 'property' within the definition of the word 'property' in S. 2 (e), Presidency Towns Insolvency Act, which is identical with the definition contained in S. 2 (d), Provincial Insolvency Act. The learned Judges decided that the father's power of disposal is not property under the Provincial Insolvency Act and it does not vest in the Receiver under S. 28 (2) of the Act.

[8] In I. L. R. (1942) 2 Cal. 413[15] the Divisional Bench of the Calcutta High Court while dealing with the effect of the insolvency of the father in a Dayabhaga joint Hindu family held that under the Provincial Insolvency Act the power which

can only be exercised for the joint benefit of the bankrupt and another—the only power which a father in a Dayabhaga joint Hindu family has—is not the power which can be exercised by the bankrupt for his own benefit and it is not therefore property within S. 2 (d), Provincial Insolvency Act. This decision in a way suggests that the powers of the father in a Mitakshara joint Hindu family which can be exercised for his own benefit may fall within the definition of the word property in S. 2 (d), Provincial Insolvency Act.

[9] It is clear from what is stated above, that there is of late much divergence of opinion on the question stated above. The High Courts in India are clearly divided in their views, the Calcutta and Madras take one view while other High Courts including this High Court take a different view.

[10] In view of the fact that the question formulated above arises frequently and is of general importance, it is, in our opinion, expedient that it should be referred to a Full Bench for its opinion. We may point out that an identical question was referred to a Full Bench in First Appeal No. 118 of 1940 but the reference had to be dropped on account of a settlement reached between the Receiver and the scheduled creditors in that case.

[11] Let the papers be laid before the Honourable the Chief Justice for orders.

OPINION

[12] The question that has been referred to us for decision is as follows :

"Whether the power of a Hindu father to sell the interests of his sons in the joint family property for the discharge of his antecedent debts, which are not tainted with illegality or immorality, vests, on his adjudication as an insolvent under the Provincial Insolvency Act, in the insolvency Court or the Receiver appointed by the Court and whether the Court or the Receiver, as the case may be, has a right to sell the interests of the sons of the insolvent for the satisfaction of the debts of the insolvent ?"

and the reason why this question has been referred to the Full Bench is clearly set out in the referring order.

[13] As the order states, neither the Court of the Judicial Commissioner nor this Court has ever entertained any doubt as to the right of the Receiver in an insolvency case to sell, in the case of the insolvency of a Hindu father, the interests of his sons in the joint family property to satisfy his antecedent debts, provided such debts are not tainted with illegality or immorality. The extreme view that the interests of the sons in the joint family property itself passed on with the interests of the father, which is a proposition that was negatived in 6 Lah. 1,[1] has never been held here. In 29 N. L. R. 159[3] it was laid down that when the manager of a joint Hindu family governed by the Mitakshara law, is adjudicated an insolvent, then, assuming that the debts payable by the manager are such as are binding on the coparceners, their undivided interests in the joint family property do not vest in the Receiver; but the power of disposal of such interests which the manager possesses under the Hindu law for satisfaction of such debts, passes on to the Receiver under S 28 (2), Provincial Insolvency Act. It will be noted that this case is one of a manager. The argument is of course stronger in the case where the manager is the father. This principle was affirmed in I. L. R. (1937) Nag. 512[4] where it was held that the Receiver appointed by the Insolvency Court has power to sell the shares of the insolvent's sons in the joint family property for paying the just and proper debts of their father, the insolvent, and indeed in I. L. R (1943) Nag. 390[5] a decision to which one of us was a party and a decision which is subsequent to both 6 Lah. 1[1] and 17 Lah. 644[2] it was assumed, after consideration of those decisions, that there could be no question of the proposition that the power of the father to sell his son's share in the joint family property for his own debts vested in the Receiver.

[14] Subsequent to the decision of their Lordships of the Privy Council in the connected cases of 6 Lah. 1[1] and 17 Lah. 644[2] there have been two diametrically opposed interpretations, the earlier being a Full Bench decision of the Patna High Court in 16 Pat 60[10] and the later a Full Bench decision of the Madras High Court in I. L. R. (1943) Mad. 83.[13] There is also the decision in I. L. R. (1942) 2 Cal. 413[15] but that was a decision concerning the power of the manager to deal with the property of his coparceners under the Dayabhaga school. Any dicta concerning what the law might be in the case of the *karta* of a Mitakshara Hindu joint family would be *obiter* and do not, in our opinion, call for consideration.

[15] It has been contended before us in support of the view that these connected decisions of their Lordships of the Privy Council have disrupted the view, taken not only in this Court but universally in India, of the power of a Receiver to sell the son's interests in the joint family of which the father and manager have become insolvents, that the direct ruling of their Lordships that the power does exist is applicable only to cases arising out of the Presidency Towns Insolvency Act and is based on a consideration of the terms of S. 52 (2) (b) of that Act, corresponding provisions of which do not exist in the Provincial Insolvency Act of 1920, and that it has been laid down by their Lordships that this power to sell is not "property" as defined in the

appropriate clause of S. 2, the definition section of either Act and that consequently as it is not "property" and nothing corresponding to S. 52 exists in the Provincial Insolvency Act, there remains now no power in the Receiver to sell or to apply the power in the way the insolvent father could have applied it. That is the view taken in the Madras High Court in contra-distinction to the view expressed some six years earlier in the Patna High Court. Their Lordships of the Madras High Court have referred to the Patna view in the following words :

" The only High Court which has considered the question since the delivery of the judgment in 17 Lah. 644 [2] is the Patna High Court. In 16 Pat. 60,[10] a Full Bench of that Court held that the father's power to sell vested in the Official Receiver under the Provincial Insolvency Act. We have considered that judgment, but we do not find anything in it which tends to shake the opinion which we have just expressed."

[16] While preferring the view of the Patna High Court to that of the Madras High Court, we do not propose to dismiss our consideration of the latter High Court's judgment in quite so summary a manner, and while expressing our respectful dissent from their conclusion, we would suggest that the conclusion reached is due to a misinterpretation of what their Lordships of the Privy Council have said. Their Lordships were presented with a plea of the defendants, *vide* 6 Lah. 1,[1] that on adjudication of the father and manager of the joint Hindu family

" the whole of the family estates and effects as well as the right, title and interest of the insolvent became vested in the Official Assignee of Bombay, who since then became the legal owner with powers of control and disposal and obtained possession of all the estate and properties including the house through which plaintiff claims possession."

As their Lordships said, this involves a startling proposition that

" when a Hindu, who happens with his sons to constitute a joint family subject to the law of the Mitakshara, is adjudged an insolvent under the Presidency Towns Insolvency Act, 1909, not only his own rights but all the rights and interests of his sons who are his coparceners in joint family property vest in the Official Assignee by virtue of the adjudication alone."

This proposition their Lordships proceeded to negative in 6 Lah. 1, [1] and in the subsequent case, 17 Lah. 644, [2] they decided the point which had been specifically left open that the power of the Hindu father, governed by the Mitakshara law, to sell the joint family property to pay his antecedent debts did vest in the Official Assignee.

[17] When their Lordships referred to S. 2 (e), Presidency Towns Insolvency Act, which is identical with 2 (d), Provincial Insolvency Act, in these terms

" The father's power to dispose of the joint property is not absolute, but conditional on his having debts which are liable to be satisfied out of that property; and S. 2 seems to contemplate an absolute and unconditional power of disposal"

they are, in our opinion, not to be taken as placing an absolute limitation on the interpretation of the word "property" in that definition as, with all respect, we consider the Madras High Court appears to hold. In the first place, we do not think that there could be any intention or any possibility of reaching a conclusion limiting the definition which begins with the word "includes". In the next place, their Lordships were disposing of an unwarranted interpretation which appears to lie on the surface of the phrase "disposing power" which might be taken to mean, as their Lordships indicate, an absolute and unconditional power of disposal, and their Lordships have pointed out that the power of the father of a Mitakshara family is not absolute but conditional on his having debts which are of a nature which the Hindu law says shall be satisfied out of that property. We do not find in their Lordships' judgment, in the same way as it was not found in I. L. R. (1943) Nag. 390, [5] anything to show that this power did not vest in the Receiver and is not one of the items of "property" which by S. 28, Provincial Insolvency Act, does so vest.

[18] Finally, we would point out in answering the contention based on the finding of the Madras High Court that what may be good law in respect of the Presidency Towns Insolvency Act is not good law under the Provincial Insolvency Act, the fact that the pronouncement of their Lordships in the case before them that the claim of the Official Assignee to exercise the insolvent's powers to sell the joint family property for his antecedent debts was well-founded, is based on decisions which their Lordships cited with such approval that, in their own words, "it is unnecessary (for us) to refer further." Two of these decisions are from the Madras High Court—46 Mad. 54, [16] 47 Mad. 87, [17] and two from the Allahabad High Court—44 ALL. 316 [18] and 47 ALL. 263, [19] and both these latter decisions are decisions under the Provincial Insolvency Act. That, in our opinion, is sufficient to dispose of the contention that the law is otherwise under the Provincial Insolvency Act than under the Presidency Towns Insolvency Act. It has been faintly objected before us that 44 ALL. 316, [18] one of the cases to which we have referred, is founded on 7 Bom. 438 [20] of which their Lordships have expressed disapproval in 6 Lah. 1 [1] at p. 16. A glance at the earlier case will show that two propositions were advanced there, one being identical with that on which 44 All. 316, [18] was decided, namely that from the date of the adjudication the Receiver takes over all rights in the insolvent's property which the insolvent himself possessed and one of those rights would be to alienate coparcenary property belonging to

himself and his minor sons in satisfaction of antecedent debts incurred by him, provided those debts were not tainted with immorality, and another proposition, which is the one of which their Lordships expressed disapproval, where it was indicated that what would vest in the official Assignee would include the actual unpartitioned separate interest of a Hindu coparcener in the immovable property of a joint family—vide 6 Lah. 1. [1]

[19] To sum up then, we are of opinion that the judgments of their Lordships of the Privy Council in 6 Lah. 1[1] and in 17 Lah. 644 [2] have not altered the law as laid down by this Court and its predecessor in respect of the vesting of a Hindu father's right to sell his son's shares in the undivided joint family property for his antecedent debts, in the Receiver when the father is adjudged an insolvent. The *cursus curiae* of this Court remains undisturbed and the question is answered in the affirmative.

S. C. *Answered in affirmative.*

A. I. R. (35) 1948 Nagpur 219 *[C. N. 74.]*

NIYOGI J.

Hajrabi w/o Abdul Jalil and others—Defendants—Applicants v. *Md. Ibrahim s/o Md. Sharif, Plaintiff and others, Defendants—Non-Applicants.*

Civil Revn. No. 407 of 1944, Decided on 5-4-1946, from order of Sub-Judge, 1st class, Daryapur, D- 17-7-1944.

(a) Court-fees Act (1870), S. 12—Order accepting plaintiff's valuation — Revision — Civil P. C. S. 115.

Where the Court disallows defendant's objection as to valuation in plaint and accepts plaintiff's valuation and the question of jurisdiction is not involved, no revision lies against such order as a rule of practice and the question of court-fee can be left over to be determined in an appeal from the decree. But where the question of jurisdiction is also involved, it is expedient to entertain revision petitions under S. 115, Civil P. C. so that the question of jurisdiction may be determined at the outset. 25 A. I. R. 1938 Nag. 122 (F. B.) *Foll., Case law discussed.* [Paras 4, 5]

Annotation : ('44-Com) Court-fees Act. S. 12 N. 13 Pts. 9, 10, ('44 Com) C. P. C. S. 115 N. 27b pt. 2

(b) Court-fees Act (1870), Ss. 7 (iv) (c) and 17—Suit for cancellation of document and for possession —Valuation—Payment on entire value of property not necessary —Separate court-fee not to be paid for relief of possession.

A suit for cancellation of a deed of gift and for the recovery of portion of the property covered by the deed is governed by S. 7 (iv) (c). Plaintiff has to state the amount at which he values the suit. He need not pay court-fee on the entire value of the property as S. 40 Specific Relief Act, allows cancellation of a document in part. Plaintiff is not liable to pay court-fee on the relief of possession under S. 7 (v) as that claim is only ancillary to the main claim of cancellation of the document: *Case law discussd.* [Paras 10, 11, 12]

Annotation : ('44-Com) S. 7 (iv) (c), N 5 pt. 3; S. 17 N. 4 pt. 2,

(c) Court-fees Act (1870), S. 7 (iv) (c)—Valuation of suits under—Power of Court to interfere.

Under S. 7 (iv) (c) the plaintiff has to state the amount at which he values his suit. But where the valuation by the plaintiff is fanciful or otherwise unreasonable Court can refuse to accept it : 26 A. I. R. 1939 Nag 50 (F. B.) *Rel. on.* [Para 10]

Annotation : ('44-Com) Court-fees Act 7 (IV) (c) N. 21 Pt. 7.

Cases referred:—

1. ('38) I. L. R. 1938 Nag. 106 : 25 A. I. R. 1938 Nag. 122 : 173 I. C. 329 (F. B.), Balaji Dhumnaji v. Mt. Mukta Bai.
2. ('43) I. L. R. 1943 Nag. 802 : 30 A. I. R. 1943 Nag. 315 : 209 I. C. 199. Pusaram v. Himmatrao
3. ('38) 16 Pat. 766 : 25 A. I. R. 1938 Pat. 22: 172 I. C. 840 (F. B.), Ramkhelawan Sahu v. Surendra Sahi
4. ('33) 56 Mad. 744 : 20 A. I. R. 1933 Mad. 506 : 144 I. C. 516 Secy of State v. Raghunathan.
5. ('41) 28 A. I. R. 1941 Cal. 518 : 196 I. C. 762, Rabindra Nath v. Girindra Mohan.
6. ('46) 1946 N. L. J. 110 : 33 A. I. R. 1946 Nag. 160 : 222 I. C. 194, Hiralalsa Ramchandrasa v. Rambhau Brijlal.
7. ('43) I. L. R. 1943 Nag. 440 : 30 A. I. R. 1943 Nag. 70 : 202 I. C. 613. Vinayakrao v. Mt. Mankunwarbai.
8. ('11) 7 N. L. R. 190 : 13 I. C. 864, Devidas v. Ramlal.
9. ('20) 16 N. L. R. 84 : 7 A. I. R. 1920 Nag. 243: 56 I. C. 360, Baldeo Prasad v. Ghasiram.
10. ('29) 25 N. L. R. 52 : 16 A. I. R. 1929 Nag. 71 : 118 I. C. 465, Baburao v. Balajirao.
11. ('38) 1938 N. L. J. 130, Mt. Thamabai, v. Lalsingh
12. ('32) 54 All. 812 : 19 A. I. R, 1932 All. 485 : 139 I. C. 32 (F. B.), Kalu Ram v. Babu Lal.
13. ('31) 10 Pat 432 : 18 A. I. R. 1931 Pat 78 : 130 I. C. 46, Kamla Prasad v. Jugarnath Prasad.
14. ('15) 38 Mad. 1184 : 2 A. I. R. 1915 Mad. 550 : 25 I. C. 683, Rajagopala v. Vijayaragbavalu.
15. ('27) 14 A. I. R. 1927 Mad. 825 : 105 I. C. 171, Venkata Narasmiha Raju v. Chandrayya.
16. ('32) 19 A. I. R. 1932 Mad. 491 : 138 I. C. 303, Govindan Nair v. Madhavi.
17. ('38) I. L. R. (1938) Nag. 558 : 26 A. I. R. 1939 Nag. 50 : 180 I. C. 271 (F. B.), Motiram v. Daulat.
18. ('03) 30 Cal 738 : 30 I. A. 139 : 8 Sar. 489 (P. C.), Balkishen Das v. Ram Narain Sahu.
19. ('33) 56 Mad. 401 : 20 A. I. R. 1933 Mad. 231: 142 I. C. 29, Thangachi Ammal, v. Mahomed Moideen.

V. L. Prabhune and C. P. Kalele—for Applicants.

P. R. Padhye—for Non-Applicants.

Order.—This is an application to revise an interlocutory order of the Subordinate Judge, First Class, Daryapur, passed in civil suit No. 209-A of 1944 on 17th July 1944. By that order the lower Court accepted the valuation for court-fees and jurisdiction as put by the plaintiff and permitted the suit to proceed.

[2] One Mahomed Shareef died on 29-3-1943 survived by his three widows named Mt. Binnabi, Mt. Gulabbi and Mt. Bunabi, and a son named Mahomed Ibrahim, and a daughter named Mt. Rahimbi. Within a month of the death of Mahomed Shareef, there arose disputes among his heirs which were apparently sought to be settled on 20-4-1943 by the execution of 4 documents by Mt. Binabi, Mt. Gulabbi and Mahomed Ibrahim as

follows: A gift deed in favour of Abdul Jalil (defendant 1) comprising two revenue paying fields of the market value of R. 6,000. A gift deed in favour of Mahomed Yasin (defendant 4) comprising one field of the market value of Rs. 200. A gift deed in favour of a Musjid (represented by *panchas* defendants 5 to 10) and comprising one field of the market value of Rs 400. A partition deed of the rest of the property was executed by the two widows and the son whereby it was divided into 2 lots, one of which was allotted to Mahomed Ibrahim, Mt. Bunabi and Mt. Rahimbi jointly and the other to Mt Binnabi and Mt. Gulabbi jointly. The suit out of which this proceeding arises was instituted by Mahamed Ibrahim for a declaration that the above-mentioned 4 documents were void and inoperative as against him on account of misrepresentation, fraud and undue influence and for a fresh partition and possession of his share of the property left by his father.

[3] The suit for purposes of court-fees and jurisdiction, was valued as follows: For Court-fees: The fields which were comprised in the three gift deeds were valued on the basis of the land revenue assessed on them, the land revenue Rs. 234; plaintiff's share (9 annas 4 pies) of the land revenue Rs. 136-4-0 × $7\frac{1}{2}$=1053-8. The relief in regard to partition of the property was valued at Rs. 200. Total for court-fees Rs. 1253-8-0. For jurisdiction: the suit was valued at Rs. 136-4-0 X 15=2047-8-0 + 200-0-0=2247-8-0. In the lower Court the defendant objected to the valuation on the ground that the valuation for court-fees and jurisdiction should have been on the basis of the market value, and contended, on that view, that the suit was beyond the jurisdiction of the lower Court. The lower Court held that the suit was properly valued both for purposes of court-fees and jurisdiction on the basis of the land revenue.

[4] It is contended *in limine* that an application for revision does not lie as the lower Court accepted the plaintiff's valuation. The point was debated at some length with citation in I. L. R. (1938) Nag. 106,[1] I. L. R. (1943) Nag. 802,[2] 16 Pat. 766,[3] 56 Mad. 744[4] and A. I. R. 1941 Cal. 518[5] to show that the view which I had taken in 1946 N. L. J. 110[6] was erroneous. The authorities no doubt make a distinction between an order demanding additional court-fees and an order accepting the court-fees paid by the plaintiff while considering the question of the exercise of revisional jurisdiction. But in principle there is really no basis for any such distinction. If refusal of the Court to proceed with the suit unless the plaintiff pays additional court-fees is regarded as failure to exercise jurisdiction, it may also be said on the other hand that the Court wrongly accepting inadequate court-fees and permitting the suit to proceed would be wrong assumption of jurisdiction.

[4A] The controversy is usually raised by the defendant, involving questions of court-fees and jurisdiction or court-fees alone, by saying that the suit is under-valued. If the Court accepts the defendant's plea, it calls upon the plaintiff to make up the deficit court-fees and refuses to proceed with the suit unless that is done. This is regarded as a refusal to exercise jurisdiction. On the other hand, the Court may reject the defendant's contention and accept the plaintiff's valuation. In this case if the Court is wrong in rejecting the defendant's contention it would be permitting the under-valued and under-stamped suit to proceed which it would have no jurisdiction to do. Is it not a wrong assumption of jurisdiction? Why should the High Court entertain the revision petition only where the Court accepts the defendant's contention and not otherwise? The Court cannot give itself jurisdiction which it does not possess by taking an erroneous view of the law. Even in cases in which the question of the amount of court-fees alone is involved, the error of the Court in accepting court-fees as paid by the plaintiff may be manifest on the face of it as it was in 1946 N. L. J. 110.[6] In such a case a party who contests the correctness of the Court's order is not entitled to invoke the provisions of S. 115, Civil P. C.; but if he applies for revision only to draw the attention of the High Court to the manifest error would it be wrong for the High Court of its own motion to take action under S. 12 of the Court-fees Act and rectify the error? The revisional jurisdiction is entirely discretionary which the High Court may exercise in any manner that it deems reasonable and proper. Nevertheless I agree that the view expressed in I. L. R. (1938) Nag. 106[1] should be adopted as a rule of practice; and the cases in which the question of court-fees, not involving also the question of jurisdiction, can well be left over to be determined in an appeal from the decree.

[5] In the present case, the question of court-fees is mixed up with that of jurisdiction. If the rule enunciated in I. L. R. (1938) Nag. 106[1] is applied, this revision petition could not even be admitted. What would be the result? The suit would proceed to its termination in the Subordinate Judge's Court and an appeal would be preferred against it. If the appellate Court would agree with the defendant, the whole proceeding would have to be declared null and void and the plaint would have to be returned for presentation to proper Court i. e., a Court which is competent to try a suit of the value upwards of Rs. 5,000. What a waste of time, money and labour it will be? It is therefore expedient in

cases such as this, involving question of jurisdiction, to entertain revision petitions under S. 115, Civil P. C., so that the question of jurisdiction may be determined at the outset on the principle underlying S. 21, Civil P. C.

[6] The questions raised in this case are of a complex character and it is therefore necessary to analyse the claim for reliefs prayed for by the plaintiff in respect of each of the several documents.

(A) Gift deed in Jalil's favour comprises fields assessed to	...	Rs. 218-12-0 worth Rs. 6,000.
(D) Gift deed in Yasins' favour comprises 1 field assessed to	...	Rs. 6-0-0 worth Rs. 200.
(E) Gift deed in favour of mosque comprises 1 field assessed to	...	Rs. 8-11-0 worth Rs. 400.
		Rs. 233-7-0 Rs. 6600

In the partition deed property (including fields and houses) worth Rs. 1091-0 3 was allotted to the plaintiff and Mt. Rahimbi and property worth Rs 887-15-3 was allotted to Mt. Binabi and Mt. Gulabbi.

[7] The plaintiff was out of possession of all property except that portion which fell to the joint share of himself and Mt. Rahimbi. The plaintiff was a party to the execution of the gift deeds as well as the partition deed. On the allegations of fraud etc., he prayed for a declaration that the gift deeds and the partition-deed be declared void and as consequential reliefs asked for possession of the fields comprised in the gift deeds and for partition of the whole property included in the gift and partition deeds.

[8] I shall take up the question of the gift deeds. The defendants' (applicants') contention is that the case is one which falls to be governed by s 7 (iv) (c), Court-fees Act, for the reason that as he was himself a party to the execution of these gift deeds, he cannot merely ask for a declaration that they were void but also that they should be cancelled. That the plaintiff in such a case as this cannot evade payment of court-fees on the consequential relief by merely asking for a declaratory relief is now well settled: *see* I. L. R. (1943) Nag. 440.[7] But the point here is that he does ask for consequential relief viz., the possession of the fields. Is the plaintiff to pay separate court-fees on the relief of cancellation in addition to what he had paid for the relief of possession? The learned counsel on either side debated the point at great length with citation in 7 N. L. R. 190,[8] 16 N. L. R. 84,[9] 25 N. L. R. 52,[10] 1930 N. L. J. 180[11] 54 ALL 812,[12] and 10 Pat. 482[13] but could not find the answer. As I looked up the authorities I am inclined to think that recent Madras decisions lend some guidance to the solution of the problem. In 38 Mad. 1184[14] the plaintiff prayed for a declaration that a decree was of no legal effect and for possession of properties affected by it. He paid court fees as follows:

Court-fee for declaration ... Rs. 10/-
Court-fee for possession of properties on Rs. 500/- being five times the kist of the lands sought to be recovered. ... Rs. 37/8/-

The District Munsif held that the prayer for the declaration was a substantial relief and that the plaintiffs must value their relief for declaration at Rs. 2400/- the amount of the decree sought to be set aside, in addition to the court-fees paid for the relief of possession. On appeal the District Judge, holding that S. 7. (iv)(c), Court-fees Act was applicable, accepted the plaintiffs' valuation of the reliefs and set aside the Munsifs' order. The question was considered by the Division Bench of the High Court under S. 115, Civil P. C., (in spite of the fact that the District Judge had accepted the plaintiffs' valuation) and the learned Judges held that the District Judge was mistaken in thinking that S. 7 (v) (c), Court-fees Act regulated the valuation of the whole suit, since part of the relief claimed was possession which has to be valued in accordance with S. 7 (v), notwithstanding that a declaration was asked for; but they agreed with the District Judge that the two prayers could not be regarded separately as the possession was not asked for on any other ground than that the decree in execution of which it was lost, should be declared invalid. It was conceded in that case that the two reliefs could not be valued independently and that the relief of possession was merely consequential.

[9] By Act V of 1922, the Provincial Legislature of Madras amended sub-section (iv) of S. 7 Court-fees Act by introducing clause (iv-A) to provide specifically for cases of cancellation of decrees and other documents. According to it, in a suit for cancellation of a decree or other instrument, the court fees were prescribed to be paid according to the value of the subject-matter of the suit; such value was deemed to be

"if the whole decree or other document is sought to be cancelled, the amount of the value of the property for which the decree was passed or other document executed; if a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property."

With reference to this enactment the question arose whether the "value of the property" meant market "value" or "statutory value" as laid down in S. 7 (v), Court-fees Act. In A. I. R. 1927 Mad. 825[15] it was held that in a suit to set aside a decree the court-fees were payable on the basis of the statutory and not the market

value if the property was revenue-paying land. In A. I. R. 1932 Mad. 491,[16] which was a suit for setting aside a partition deed, the court-fees were allowed to be paid on the statutory value of the subject-matter of the suit, following the last mentioned case.

[10] I am not concerned here with the local amendment of S. 7 (IV), Court-fees Act made in Madras but with the interpretation put on the word "value". Since, in our Province, in the absence of such an amendment of the Court-fees Act, the suit for cancellation of a document would fall under S. 7 (iv) (c), it has to be considered whether the market value or the statutory value should be taken to be the basis for calculation of court-fees. In cases such as mortgage deeds or decrees for money or even sale deeds, the question may well arise, as it did in 7 N. L. R. 190,[8] 16 N. L. R. 84,[9] 25 N. L. R. 52,[10] whether the court-fees are payable on the amount, the payment of which the plaintiff seeks to avoid or the value of the property in dispute; but in the present case the question relates to a gift deed which comprises only the revenue-paying fields. It therefore stands on a better footing than the decree, which was the subject-matter of the suit in A. I. R. 1927 Mad. 825.[15] As the suit falls under S. 7 (iv) (c), the plaintiff has to state the amount at which he values his suit. He has stated the value to be 7½ times the land revenue payable on the fields. Can the Court refuse to accept his valuation? The answer is yes, but that is subject to a qualification viz., that the plaintiff's valuation is fanciful or otherwise unreasonable. This was pointed out in I. L. R. (1938) Nag. 558[17] at p. 566. It cannot be said that the plaintiff's valuation is unreasonable since that would be the right valuation if the plaintiff had brought a suit for possession only. As the learned Judges point out in A. I. R. 1927 Mad. 825,[15] where special rule of valuation is provided by law itself, it is but proper to follow that rule rather than adopt any other method.

[11] The next question is: Has the plaintiff to pay court-fees on the entire value of the property or only a part of it commensurate with his share in it? It is contended that since the document has to be cancelled, court-fees must be paid in full. I do not see my way to accede to this contention in view of S. 40, Specific Relief Act, which permits of cancellation of a document in part. I may as well advert here to 30 Cal. 738[18] in which case their Lordships of the Privy Council pointed out that a person aggrieved with a partition could sue to set it aside so far as it affected himself (ibid p. 752).

[12] Now, it may be recalled that the plaintiff has paid court-fees only for the relief of possession but has not paid court-fees for the relief of cancellation. The question is, should he be called upon to pay double set of court-fees? I think, he should not be. In 56 Mad. 401[19] it was held that in a suit for cancellation of a sale deed and for the recovery of possession of the property covered by the deed, the plaintiff is not liable to pay court-fees on the relief with regard to possession under S. 7 (v), Court fees Act because the claim for possession is only ancillary to the main claim which is the setting aside of the sale deed. This view accords with the local amendment of S. 17, Court-fees Act made by C. P. and Berar Act I of 1941, (*vide* proviso to section 17 (2)). That disposes of the question relating to the three gift deeds.

[13] As to the partition-deed, the plaintiff had paid only Rs.20 as for declaration but has not paid on the relief of cancellation. He was one of the executants of the partition deed and he cannot reopen the transaction unless he obtains cancellation of that deed. He must therefore pay court-fees on his 7/12th share of the value of the property comprised in that deed. It is as follows:—

S. No./2	Assessment 50	
96/1	49-5 3	
9/1	20-6-0	
8	46-8-0	
8/2	32-8-0	
14	63-14-3	
	262-9-6 x7 ½	=1968-12-0
House worth	250	
House worth	400	
3 mango trees.	6	
	656	656-0-0
		2624-12-0

The plaintiff must pay court-fees on 7/12th of 2624 12 0=1531 in round figure for the relief of cancellation. He need not pay for the relief of possession.

[14] The value for jurisdiction will be as follows:—

Gift deeds—plaintiff's 7/12th share of the total assessment.	—	136-4-0 x 15	=2043-12-0
Partition deed: (a) Fields	-Do-	153-4-0 x 15	=2298-12-0
(b) Houses and trees worth	—	656-0-0	
		4998-8-0	

As the value for jurisdiction does not exceed Rs. 5,000, the suit is triable by the lower Court. The case is sent back to the lower Court with direction to recover court-fees on Rs. 1531 on account of the relief relating to the partition deed.

[15] I make no order as to costs as the success is equally divided between the parties.

D.R.R. *Order accordingly.*

A. I. R. (35) 1948 Nagpur 223 *[C. N. 75.]*

SHEVDE J.

Attarsingh Bisan Singh and others — *Applicants* v *Manoharsingh Natha Singh and others* — *Non-Applicants.*

Civil Revn. No. 298 of 1944, Decided on 25-7-1947, from order of 4th Sub-Judge, 2nd Class, Nagpur, D/- 4-5-1944.

(a) Court-fees Act (1870), S. 7 (iv) (c) and S. 7 (iv) (f)—Mode of valuation of plaint — Valuation by plaintiff — Arbitrary valuation — Power of Court to interfere under O. 7, R. 11, Civil P. C.

The principle underlying S. 7 (iv) (c) and S. 7 (iv) (f) is substantially the same. In both the cases it is for the plaintiff to put his valuation whether it is a case of consequential relief or whether it is a case of accounts. Ordinarily the Court should not endeavour to correct the plaintiff's valuation except in a clear case where the disparity is so great as to show that the plaintiff has not endeavoured to fix a fair value at all but has simply set down a figure which is unreasonable and bears no relation to the value of the right litigated. When the valuation put for court-fee purposes by the plaintiff on a relief sought by him in a suit appears to be arbitrary and unreasonable the Court may reject the plaint and leave the plaintiff to correct the valuation or have the suit rejected. There is nothing in the Court-fees Act which shows that in this type of case the power which the Court is given by the Civil P. C. to challenge an undervaluation is taken away and if the Court thinks that the value assessed is unreasonable there is no reason why it should not treat that unreasonable valuation as an undervaluation and exercise its powers under O. 7, R. 11, Civil P. C: 26 A.I.R. 1939 Nag. 50 (F B.), *Foll.*; 30 A. I. R. 1943 Pat. 102, *Ref.*;28 A. I. R. 1941 Rang. 322 (F. B.), *Dissent.* [Para 3]

Annotation:— ('44-Com) Court-fees Act, S. 7 (iv) (c) N. 21 pt. 7.

(b) Court-fees Act (1870), S. 11—Undervaluation of plaint — Court's powers.

There is nothing in S. 11 that takes away the power of the Court to challenge an undervaluation in the plaint. [Para 5]

('44-Com) Court-fees Act, S. 7 (iv) (c) N. 21.

Cases referred:—

1. ('38) I. L. R. (1938) Nag. 558 : 26 A. I. R. 1939 Nag. 50 : 180 I. C. 271 (F. B.), Motiram v. Daulat.
2. ('42) 21 Pat. 720 : 30 A. I. R. 1943 Pat. 102 : 206 I. C. 241, Hasan Mirza v. Bakar Hasan.
3. Misc F. A. No. 257 of 1939, D/- 12-1-1944, Fakir Singh v. Messrs, Nathu Singh.
4. ('41) 28 A. I. R. 1941 Rang. 322 : 1941 Rang. L. R. 512 : 198 I. C. 414 (F. B.), Maung Ya v. Maung Lu Gyaw.
5. ('42) 1942 N. L. J. 197, Motilal v. Gulabsa.
6. ('42) I. L. R. (1942) Mad. 455 : 29 A. I. R. 1942 Mad. 247 : 201 I. C. 261, Khaja Moideen v. Abdul Gaffoor.

B. R. Mandlekar — for Applicants.

P. Lobo and H. N. Vaidya — for Non-Applicants, Nos. 1; and 2 and 3, respectively.

Order. — The plaintiff (non-applicant No. 1 before me) filed this suit for accounts of a dissolved partnership or for dissolution and accounts under the Partnership Act valued at Rs. 150/- for the purposes of court-fees as well as jurisdiction. On the face of the plaint, the business of partnership between the parties was a big concern as it involved the work of constructing buildings and taxi-trucks, and other construction work in the Nagpur Aerodrome Area under the Central Public Works Department, Aviation Division, Nagpur, worth over a lac of rupees. After the institution of the suit, the plaintiff filed an application (interlocutory application No. 1) for the appointment of a Receiver on 29-3-1944 on the ground that the second defendant Budh Singh (who died during the pendency of this revision leaving him surviving a widow and 5 sons, non-applicants Nos. 4 (a) to (f)) had fraudulently contrived to obtain and disburse an amount of Rs. 1,42,143-15-6 on 28-2-1944 on behalf of the partnership from the office of the Executive Engineer, Aviation Division, Central Public Works Department, Nagpur, in spite of notices served on the defendants individually on 25-11-1943 to the contrary. It was also alleged that all the valuable and relevant documents concerning the business were removed from Nagpur to Akola in Berar where 3 of the defendants reside with a view to preventing the plaintiff from having any access thereto and to causing him loss and annoyance. On 30-11-1944 the plaintiff also filed an application (interlocutory application No. 10) for attachment before judgment under O. 38, R. 5, Civil P. C., and there again he complained that Budh Singh (defendant 2) had drawn other sums totalling to Rs. 5,72,000/- on various dates, which he had partly paid to defendents 3 and 5 and 6 to the exclusion of the plaintiff. It was contended that this money belonged to the partnership in suit and was deposited in the Imperial Bank of India, Nagpur, and that out of this sum defendant 2 had drawn a sum of Rupees 2,90,000 in his favour. In view of the large and extensive business of the partnership worth over a lack of rupees the defendants applied to the lower Court and contended that the plaintiff had deliberately and arbitrarily undervalued his relief and that his valuation at Rs. 150 for the purposes of court-fees and jurisdiction was palpably low and absurd. It was further contended that in any case the valuation ought to be in excess of Rs. 5,000 which he had actually contributed as his share of capital for the partnership and filed his suit in a higher Court so as to be able to agitate the dispnte in the High Court by way of first appeal. The plaintiff has by putting such a low valuation deliberately filed his suit in the Court of the 4th Subordinate Judge, 2nd Class, Nagpur, with a pecuniary jurisdiction of Rs. 500 only so as to deprive the defendants of their right to appeal to the High Court. If the plaintiff's suit is correctly valued the Court of the 4th Subordinate Judge, 2nd Class, will have no jurisdiction to try it and the plaint will have to be returned for presentation to the proper Court.

[2] The lower Court, relying upon some observations in the Full Bench case reported in I. L. R. (1938) Nag. 558[1] and divorced from the context, rejected the defendants' application and negatived their contention on the ground that the Court was powerless to challenge the valuation put by the plaintiff on the relief claimed in the suit. It is against this order that Attarsingh, Harnamsingh and Harbuxsingh (defendants 4 and 6) have jointly preferred this revision.

[3] It is contended by Mr. B. R. Mandlekar advocate for the applicants that the lower Court did not correctly appreciate the principles of law as laid down in the Full Bench case in I. L. R. (1938) Nag. 558[1] and he pointedly referred to the discussion of the matter at pp. 569 to 571. It is no doubt true that the question about the court-fees before the Full Bench was in regard to a case under S. 7 (iv) (c) of the Court-fees Act and that the point for decision before me relates to a case under S. 7 (iv) (f) of the Court-fees Act. In my view the principle underlying both these provisions is substantially the same. In both the cases it is for the plaintiff to put his valuation whether it is a case of consequential relief or whether it is a case of accounts. It is held by the Full Bench that ordinarily the Court should not endeavour to correct the plaintiff's valuation except in a clear case where the disparity is so great as to show that the plaintiff has not endeavoured to fix a fair value at all but has simply set down a figure which is unreasonable and bears no relation to the value of the right litigated and it is further held that when the valuation put for court-fee purposes by the plaintiff on a relief sought by him in a suit appears to be arbitrary and unreasonable the Court may reject the plaint and leave the plaintiff to correct the valuation or have the suit rejected. Their Lordships have observed that there is nothing in the Court-fees Act which shows that in this type of case the power which the Court is given by the Civil Procedure Code to challenge an undervaluation is taken away and if the Court thought that the value assessed was unreasonable there was no reason why it could not treat that unreasonable valuation as an undervaluation and exercise its powers under O. 7, R. 11, Civil P. C.

[4] The learned counsel for the applicants also relied on 21 Pat. 720[2] in support of his contention that the mere admission of a plaint or appeal did not operate to deprive the Court of the power to reject it for insufficiency of court-fee under O. 7, R. 7, Civil P. C., 1908. It was further contended that regard being had to the nature of the partnership transactions involving thousands of rupees and to the fact that this partnership was assessed to excess profit taxes to the extent of a lac of rupees or more and also the fact that the Court will be required to examine such extensive accounts between the parties for the purpose of ascertaining the plaintiff's 1/7th share of the profit of partnership, it is quite obvious that the plaintiff's valuation of his relief of Rs. 150 for the purpose of court-fees and jurisdiction is manifestly low and unreasonable and it is the duty of the Court to correct the valuation and in case the proper valuation exceeds the jurisdiction of the Court to return it for presentation to the proper Court. It is further contended that the view of the lower Court that it is powerless and has no jurisdiction to correct the valuation is not tenable in law and that the lower Court has failed to exercise the jurisdiction that vests in it under S. 115, Civil P. C.

[5] The learned counsel appearing on behalf of the plaintiff (non-applicant No. 1 here) contended that it might turn out after the rendition of accounts that the plaintiff might not be found to be entitled to the relief of Rs. 150 as valued in the plaint. It was also argued that in case the plaintiff is eventually found entitled to any amount in excess of Rs 150 he will not be allowed to execute the decree unless he has made up the deficit court-fee under S. 11 of the Court-fees Act and that in any case there will be no loss of revenue. It should be borne in mind that S. 11 of the Act will come into play only after the final decree is passed as it would be by virtue of a final decree that the plaintiff's share would be definitely ascertained. My attention in this connection was drawn to a Division Bench case, viz., Misc. F. A. No. 257 of 1939.[3] A similar argument based on the provisions of S. 11 of the Court-fees Act was put forward in that case, but it was repelled by their Lordships on the ground that there was nothing in S. 11 that took away the power of the Court to challenge an undervaluation in the plaint.

[6] The learned counsel for the plaintiff (non-applicant No. 1) relied upon A. I. R. 1941 Rang. 322[4] at p. 323 and 1942 N. L. J. 197.[5] The Rangoon case was a suit for administration being suit for accounts and there is conflict of decision whether a suit for administration is a suit for accounts for purposes of S. 7, para. (iv), cl. (f) of the Court-fees Act. The Madras High Court has recently decided in I. L. R. (1942) Mad. 455[6] that a suit for administration is not a suit for accounts and is not governed by this clause. In any case whether a suit for administration is one for accounts or not I am not, with great respect to the learned Judges of the Rangoon High Court, inclined to accept the extreme position laid down by them that the plaintiff is entitled to place his own valuation on the relief

sought and that it cannot be challenged by the Court under any circumstances. That the remedy suggested by them to the aggrieved defendant who considers that the relief has been undervalued and he is being deprived of his rights of appeal thereby lies under S. 24, Civil P. C., does not appeal to me as correct. Their Lordships suggest that in case the amount eventually found due to the plaintiff in a suit for accounts exceeds by far the plaintiff's valuation the aggrieved defendant should either move the High Court or the District Court for a transfer of the suit or appeal or other proceeding to any Court subordinate to it and competent to try or dispose of the same. Manifestly this remedy is obviously unworkable for the simple reason that the valuation of the lis continues throughout all its stages up to the termination of the lis and it would be apparently very difficult to persuade the High Court to transfer the appeal from the file of the District Court to its own file under the provisions of S. 23, Civil P. C., merely because the amount that is found due to the plaintiff has exceeded the plaintiff's valuation to such an extent that first appeal lay only to the High Court. The Nagpur case can be distinguished from the present case in so far as in that case there was no difficulty of jurisdiction being ousted in case the plaintiff's valuation was corrected by the Court.

[7] I think that there is ample material on the record to show that the plaintiff's valuation at Rs. 150/- is manifestly low and unreasonable and the lower Court had had full jurisdiction to correct it. I do not think that in the circumstances of the case it is fair and just to allow the plaintiff to carry on his litigation till the end, and then in the event of his success enable him to offer the deficit court-fees and reap full benefit of his decree. I allow the revision petition and set aside the order of the lower Court and direct it to enquire into the matter and decide the question of correct valuation of the plaintiff's relief in the suit. The costs of this application should be borne by the plaintiff (non-applicant No. 1). Counsel's fee Rs. 100/- as certified.

D.R.R. *Revision allowed.*

A. I. R. (35) 1948 Nagpur 225 *[C. N. 76.]*

PADHYE J.

Raghunathdas Madangopal Bhangade Shop — Plaintiff — Applicant v. *Warlu Bapu Maral and others—Defendants —Non-Applicants.*

Civil Revn. No. 169 of 1946, Decided on 28-3-1947, against decree of Civil Judge, Second Class, Warora, D/- 1-2-1946.

1948 N/29 & 30

Limitation Act (1908), Art. 75 — Applicability — Instalment bond with exigibility clause — Starting point—Waiver—What amounts to.

A suit on an instalment bond with an exigibility clause is governed by Art. 75. The cause of action to recover the entire debt starts when the exigibility clause comes into operation unless the payee or the obligee waives the benefit. Once the exigibility clause comes into operation the primary terms about repayment are superseded and the cause of action to recover all the instalments due or not due under the original agreement accrues. The creditor thereafter cannot take advantage of the primary terms and sue for those instalments only which are within limitation on the strength of the primary contract terms. The exigibility clause is for the benefit of the creditor and he has a right to waive that benefit even in the absence of a fresh agreement, a fresh consideration or a fresh bilateral arrangement. Where the benefit of the exigibility clause when it comes into operation on the first occasion is waived, the cause of action accrues when fresh default is made in respect of which there is no waiver. Waiver is a mixed question of law and fact and it has to be properly pleaded and proved by the creditor. A choice left to the creditor in the default clause itself is inconsequential. A mere inaction on the part of the creditor such as an abstinance to sue or a mere receipt of payment does not amount to a waiver. What is required is some overt act on the part of the creditor communicated to the debtor. The payment by the debtor and the acceptance by the creditor specifically made towards the satisfaction of a particular defaulted instalment would amount to a waiver of that default and of the benefit arising out of that default: *Case law discussed.* [Paras 5, 6 and 12]

Annotation : — ('42-Com.) Lim. Act, Art. 75 N. 8 Pt. 3; N. 10 Pt. 1; N. 11; N. 15 Pt. 3.

Cases referred :—

1. ('32) 28 N. L. R. 44 : 19 A. I. R. 1932 Nag. 1 : 135 I. C. 414 (F.B.), Vishwanath v. Sadashiva.
2. ('43) I.L.R. (1943) Nag. 630 : 29 A. I. R. 1942 Nag. 138 : 203 I. C. 250, Gulabrao v. Ganpati.
3. ('32) 7 Luck. 442 : 19 A. I. R. 1932 P. C. 207 : 59 I. A. 376 : 138 I. C. 779 (P. C.), Lasa Din v. Gulab Kunwar.
4. ('26) 53 Cal. 277 : 13 A.I.R. 1926 Cal. 789 : 96 I. C. 594, Basanta Kumar Singh v. Nabin Chandra.
5. ('35) 57 All. 108 : 21 A. I. R. 1934 All. 661 : 151 I. C. 585 (F.B.), Jawahar Lal v. Mathura Prasad.
6. ('47) 34 A. I. R. 1947 All. 38 : I. L. R. (1946) All. 711 : 225 I. C. 122, Bhagwati Prasad v. Chatrapal.
7. ('34) 30 N.L R. 314 : 21 A.I.R. 1934 Nag. 180 : 151 I. C. 97, Shamrao v. Moreshwar.
8. ('33) 20 A. I. R. 1933 P. C. 233 : 58 Bom. 101 : 60 I. A. 368 : 146 I. C. 739 (P. C.), Flerrie Edridge v. Rustomji.
9. ('25) 47 All. 552 : 12 A.I.R. 1925 All. 499 : 87 I. C. 162, Kanhai v. Amrit.
10. ('11) 7 N. L. R. 147 : 12 I. C. 741, Ballabhdas v. Dalipsingh.
11. ('39) 18 Pat. 459 : 26 A. I. R. 1939 Pat. 433 : 183 I. C. 523 (F. B.), Gokhul Mahton v. Sheo Prasad Lal.
12. (1878) 8 Ch. D. 201 : 47 L. J. Ch. 644 : 38 L. T. 286 : 26 W. R. 552, Keene v. Biscol.
13. ('35) 57 All. 561 : 21 A. I. R. 1934 All. 1039 : 153 I. C. 205, Sukh Lal v. Bhoora.

P. K. Tare—for Applicant.
R. G. Siras—for Non-applicants.

Order.—This is a civil revision by the plaintiff against the dismissal of his suit based on an instalment bond dated 27-4-1936 for Rs. 231-4-0 payable by 9 annual instalments on the follow.

ing dates : Rupees 25 on 27-4-1936. Rs. 25 on 10-5-1937. Rs. 25 on 30-4-1938. Rs. 25 on 9-4-1939. Rs. 25 on 7-5-1940. Rs. 25 on 26-4-1941. Rs. 25 on 15-4-1942. Rs. 25 on 4-5-1943. Rs. 25 on 22-4-1944. It is further stipulated that interest at 1-8-0 p.c. p.m. would be paid on defaulted instalments and the entire amount would become payable on default of any three instalments.

[2] The defendant paid the following amounts: Rupees 25 on 27-4-1936. Rs. 25 on 23-8-1937. Rs. 25 on 7-6-1938. Rs. 25 on 8-2-1940. Rs. 10 on 28-4-1942.

[3] The pleadings in the case are, as usual, not clear and much is left merely to inferences. The plaintiff put down the cause of action for the suit on 15-4-1942, i. e., on default of the 7th instalment and pleaded that the first four instalments were satisfied. Waiver is not pleaded expressly. What was however implied was that the defaults in payment of the second, third and fourth instalments on due dates were waived when the debtor paid the amounts on 23-8-1937, 7-6 1938 and 8-2-1940 as instalments and were received and appropriated by the creditor as instalments. It is on that basis that the plaintiff regarded the fifth, sixth and seventh instalment as defaulted instalments bringing into operation the exigibility clause.

[4] In the absence of an express plea of waiver the lower Court dismissed the plaintiff's suit *in limine* as barred by limitation. Relying on 28 N. L. R. 44[1] and I. L. R. (1943) Nag. 630[2] it held that mere forbearance to sue after the operation of the exigibility clause does not amount to a waiver. The extracts of account books which the plaintiff had filed were returned to him and they are again produced in this Court.

[5] It is beyond dispute that the article of the Limitation Act which governs a suit on an instalment bond with an exigibility clause is Article 75 of the Act. It is equally beyond dispute that the decision of their Lordships of the Privy Council in 7 Luck. 442[3] does not apply to suits falling under Article 75, Limitation Act. The cause of action to recover the entire debt starts when the exigibility clause comes into operation unless the payee or the obligee waives the benefit; where the waiver of the benefit of the exigibility clause when it came into operation on the first occasion is pleaded and proved, the cause of action accrues when fresh default is made in respect of which there is no waiver.

[6] It was at one time thought that waiver was not necessary to be pleaded and proved when the clause in the bond sued upon itself left an option to the creditor to take or not to take the benefit of the exigibility clause. It was also thought that the plaintiff was in any case entitled to recover such instalments as were within limitation on the basis of the primary term regarding the payment of instalments. Both these contentions are now set at rest. It was pointed out by the Full Bench of the Judicial Commissioner's Court in 28 N. L. R. 44[1] following 53 Cal. 277[4] that the wording of the clause was immaterial. It was observed that the question is not what the creditor should do but what the debtor was liable for. The same view is taken in a very recent Full Bench decision of the Allahabad Hign Court reported in 57 ALL 108[5] and also in A. I. R. 1947 ALL 38.[6] Thus it is absolutely necessary in a suit falling under Article 75 of the Limitation Act, and not instituted within 3 years of the operation of the exigibility clause that the creditor must plead and prove that he waived the benefit of the exigibility clause when it operated. Once the exigibility clause comes into operation, the primary terms about repayment are superseded and the cause of action to recover all the instalments due or not due under the original agreement accrues. The plaintiff cannot thereafter take advantage of the primary terms and sue for those intalments only which are within limitation on the strength of primary contract terms: *vide* 30 N. L. R. 314,[7] 57 ALL 108.[5]

[7] Waiver, as has been observed by their Lordships of the Privy Council in A. I. R. 1933 P. C. 233[8] is a mixed question of law and fact and it is therefore necessary that it should be properly pleaded and proved. It is well established, as was held in 47 ALL 552[9] and other decisions that mere failure to sue does not amount to a waiver as contemplated by Article 75, Limitation Act. It is also held in 7 N. L. R. 147[10] and other cases that a mere payment and acceptance of an overdue instalment did not amount to a waiver of the defaulted instalment. On this point the decisions are not unanimous and the Calcutta High Court has consistently held that the acceptance of an overdue instalment amounts to a waiver of the default. The latter view has found favour with Manohar Lall J. in 18 Pat. 459[11] and I respectfully agree with that view. The learned Judge has pointed out and if I may say so with respect, quite correctly that where the creditor has accepted an overdue instalment it must be held that he has waived his right which accrued to him on that default and that the starting point of limitation would be from the next default, if not waived.

[8] The conflict of view as stated above is, in my view, more apparent than real. Even after the exigibility clause comes into operation, the creditor has to recover his debt and the debtor is liable to pay it. Thus in making a part payment of debt, the debtor discharges his

liability partially and the creditor gives him a discharge to that effect. This obviously does not amount to a waiver. A distinction should therefore always be made between the payment made by the debtor and accepted by the creditor specifically towards the satisfaction of the defaulted instalment and the payment made only towards the reduction of the debt. If the creditor chooses to accept the payment not merely towards the reduction of a debt but towards a specific defaulted instalment and appropriates it as such, then that instalment cannot after that date be still regarded as a defaulted instalment supporting the operation of the exigibility clause. A satisfied instalment and a defaulted instalment are contradictions in terms. Moreover in receiving a defaulted instalment as such there is an implied agreement if an agreement is necessary, that the creditor gives his right to treat that as a defaulted instalment.

[9] In 47 ALL. 552[9] Mukerji J. relied on the passage in Halsbury's Laws of England vol. 7, page 423, article 868 and took the view that waiver is, in effect, a substituted contract. With utmost respect I do not see my way to agree with this view. The passage from Halsbury was in respect of a substantive law of contract and in my opinion it has no application to the 'waiver of benefit' within Art. 75, Limitation Act, which is a procedural law. It is apparent from Art. 75, Limitation Act, that the default clause is for the benefit of the creditor. This was accepted by Bose J. in I. L. R. (1943) Nag. 630.[2] It follows, therefore, that one for whose benefit the clause is meant may waive the benefit of that clause without the consent of the other party. The choice is exclusively of the creditors. As Fry J. (as he then was) correctly observed in (1878) 8 Ch. D. 201.[12]

"Where a right has accrued it can be waived but to amount to waiver there must be something done which is inconsistent with the continuance of that right".

[10] I cannot improve upon the language employed by Sulaiman C. J. while discussing this aspect of the case in 57 ALL. 561[13] at p. 567 and I therefore reproduce what is observed there:

"It is not necessary that there should be either a fresh contract between the parties or a fresh consideration proceeding from the debtor in order to bind the creditor by his choice. It seems to me that the words 'waives the benefit' in Art. 75 do not mean the same thing as availing one-self of the equitable doctrine of waiver, for which either fresh consideration, a fresh agreement or something amounting to an estoppel is necessary. That doctrine is invoked against a creditor, whereas the waiver of the benefit spoken of in Art. 75 is something exercised for the benefit of the creditor and not against him. The waiver therefore may be a purely one-sided act and need not be for consideration proceeding from the debtor. The waiver may be by the expression of an intention to waive the benefit either by communication to the debtor or by any other overtact. Waiver is a mixed question of law and fact, and, as pointed out by my learned brother, it depends on the circumstances of each case.

. . . . . waiver is something more than mere inaction or omission. But in my opinion it is not necessary that it should amount to any novation of contract or any new agreement for consideration or that it should be any other bilateral agreement."

[11] In 18 Pat. 459[11] at pp. 478-479 Manohar Lall J., one of the Judges constituting the Full Bench, observed:

"The weighty observations of Lord Deman and Fry. J. quoted in the order of reference correctly indicate how this question should be determined. It is there laid down that mere failure to sue or inaction by the creditor is not a waiver of the default, something else must be established to show that the promisee has waived his right. For instance, his acceptance of an overdue instalment or his communicating to the promisor for a consideration that he will not insist upon his rights which have already accrued to him on the default which has taken place, or, it may be that the promisor himself approches the promisee or writes to him to stay his hands and not to proceed to demand the full amount and if the promisee agrees to such request, these will ordinarily amount to a waiver. In such cases it is clear that some overt act has been established from which the Court of fact can draw the conclusion that the obligee has waived the default. In some cases it will be easy to decide this question by looking at the frame of the suit and to find from the plaint the manner in which the allegations have been made."

[12] On the aforesaid discussion and authorities the following points can be taken to be well-established:

(a) That the exigibility clause in an instalment is for the benefit of the creditor and he has a right to waive that benefit even in the absence of a fresh agreement, a fresh consideration or a fresh bilateral arrangement.

(b) That a mere inaction on the part of the creditor such as an abstinance to sue or a mere receipt of payment does not amount to a waiver. What is required is some overt act on the part of the creditor, communicated to the debtor, by which a Court of fact can conclude that the creditor has waived the benefit.

(c) The payment by the debtor and the acceptance by the creditor specifically made towards the satisfaction of a particular defaulted instalment would amount to a waiver of that default and of the benefit arising out of that default.

(d) A waiver is a mixed question of law and fact. It has to be properly pleaded and proved. A choice left to the creditor in the default clause itself is inconsequential.

(e) In the absence of proof of waiver, the creditor cannot fall back on the primary terms of the bond regarding repayment and claim to recover on that basis instalments which are still within limitation.

[13] Now keeping these principles in view the plaintiff must plead in every case based on an

instalment bond if he waived the benefit of the exigibility clause when it accrued on the first occasion and on subsequent occasions and when according to him that benefit again accrued and which he has not waived. As said above, the plaintiff vaguely pleaded that the first four instalments have been recovered and he subsequently disclosed the dates of repayment which were other than due date of instalments. His suit is specifically for the amount due on the 5th and subsequent instalments. He produced along with the plaint the extracts of his regularly kept account books (these extracts are yet to be proved). In these accounts the repayments, though not made on due dates, are specifically appropriated towards particular instalments and those instalments are consequently treated as satisfied. It is not clear from the record if the appropriation was made at the prorequest of the debtor or with his knowledge and consent. The plaintiff had no opportunity to go into the witness box and matters have yet remained to be explained. It is clear to my mind that what the plaintiff meant to plead was a waiver but he has not done so with sufficient clarity. In my opinion, the learned Judge of the lower Court acted with undue haste in dismissing the plaintiff's suit without trial. The decision of the lower Court is not satisfactory.

[14] In the ends of substantial justice, I set aside the decision of the lower Court and remand the case to the lower Court for a fresh trial giving to the parties fresh opportunity for pleading and adducing evidence.

[15] In the circumstances of the case, I do not allow costs to the applicant in this case.

D.H. *Case remanded.*

*** A. I. R. (35) 1948 Nagpur 228** *[C. N. 77.]*

BOSE AND HEMEON JJ.

Beohar Singh Raghubir Singh — Assessee — Applicant v. *Commissioner of Income-tax, U. P., C. P. and Berar, Lucknow—Opposite party.*

Misc. Civil Cases Nos. 63 of 1944 and 7, 8, 85, 91, 92 and 98 of 1945, Decided on 4-9-1946, reference made by Income-tax Appellate Tribunal, Bombay, D/- 6-7-1944.

* (a) Income-tax Act (1922), S. 2 (1)—Forest, income from.

Income derived from sale of forest produce such as timber, tendu leaves, *harra* etc., derived from a forest which is not cultivated but is of a spontaneous growth and the produce of which is not due to the skill or labour expended on it by the assessee is not agricultural income and is not exempt from taxation.

[Paras 26, 29, 30]

(b) Incom-tax Act (1922), S. 66—High Court—Functions of.

The High Court to which a reference is made is not a Court of appeal and is not free to debate such questions as might seem to arise in the case, however important they may be. It is only an advisory body which is not free to tender unsolicited advice. It can only advise on questions referred. [Para 2]

(c) Income-tax Act (1922), S. 2 (1) — Agriculture —Meaning of.

Agriculture is the art or science of cultivating the ground. The essence of agriculture even when it is extended to include "forestry" is the application of human skill and labour; without that it can neither be an art or science: *Case law discussed.* [Para 7]

(d) Interpretation of Statutes — Meaning of words—Same word used in different Acts—Acts of Central and Provincial Legislatures.

It is open to the legislature to widen or restrict the ordinary meaning of a word and because it chooses to do so for the purposes of a particular Act it does not follow that the same result is intended in another Act framed for a different purpose, having different provisions and using different language. [Para 9]

Held, that in construing a Central Act like the Income-tax Act [in this case with reference to the meaning of "agricultural income" in S. 2 (1)] it was not a proper approach to take into consideration local statutes like the Land Revenue Code. [Para 19]

(e) Income-tax Act (1922), S. 2 (1)—Pasturage.

The pasturing of cattle is so closely allied to agriculture that it has come to be considered part and parcel of it. [Para 12]

(f) Income-tax Act (1922), S. 2 (1) and S. 4 (3) (viii)—Object of exemption of agricultural income.

It is not correct to say that the object of exempting agricultural income from income-tax is to avoid double taxation. [Para 16]

(g) Income-tax Act (1922), S. 6—Other sources—Meaning of—Income-tax Act, S. 12.

The words "income from other sources" describe a true residuary group embracing within it all sources of income, profits and gains which are liable to tax under the Act. The income to fall under this head need not be ejusdem generis with the previous kinds of income. [Para 18]

(h) Income-tax Act (1922), S. 2 (1)—Distinction between clause (a) and clause (b).

Clause (a) refers to income derived from land which is used directly for agricultural purposes and clause (b) to by-products such as selling of milk, the pasturing of cattle etc. provided the endeavour is agricultural and provided it is reasonably connected with land used for agricultural purposes. [Para 23]

(i) Income-tax Act (1922), S. 2 (1) —Agricultural income—Meaning of.

It is essential that the income should be derived from some activity which necessitates the employment of human skill and labour and which is not merely a product of man's neglect or inaction except for the gathering in of the spoils. Not only must the assessee labour to reap the harvest but he must also labour to produce it. [Para 23]

(j) Income-tax Act (1922)—Interpretation Departmental instructions in Income-tax Manual.

In interpreting the Act it is not proper to take into consideration the departmenal instructions contained in the Income-tax Manual into consideration. [Para 24]

(k) Incom-tax Act (1922), S. 2 (1) — Income from *Lac*.

For the purposes of the Income-tax Act *lac* cultivation cannot be regarded as an agricultural operation and income derived from this source is taxable. 28 A. I. R.

1941 Pat. 289 (S. B.), *Foll.*; 24 A. I. R. 1937 Nag. 289, *Disting.* [Para 28]

(l) Income-tax Act (1922), S. 2 (1)—Interest on arrears of agricultural rent.

Interest received from tenants on the arrears of rent due from them is agricultural income. Misc. Civil Case 34 of 1945, D/- 29-10-1945, *Foll.* [Paras 36, 39]

(m) Income-tax Act (1922), S. 2(6-c)—Capital receipt and income—Income derived by sale of timber.

Whether a given receipt is capital receipt or income depends on circumstances so that what is income in the hands of one man may be a capital receipt in those of another.

Where the assessee sold timber annually from the forest and there was no reduction or loss of any capital asset, that is the forest land:

Held that the receipts derived by sale of timber were income and not a receipt of a capital nature : 30 A. I. R. 1943 P. C. 153, *Rel on.* [Paras 40, 41]

(n) Income-tax Act (1922), S. 2 (1)—Bazar dues.

Bazar dues, i. e., collections from persons who are permitted to erect temporary stalls on agricultural land on weekly bazar day, are not agricultural income. [Para 42]

(o) Income-tax Act (1922), S. 4 (3)—Exemption —Burden of proof.

The burden lies on the assessee to bring himself within the purview of the exemption. [Para 30]

(p) Income-tax Act (1922), S. 2 (1)—Nazarana.

Nazarana is not ipso facto an agricultural income in the absence of any evidence to show that it was derived from agricultural sources. [Paras 43, 44]

Cases referred :—

1. ('33) 12 Pat. 318 : 20 A. I. R. 1933 P. C. 108 : 60 I. A. 146 : 142 I. C. 437 (P. C.), Commissioner of Income-tax B. & O. v. Kameshwar Singh of Darbhanga.
2. ('40) I. L. R. (1940) Kar. P. C. 335 : 27 A. I. R. 1940 P. C. 158 : 190 I. C. 1 (P. C.), Rajendra Narayan v. Commissioner of Income-tax B. & O.
3. ('30) 54 Bom. 437 : 17 A. I. R. 1930 P. C. 151 : 57 I. A. 152 : 123 I. C. 177 (P. C.), Trustees Corporation (India), Ltd. v. Commissioner of Income-tax, Bombay.
4. ('36) 60 Bom. 248 : 23 A. I. R. 1936 P. C. 55 : 63 I. A. 99 : 160 I. C. 1 (P. C.), National Mutual Life Association of Australasia Ltd. v. Commissioner of Income-tax, Bombay Presidency & Aden.
5. ('46) I. L. R. (1946) Nag. 594 : 33 A. I. R. 1946 Nag. 397 : 224 I. C. 589, Income-tax Appellate Tribunal, Bombay v. Managing Trustee, Shri Radha Madho Trust, Saugor.
6. ('42) 1942 F. C. R. 53 : 29 A. I. R. 1942 F. C. 27 : I. L. R. (1942) Kar. F. C. 40 : I. L. R. (1942) Lah. 623 : 200 I. C. 198 (F. C.), Meghraj v. Allah Rakhia.
7. ('41) 20 Pat 699 : 28 A. I. R. 1941 Pat. 289 : 194 I. C. 203 (S. B.), Province of Bihar v. Pratap Udai Nath Sahi Deo.
8. ('31) 54 Mad. 900 : 18 A. I. R. 1931 Mad. 659 : 134 I. C. 42, Chandrasekhara Bharathi v. Duraisami Naidu.
9. ('99) 22 Mad. 39, Venkayya v. Ramasami.
10. ('01) 24 Mad. 421, Murugesa Chetti v. Chinna Thambi Goundan.
11. ('22) 44 All. 19 : 9 A. I. R. 1922 All. 301 : 64 I. C. 248 (F. B.), Kesho Prasad v. Sheo Pargash Ojha.
12. ('24) 46 All 831 : 11 A. I. R. 1924 P. C. 247 : 51 I. A. 381 : 82 I. C 962 (P. C.), Kesho Prasad v. Sheo Pargash Ojha.
13. ('22) 46 Bom. 48 : 9 A. I. R. 1922 Bom 146 : 64 I. C. 117, Hiralal Ravchand v. Parbhulal Sakhidas.
14. ('19) 6 A. I. R. 1919 Lah. 222 : 91 P. R. 1919 : 52 I. C. 563, Kaju Mal v. Salig Ram.
15. ('38) I. L. R. (1938) Nag. 31 : 24 A. I. R. 1937 Nag. 289 : 171 I. C. 553, Imam Ali v. Priyawati Devi.
16. ('22) 45 Mad. 710 : 9 A. I. R. 1922 Mad. 351 : 70 I. C. 657, Panadai Pathan v. Ramasami Chetty.
17. ('24) 5 Lah. 50 : 11 A. I. R. 1924 P. C. 1 : 51 I. A. 11 : 79 I. C. 946 (P. C.), Kaju Mal v. Saligram.
18. ('22) 45 Mad. 518 : 9 A. I. R. 1922 Mad. 325 : 70 I. C. 504 (F. B.), Chief Commissioner of Income-tax v. Zamindar of Singampatti.
19. ('24) 51 Cal. 504 : 11 A. I. R. 1924 Cal. 668 : 84 I. C. 31, Emperor v. Probbat Chandra.
20. ('31) 54 Mad. 21 : 17 A. I. R. 1930 Mad. 764 : 126 I. C. 596 (F. B.), Commissioner of Income-tax, Madras v. Manavedan Tirumalapur.
21. ('41) 20 Pat 699 : 28 A. I. R. 1941 Pat. 289 : 194 I. C. 203 (S. B.), Province of Bihar v. Pratap Udai Nath Sahi Deo.
22. ('45) 32 A. I. R. 1945 Oudh. 35 : 20 Luck. 212, Maharaja of Kapurthala v. Commissioner of Income-tax, Central and United Provinces.
23. ('45) 32 A. I. R, 1945 Oudh. 42, Special Manager, Court of Wards v. Commissioner of Income tax, U. P. & C. P.
24. ('45) 32 A. I. R. 1945 Oudh 44, Mustafa Ali Khan v. Commissioner of Income-tax, U. P. & C. P.
25. ('46) 1946-14 I. T. R. 356 (Oudh.), Nawazish Ali Khan v. Commissioner of Income-tax, C. P. & U. P.
26. ('38) 25 A. I. R. 1938 Rang. 260 : 176 I. C. 601 (F. B.), Commissioner of Income-tax, Burma v. Kokine Dairy, Rangoon.
27. ('34) 9 Luck. 115 : 20 A. I. R. 1933 Oudh 475 : 146 I. C. 651, Commissioner of Income-tax, Central & United Provinces v. Rani Saltanant Begam.
28. ('37) I. L. R. (1937) Mad. 734 : 24 A. I. R. 1937 Mad. 393 : 168 I. C. 160 (S. B.), Chellappa Chettiar v. Commissioner of Income-tax.
29. ('43) 22 Pat. 713 : 30 A. I. R. 1943 P. C. 153 : 70 I. A. 180 : I. L. R. (1944) Kar. P. C. 98 : 210 I. C. 1 (P. C.), Kamakshya Narain Singh v. Commissioner of Income-tax, B. & O.
30. ('31) 58 Cal. 430 : 17 A. I. R. 1930 P. C. 209 : 57 I. A. 228 : 125 I. C. 871 (P. C.), Prabhatchandra Barua v Emperor.
31. ('75) 23 W. R. 314 : 15 Beng. L. R. 83 : 2 I. A. 169 : 3 Sar. 456 (P. C.), Srimathoo Moothoo Vijia Ragoonadah Kolandapuree Netchiar v. Dorasinga Tevar.
32. ('42) 1942 F. C. R. 1 : 29 A. I. R. 1942 F. C. 8 : 21 Pat 521 : I. L. R (1942) Kar F. C. 1 : 199 I. C. 1 (F. C.), Hulas Narain Singh v. Province of Bihar.
33. ('39) 1939 F. C. R. 18 : 26 A. I. R, 1939 F. C. 1 : I. L. R. (1939) Kar. F. C. 6 : 180 I. C. 161 (F. C.), Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, In the matter of.
34. ('41) 1941 F. C. R. 12 : 28 A. I. R. 1941 F. C. 72 : I. L. R. (1941) Kar. F. C. 148 : 194 I. C. 357 (F. C.), Hindu Women's Rights to Property Act 1937, In re.
35. ('30) 17 A. I. R. 1930 P. C. 120 : 126 I. C. 88 (P. C.) H. M. Edward v. Attorney-General of Canada.
36. ('95) 22 Cal. 788 : 22 I. A. 107 : 6 Sar 603 (P. C.), Administrator-General of Bengal v. Premlal.
37. ('20) 43 Mad. 550 : 7 A. I. R. 1920 P. C. 56 : 47 I. A. 33 : 56 I. C. 163 (P. C.), Krishna Ayyangar v. Nallaperumal Pillai.
38. (1891) 1891 A. C. 531 : 61 L. J. Q. B. 265 : 65 L. T. 621, Commissioners for Special Purposes of Income-tax v. Pemsel.
39. ('15) 2 A. I. R. 1915 P. C. 127 : 1915 A. C. 1100 : 84 L. J. P. C. 234 (P. C.), Pate v. Pate.
40. ('08) 4 N. L. R. 104, Hiria v. Mahomed Sirujuddin Khan.
41. Misc. Civil Case No. 34 of 1935, D/- 29-10-1945, Pratapmal Laxmichand, Firm v. Commissioner of Income-tax, U. P., C. P. & Berar.

R. N. Padhye (in Nos. 63 and 7); G. J. Ghate (in No. 7); D. T. Mangalmoorti (in No. 8); J. P. Dwivedi (in No. 85) and S. C. Dube (in No. 91, 92 and 98) — for Applicant.

R. Kaushalendra Rao (in No. 63) and V. R. Sen (in Nos. 7, 8, 85, 91, 92 and 98)—for Opposite Party.

Order.—This judgment will govern miscellaneous civil case No. 63 of 1944 and miscellaneous civil cases Nos. 7, 8, 85, 91, 92 and 98 of 1945. The questions they raise are not common to all, except as regards one question, but as the others are interlinked between them it will be convenient to group the cases according to the questions referred and deal with all in one judgment.

[2] These cases are all income-tax references made under S. 66 (1), Income-tax Act, as amended in 1939. In view of the contentions made before us, we think it desirable to set out the limits of our authority at the outset. It is important to emphasise that we are not a Court of appeal and accordingly are not free to debate such questions as might seem to us to arise in the case, however important they may appear to be. We are only an advisory body which is not free to tender unsolicited advice. We can only advise on the questions referred and accordingly will have to confine our answers to the questions asked. We have certain other powers, and indeed it will be necessary to exercise them in one of the cases heard along with these (we shall deal separately with that), but these powers only enable us to send the matter back and compel a reference. Until that is done, we have no power to debate questions which have not been referred. This is clear from the Act, but the matter has been placed beyond controversy by their Lordships of the Privy Council in 12 Pat. 318[1] at p. 335, I. L. R. (1940) Kar. P. C. 335,[2] 54 Bom. 437[3] at p. 455 and 60 Bom. 248[4] at p. 257. It has also been so decided by this Court in I. L. R. (1946) Nag. 594[5] at page 601.

[3] The question which concerns all the cases has been referred in these terms in Misc. Civil Case No. 63/44 :

"Whether, in the circumstances of this case, the income of Rs. 10,835 derived from the sale of forest produce is "agricultural income" exempt from taxation under S. 4 (3) (viii), Income-tax Act."

The point is the same in the other cases though in some of them the language is a little different, and, naturally the figure differs in each case.

[4] The question is one of mixed fact and law. So far as the facts are concerned they will be found separately in each case. So far as the law goes it will be necessary to search for some general and clear cut principle, because opinions have differed, and in the absence of principle, opinion tends to be arbitrary.

[5] The definition given in the Act is that "agricultural income" means :

"(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such; (b) any income derived from such land by (i) agriculture."

Clause (b) throws us back to cl. (a) because of words "such land" which refer to the land described there. It is land which is (1) used for agricultural purposes and (2) either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such.

[6] It is admitted that the land in all these cases is either assessed to land revenue or is subject to a local rate assessed and collected by officers of the Crown as such, and that, therefore to that extent, the income complies with the definition. But that is not enough, for, it must also either be used for agricultural purposes or for agriculture. The question, therefore, is how far does agriculture covers forests? Opinions differ regarding this, and because of that the learned acting Advocate-General suggested that it will be pertinent to go back to first principles and analyse the root of the word.

[7] The dictionaries tell us that agriculture comes from *ager*, a field, and *cultura*, cultivation. This implies the use of human skill and labour; and that is exactly how the dictionaries define it. Webster, for instance, says that agriculture is the "art or science of cultivating the ground," and includes in it the rearing and management of livestock, husbandry, farming and so forth. Other dictionaries including the Oxford English Dictionary, employ the same basic conception. Some include "forestry", in the term. It is to be observed, however, that the word used when forestry is included, is forestry and not forests. The distinction is important because when one turns to the definition of forestry in the dictionaries one finds that is also an art or a science. Thus, Webster says it is "the art of farming or cultivating forests; the management of growing timber," and the Oxford English Dictionary says much the same thing. Therefore, throughout we find that the essence of agriculture, even when it is extended to include "forestry," is the application of human skill and labour. Without that it can be neither an art nor a science. And that we feel must be the determining factor in this class of case.

[8] Turning next to the cases, one of the most important is the Federal Court judgment in 1942 F. C. R. 53,[6] not because it deals directly with this question, though it touches an allied matter, but because it lays down certain general

principles which bind us, and clears much of the ground.

[9] The learned Judges were dealing with the expression "agricultural land" in the Constitution Act, and after pointing out that it had not been defined there said at page 61 :

"It must accordingly be understood in the sense which it ordinarily bears in the English language,"

and again at page 62 :

"As regards the connotation of the word "agriculture," it may be pointed out that "agriculture," has been variously defined in several English and Indian statutes for the purposes of these statutes and it is neither useful nor legitimate to attempt to draw any inference from these statutory definitions for the purpose of determining the ordinary connotation of the word in English language."

They then referred to decisions in which the Court has placed a restricted meaning on the terms "in view of the indications afforded by the particular Act which had to be considered by the Court," and to others which construed the term in a more general sense. The sum and substance of it all is that it is of little avail to consider these decisions because, of course it is open to the Legislature to widen or to restrict the ordinary meaning of a word, and because, if it chooses to do so for the purposes of a particular Act it does not follow that the same result is intended in another Act framed for a different purpose, having different provisions and using other language. In the face of that we do not think it will be either profitable or proper to consider in detail the various decisions which construe the term, or analogous expressions, for the purpose of some particular Act. Some of them have been referred to in the Federal Court's judgment at pp. 62-65, and others will be found in decisions like 20 Pat. 699[7] and 54 Mad. 900.[8] It will suffice to say that the following cases related to special Acts, and at least part of the decisions in each is based upon matters special to those Acts : 22 Mad. 39,[9] 24 Mad. 421,[10] 54 Mad. 900,[8] 44 ALL. 19,[11] 46 ALL. 831,[12] 46 Bom. 48[13] at p. 51, A. I. R. 1919 Lah. 222[14] and I. L. R. (1938) Nag. 31.[15] The other cases in this class, though dealing with special Acts, base the decision on general grounds and to that extent are more in point. But all they serve to show is that difference of opinion is possible, the meaning being extended in some cases and restricted in others. Thus, 45 Mad. 710,[16] holds that the growing of casuarina trees for fuel is an agricultural purpose and 46 Bom. 48[13] discards what we might term the human agency test and employs instead one which determines whether the income is derived from the produce of the land and not what is the actual quantum of labour bestowed on it. Of these two the former is largely based on considerations which the Federal Court state are irrelavant, namely, the meaning of the term in certain English Acts where special statutory definitions are given. With the latter we do not, with respect, agree.

[10] As to the other cases, the Federal Court state that the view taken in 24 Mad. 421,[10] 22 Mad. 39[9] and 45 Mad. 710,[16] has not gone unchallenged and the learned Judges refer to 54 Mad. 900.[8] So also they state that the decision of the Judicial Committee in 46 ALL. 831,[12] upholding 44 ALL. 19[11] lays down no principle or test of general application. They are accordingly not of much value for the present purpose. The only decisions in this class which, in our opinion, lay down general rules are best referred to in the language of the Federal Court, 1942 F. C. R. 53[6] at pp. 62-63 :

"Their Lordships confirmed a decision of the Punjab Chief Court to the effect that land used as a tea garden was used for "agricultural purposes." In the judgment of the Chief Court (which was generally approved by their Lordships) it was observed that "the term 'agricultural land' is used in the Act of 1905 in its widest sense to denote all land which is *tilled*" ..... The Chief Court had held that land covered by a natural forest was not agricultural, and this view also would seem to have been confirmed by the Judicial Committee."

We have underlined (here italicized) the word "tilled" because, in our opinion, that brings out the distinction which we have sought to draw between an agricultural and a non-agricultural purpose. The decisions referred to are A. I. R. 1919 Lah. 222[14] at p. 225 and 5 Lah. 50[17] at p. 52.

[11] From here we proceed to consider cases under the Income-tax Act. A large number were cited but those dealing with forests are not many. Of them, 45 Mad. 518[18] at p. 526 thought, without deciding the point, that "forestry" might be regarded as agriculture. We stress, however, the use of the word "forestry" as opposed to "forests".

[12] 51 Cal. 504[19] held that income derived from pasturage was agricultural income but not that from fisheries or from land leased for stacking timber. The "pasturage" part of the decision would, at first sight, appear to offend the rule we have suggested but the point was not decided because it was not contested once the case reached the High Court (*see* page 527.) But that apart, nearly every rule has its exceptions and the pasturing of cattle is so closely allied to agriculture that it has become to be considered part and parcel of it and the meaning of the term is now so well established that there is no longer room for doubt. That, however, does not apply to forests, or even to forestry, though we think it possible that the latter might fall within the scope of the definition.

[13] 54 Mad. 21[20] holds that income from unassessed forest land is not agricultural income, and 20 Pat. 699 [21] at p. 724 applies the same rule

to uncultivated forest land, as also does A. I. R. 1945 Oudh, 35,[22] A. I. R. 1945 Oudh 42,[23] A. I. R. 1945 Oudh 44,[24] and 1946 I. T. R. 356.[25]

[14] This resume will show that so far as forests are concerned the definition we have adopted making actual cultivation with the aid of human skill, and labour the dividing line, reconciles, as far as we can see, the various cases which have been cited on the matter of forests.

[15] The other cases cited to us are not in point and do not help because they deal with other matters, such as dairy farming, A. I. R. 1938 Rang. 260,[26] allowances from a zemindari to a Rani, 9 Luck 115,[27] a money-lender who cultivates a field in lieu of a debt due to him, I. L. R. (1937) Mad. 734,[28] and royalties from a coal mine, 22 Pat. 713[29] at p. 722. All we need say with respect to them, excluding of course the judgment of the Privy Council, is that in so far as their more general observations agree with the distinction we make, they support us, and in so far as they do not, then, with great respect, we differ from them. Their Lordships held that royalties from coal mines were not agricultural income and nothing that their Lordships said detracts from our view.

[16] It will be necessary, however, for us to meet certain arguments. It was suggested in some of the cases that the object of exempting agricultural income from tax was that it already pays tax in another form, namely land revenue or cesses, and, therefore, the idea is to avoid double taxation. This view will be found advanced in, for instance, 45 Mad. 518[18] at pp. 526, 527. But we think it is sufficiently met in A. I. R. 1945 Oudh 35[22] at p. 39. The learned Judges point out there that the fact that the Act requires the income not only to be subject to land revenue or cesses but also to be derived from agriculture or from land used for agricultural purposes shows that incomes from other types of land are not exempt even though they pay land revenue. And that of course is patent. Rents derived from bungalows on malik makbuza land in a town are already taxable. Nor indeed is there any reason why there should not be double taxation if the legislature chooses to impose it. That is also dealt with in the Oudh case. The argument is also met by what their Lordships of the Privy Council say in 58 Cal. 430[30] at p. 444. Their Lordships point out that in such cases the land revenue or cesses paid are deducted from the gross receipts because the tax is not levied on gross receipts but on income. In practice, therefore, there is no double taxation.

[17] It was also argued that this income is not taxable at all because S. 6 of the Act sets out the only sources of taxable income. It cannot fall under the head "income from property" because S. 9 defines that and there is no room for forest produce there. So also S. 10 sets out what is to constitute "profits and gains of business, profession or vocation". That also excludes income from forests. And as regards "other sources", it was contended that this must be read "*ejusdem generis*" with what precedes it. It was said that an important head of income such as the present could hardly have been left for inclusion under a general section. It was pointed out that forests cover a large section of India and, therefore, assume more than ordinary importance in this country.

[18] That may be so, but the same applies to agriculture, and S. 4 (3) (viii) and 2 (1) (a) and (b) would be otiose if agricultural income is exempt in any way. The fact that it was necessary to include these sections shows that income of this sort would be taxable but for the exemptions. But this apart, the matter has now been set at rest by their Lordships of the Privy Council. In 58 Cal. 430[30] at p. 442, their Lordships say that the words appear to be

"Clear and emphatic, and expressly framed so as to make the sixth head mentioned in S. 6 describe a true residuary group embracing within it all sources of income, profits and gains provided the Act applies to them, i.e., provided that they accrue or arise or are received in British India or are deemed to accrue or arise or to be received in British India, as provided by S. 4 (1), and are not exempted by virtue of S. 4 (3)".

In view of that it is not necessary to say anything further.

[19] Part of the argument on behalf of the assessees had reference to certain provisions in some of our local Acts, such as the Land Revenue Act; but we do not consider that a proper approach when construing an Act of the Central Legislature. Central Acts apply all over India while Provincial Acts have limited provincial application; also Acts touching the same topics can, and often do, differ from Province to Province. It would be impossible for us to conclude that the words in a Central Act have one meaning in one Province and another in another. The same assessee might have forests in this Province as well as in other Provinces. The local Acts in each might differ. It would be impossible for us to hold that his income from forests is exempt here while taxable elsewhere because the same words used in the Income-tax Act mean one thing in one place and another in another.

[20] It is pertinent here to quote the Privy Council in 23 W. R. 314.[31] The case is not in point but the observations are pertinent. At page 317 their Lordships say:

"It is obvious that an enactment which is intended to apply to all the Courts in India, and which is also a modern enactment, ought to receive the same construction in all those Courts, and that no inconsistent course of practice should be allowed to spring up in any of the presidencies.";

and at page 320,

"unless, therefore, etc . . . . . we must come to the absurd conclusion that the same words are to be interpreted by the High Court in one sense when it is exercising its original jurisdiction or sitting on an appeal from a decree made under that jurisdiction, and in a different sense when it is sitting on an appeal from a mofussil Court; and further that the Legislature has by the same form of words intended to make one law for the mofussil Courts, and another for those of the Presidency towns."

[21] Another branch of this argument had relation to a possible conflict between the provincial and Federal Legislative Lists in the Constitution Act unless the matter was decided in the way contended for by the assessees. But the basis of that argument is that agricultural income from land revenue paying estates etc., cannot be taxed. No one questions that, and if the income from these forests is agriultural income then, of course, it cannot be taxed. The whole question is whether it is such income. The other phase of this argument was only a variation of what was argued before the Federal Court in 1942 F. C. R. 1.[32] It would be pointless to elaborate this further.

[22] Attempts were made to induce us to consider passages in the report of the Select Committee which dealt with the Indian Income-tax bill. 1939 F. C. R. 18[33] at p. 46 was relied on. But that passage has been much misunderstood and was explained by Gwyer C. J. in 1941 F. C. R. 12[34] at p. 41. It is true this was not done in the course of a judgment but was an interjection during the arguments, but the substance of what he said accords with what the Privy Council laid in A. I. R. 1930 P. C. 120.[35] Two other decisions of the Judicial Committee are also apposite: 22 Cal 788[36] at p. 799 and 43 Mad. 550[37] at p. 564.

[23] Mr. Mangalmurti stressed the difference between the words "*any* rent or revenue derived from land *which is used for agricultural purposes*" in S. 2 (1) (a) and the words "any income derived from such land by agriculture." He argued that the former was the wider and would include income from any by-product of the land and certainly income which came directly from the land. In our judgment the first clause refers to income derived from land which is used directly for agricultural purposes and the second to by-products, such as the selling of milk, the pasturing of cattle etc., provided the endeavour is agricultural and provided it is reasonably connected with land used for agricultural purposes. The distinction may be of importance in some cases, but here it still leaves the burden of deciding what "agriculture" means. As we have said whatever else may be necessary it is essential that the income should be derived from some activity which necessitates the employment of human skill and labour and which is not merely a product of man's neglect or inaction except for the gathering in of the spoils. Not only must be labour to reap the harvest—that of course he must do else there could be no income—but be must also labour to produce it.

[24] An attempt was also made to get us to take into consideration the previous practice of the department and the instructions embodied in the Income-tax Manual. This also is not permissible. It shows no more than that either certain officers of the department hold a certain view of the law, or that it was considered expedient at that time, for this reason or that, not to tax income of this kind. The Courts are here to interpret the law and what departmental officers thought is not relevant. The argument is doubtless founded on certain observations of Lord Halsbury in 1891 A. C. 531[38] at p. 546 but Lord Macnaghten said in the same case at page 591 that he would prefer not to express an opinion on the point. Also a later House of Lords case 1915 A. C. 1100[39] at pp. 1107 & 1108 brushed aside the continuous interpretation which the Supreme Court of Ceylon had placed on a statute for 44 years. We do not think, therefore, that it will be proper to take those matters into consideration and so will exclude them.

[25] Having enumerated the general rule we will now proceed to examine the facts in each case separately and determine how far they conform to the rule we have enumerated.

[26] *Misc. Civil Case No. 63/44.*—The facts were agreed in this case. It appears from the order of reference, as also from the decision of the Income-tax Appellate Tribunal in appeal, that the forest here was not a cultivated one and was of spontaneous growth. The same remarks apply to the following items of produce, namely, harra nuts and mohua flowers. According to our definition, they are not included within the exemption and so are liable to tax.

[27] As regards lac, it was held in 20 Pat. 699[7] at p. 726 that income from this source is taxable. On the other hand one of us (Bose J.) held in I. L. R. (1938) Nag. 31[15] at p. 33 that lac cultivation is an agricultural operation. But the decision was based on the C. P. Tenancy Act and it was made clear that that Act had extended the definition of agriculture. Accordingly, what 4 N. L. R. 104[40] at p. 112 had held was not agriculture (namely lac cultivation) was considered to be "agriculture" because of the extension of the definition in the later Act for the purposes of that Act.

[28] Now, it is clear from 4 N. L. R. 104[40] at p. 112 that

"Lac is neither timber nor fruit. In the case before me, it is not the produce of the tenant's labour, but of his neglect and idleness. It is the deposit of an insect upon the smaller branches of the palas trees".

Again at page 110 Stanyon A. J. C. says :

"Such propagation can only be developed by allowing the land to lie waste so that the palas trees can spread over it as jungle. Therefore the produce of lac involves a use of the land in a manner which is opposed to agriculture, as we understand that term in relation to village operations in this province."

In the circumstances we are of opinion that for the purposes of the Income-tax Act lac cultivation cannot be regarded as an agricultural operation. In any case it has not been shown that in this case the conditions were otherwise than as described above.

[29] Our answer to the question referred in this case is that the Rs 10,835 derived from the sale of forest *produce is not "agricultural income" and so is not exempt* from taxation.

[30] *Miscellaneous Civil Case No. 7 of 1945.* Here also the facts are agreed. The forest income is derived from a sale of timber which the assessee cuts into beams, logs, poles etc.; also from the sale of tendu leaves which are used in the manufacture of bidis. The finding regarding the nature of the forest is to be found in the Tribunal's appellate order and is given in these words:

"It is impossible that all these forest trees or tendu shrubs could have been planted or reared by any process of agriculture, that is to say, by the cultivation of the soil. It may be that at some stage in their growth the trees required to be watered or watched. But the fact is that they had been standing upon the land for a number of years during which the soil has remained untouched."

The evidence adduced by the assessee to show that he had planted the trees was disbelieved. In the circumstances, the burden being on the assessee to bring himself within the purview of the exemption, and he not having proved that the forest was "cultivated" by him in the sense that its produce was due to the skill and labour which he expended on it as opposed to produce which would come in anyway from natural causes despite inaction on his part, we are of opinion that the Rs. 19,447 arising from those sources was rightly held to be taxable.

[31] *Miscellaneous Civil Case No. 8 of 1945.* The forest income here was derived from leases of the forest "for the purpose of cutting and removing standing timber and fuel, and taking tendu leaves, lac and harra therefrom".

[32] The finding regarding the nature of the forest is to this effect:

"The trees in these forest lands are obviously of spontaneous growth and must have been standing for a number of years. It is impossible to say that they were either planted or reared up by any process of agriculture."

We hold that the Rs. 12,373 assessed to income under this head was rightly assessed.

[33] *Miscellaneous Civil Case No. 85 of 1945.* In this case, Rs. 1,799 received from the sale of harra and tendu leaves has been assessed. The Appellate Assistant Commissioner found here that the forest was of spontaneous growth and that "nothing is done in the nature of preparing land for the growth of the trees therein". The Tribunal has accepted this and nothing has been shown us to the contrary. Accordingly, here also, we hold the income was rightly assessed.

[34] *Miscellaneous Civil Case No. 91 of 1945.* Here also the finding of the Tribunal is that the forest was :

"Of a spontaneous growth and no process of agriculture was employed in growing the forest. It may be that at one time forest guards may have been employed but that does not make it an agricultural income. Active human agency in tilling the soil was not employed nor any process which is commonly understood as an agricultural process was used in the production of the forest trees which grow spontaneously and which were sold from time to time to clear off the overgrowth."

We agree that the income under this head was rightly assessed.

[35] *Miscellaneous Civil Cases Nos. 92 and 98 of 1945.* The income in both these cases was from the sale of forest trees. The findings in each regarding the facts are the same as in Miscellaneous Civil Case No. 91/45, and are given in the same words. Our conclusion is, therefore, the same in these two cases as in Miscellaneous Civil Case No. 91/1945.

[36] We now turn to points which are not common to all the cases. A question of interest arises in Miscellaneous Civil Case No. 63/44, as also in Miscellaneous Civil Cases Nos. 8 and 85 of 1945. We will deal with that. The question has been posed in much the same language in all three cases except for the figure. It was (we quote from Miscellaneous Civil Case No. 85/1945.)

"Whether the sum of (Rs. 1,270) representing interest received by the assessee on the arrears of agricultural rents due to him from his tenants is agricultural income within the meaning of S. 2 (i) (a), Income-tax Act ?".

[37] This matter has been recently decided by a Divison Bench of this Court in Misc. Civil Case No. 34 of 1945.[41] We do not feel free to differ from this decision though had the matter been res integra we might have taken another view.

[38] It was contended by the learned acting Advocate-General that the decision is distinguishable and that it is, in any event, wrong. The ground of distinction is said to be that the question posed there narrows the scope of the enquiry to the Central Provinces Tenancy Act whereas here there are no such limitations. It is true the Central Provinces Tenancy Act is expressly mentioned in the question referred in that case whereas it is not mentioned in the present cases but that makes no difference. We are not asked to decide whether all interest is exempt but whether interest received from tenants on the arrears of rent due from them is. These interests are received under the provisions of the Central Provinces Tenancy Act and therefore whether the Act is

expressly mentioned or not the fact remains that the rent is received in the same way and for the same reasons in both sets of cases. We are unable to distinguish that case from the present ones.

[39] As regards the contention that the decision is, in any event, wrong, we find that the matter is debatable and that it is as easy for a Judge acting judicially to reach the one conclusion as the other. In an ultimate analysis it narrows down to a question of individual preference, it being possible to advance cogent reasons on either side. That being the position, we do not feel free to differ, nor do we think it proper to refer the point to a Full Bench. This, we feel, is one of the cases in which certainty is of more value than the doubtful satisfaction of reaching a conclusion by a mere counting of heads. The matter has been fully debated in other High Courts. Opinions have differed and the Division Bench in the former case preferred one view to the other. In our view either the legislature should step in and say which view should prevail, or we should in this Province, accept the view of our own High Court. After all the two, the rent and the interest, are so intimately bound together that it is not unreasonable to hold that they are species of the same genus, though we realise that it is anomalous that while a man who receives his rent regularly and places the money it represents in a bank must pay tax on the interest he receives from the bank whereas another who leaves his money with the tenant and receives interests from the tenant instead of from a bank need not. But anomalies arise on the other view too. The interest is recoverable under the Central Provinces Tenancy Act in the same way and along with the rent which is in arrear. It creates the same burden on the land and subjects a defaulting tenant to the same penalty. In the circumstances, we hold, following Misc. Civil Case No. 34 of 1945[41] that the interest in these three cases is exempt from taxation, it being agricultural income.

[40] Miscellaneous Civil Case No. 7/45 raises another question. We are asked to decide whether a profit of Rs. 19,447/- arising from the sale of forest produce, such as timber and *tendu* leaves, is a receipt of a capital nature and so exempt on that score.

[41] Their Lordships of the Privy Council point out in 22 Pat. 713 [29] at P. 724 that whether a given receipt is capital expenditure (receipt ?) or income depends on circumstances, so that what is income in the hands of one man may be capital expenditure (receipt ?) in those of another. The facts here are admitted and are stated thus in the order of reference.

"But it was admitted before us that the assessee sells timber annually and derives the income in question and that there has been no reduction or loss of any capital asset, that is the forest land, by the timber being cut and sold."

That places the matter, in principle, on a par with the decision of the Judicial Committee just cited. We hold that the Rs. 19,447/- under this head is income and was rightly included in the assessment.

[42] Miscellaneous Civil Case No. 8/45 raises the following additional question:

"Whether there was any material to hold that the "bazar dues" and "*nazrana* receipts" of Rs. 171/- and Rs. 192/- respectively were items of "agricultural income" . . . .

As regards this, the Tribunal said:

"The learned advocate for the assessee explained that the items comprised in it were collections from persons who were permitted to erect temporary stalls on the assessee's agricultural lands on weekly bazar days. The explanation itself is sufficient to reject the assessee's claim to such receipts being regarded as agricultural income".

With that we agree and add that the point was abandoned before us by counsel for the assessee who appeared in place of Mr. Mangalmurti on the second day. We hold the Rs. 192/- was rightly included in the assessment.

[43] As regards the *nazrana*, receipts under this head can flow from sources which are not agricultural, as for example, money taken from consent to a transfer of tenancy and other lands, presents on the occasion of a marriage, and so forth. Therefore, until we know exactly what the nazrana consisted of, it is impossible for us to say whether the income is agricultural or not. The Tribunal says:

"it was alleged before us that it represented the amount levied from tenants taking up vacant plots for the purpose of cultivation. But the statement was not borne out by any evidence.

[44] We asked counsel to point out any evidence to us which would indicate the nature of the *nazrana* and he admitted there was none. The burden is on the assessee and as he has produced no evidence on this point his contention must fail. We hold there is no material and that the sum of Rs. 192/- was rightly assessed.

[45] The result of our findings is that the assessees have lost in all the cases and on all the points except on the question of interest in three of the cases, namely, Miscellaneous Civil Case No. 63/44 and Miscellaneous Civil Cases Nos. 8 and 85 of 1945. They will, therefore, pay the costs of the Commissioner in all but these three cases. Counsel's fee Rs. 100/- in each case.

[46] As regards the remaining three cases, the success of the assessee on this point in two of the cases is so negligible as compared with his failure that we think it proper that each should pay the Commissioner's costs there as well. In Miscellaneous Civil Case No. 63/44 the assessee lost

on the item of Rs. 10,835/- and succeeded only as regards Rs. 501/-. In Miscellaneous Civil Case No. 8/35 the assessee failed as regards Rs. 12,373/- and succeeded as regards Rs. 314/-. We therefore, direct that each of these two assessees should pay the Commissioner's costs. Counsel's fee Rs. 100/- in each case.

[47] That leaves Miscellaneous Civil Case. No. 85/45. There, the success and failure is almost equal. The assessee lost as regards Rs. 1,799/- and won as regards Rs. 1,270/-. There will be no order as to costs in this case.

G.B. *Reference answered accordingly.*

A. I. R. (35) 1948 Nagpur 236 *[C. N. 78.]*

POLLOCK AND SHEVDE JJ.

Hazarilal and others—Appellants v. *Choudhary Halkulal and others — Respondents.*

First Appeal No. 97 of 1940, Decided on 23-9-1947, from decree of 2nd Sub-Judge, 1st Class, Jubbulpore, D/-29-2-1940.

(a) Pleadings—Practice—Point not specifically pleaded by defendant but fair notice of case to be made by him given to plaintiff—Court would be disinclined to stress structure of pleadings too strictly.

Where in a suit the defendant has not specifically pleaded certain point, the High Court in appeal will not be inclined to stress the structure of the pleadings in the suit too strictly if fair notice of the case to be made out by the defendant had been given to the plaintiff: 21 A. I. R. 1934 P. C. 130, *Rel. on.* [Para 15]

(b) Hindu law—Widow—Co-widows in possession of joint estate derived from husband can make absolute partition so as to extinguish right of survivorship inter se—Such agreement held was not proved.

Two or more co-widows of a Hindu governed by the Benares School of the Mitakshara, who have inherited the property of their husband, are entitled, by agreement among themselves, to make an absolute partition of their joint estate so as to extinguish the right of survivorship *inter se*. Where there is no direct evidence to prove such an argeement, the agreement cannot be inferred from the mere fact that one of the co-widows has transferred her share independently and the other co-widow has not protested against it nor has taken any steps to challenge it in a Court of law during her lifetime: 1 A. I. R. 1914 Nag. 21 and 15 A. I. R. 1928 P. C. 251, *Rel. on.* [Para 16]

(c) Hindu law —Widow—Widows cannot by any agreement between them affect rights of ultimate reversioners.

The fact that co-widows at the time of partition between them have entered into an agreement to relinquish their rights of survivorship cannot affect the rights of the ultimate reversioners, because two or more widows cannot, by any agreement between them, affect the rights of the ultimate reversioners: 16 Mad. 1 (P. C.), *Rel. on.* [Paras 18 & 19]

(d) Hindu law—Widow—Surrender—Surrender by one of two co-widows of her share in favour of next reversioner—Other co-widow not joining nor surrendering her share—Surrender is invalid.

An alienation by a widow or other limited heir of the estate, inherited by her, may be validated, if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner, if there be only one, or of the whole body of reversioners, if there be more than one at the time of the alienation, and if there are two or more widows, the surrender must be by all of them. Where the surrender was by only one of the co-widows and the other co-widow did not join in the act of surrender nor did she surrender her own share of the husband's estate that she separately held under the arrangement of the partition, the surrender is invalid and inoperative under Hindu law. [Para 18]

(e) Hindu law— Widow—Sale by widow of husband's estate without legal necessity is not binding on next reversioner.

A sale by a widow of property derived by her from her husband is not binding on the next reversioner if it is without legal necessity. [Para 20]

(f) Hindu law— Widow— One of two co-widows cannot prejudice rights of survivorship of other co-widow by alienations even though for legal necessity save with consent of other— Widows by agreement relinquishing right of survivorship in portion held by each other— It will not bind reversioner.

One of the two co-widows cannot prejudice the rights of survivorship of the other, by alienation, even though for legal necessity, save with the consent of the other. The mere fact that a partition has taken place between them does not imply a right to prejudice the claims of the survivor. Even in a case where the arrangement between the two widows may be of such a character that each relinquishes her right of survivorship in the portion of the estate held by the other and where an alienation (with or without legal necessity and without the consent of the other) cannot be questioned by the other, it will not bind the reversioner: *Case law referred.* [Para 20]

(g) Evidence Act (1872), S. 115— Deed of assignment by Hindu widow attested by next reversioner and receipt of consideration scribed by him— No evidence that next reversioner made representation to transferees nor that they acted on faith of it— Next reversioner is not estopped from challenging assignment.

The main question in determining whether estoppel has been occasioned, is whether the representation has caused the person to whom it has been made to act on the faith of it. The existence of estoppel does not depend on the motive, or on the knowledge of the matter on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act, or to abstain from acting, should have been fraudulent, or that he should not have been under a mistake or misapprehension. Hence, where a deed of assignment by a Hindu widow has been attested by the next reversioner and the receipt of consideration is scribed by him with knowledge of the previous transaction, these facts would not estop the next reversioner from challenging the assignment in absence of evidence that he made any representation to the assignee or that the assignee acted on the faith of it. [Para 22]

(h) Evidence Act (1872), S. 115— Alienation by Hindu widow—Failure of next reversioner to challenge it during her life time will not estop him from challenging it after death of widow.

Though a presumptive reversionary heir has a title to challenge an alienation at its inception he need not do so but is entitled to wait till the death of the widow has affirmed his character as the nearest reversionary heir. Hence the fact that a presumptive reversioner

has not challenged an alienation by a widow at its inception during her life-time will not estop him from challenging it after the death of the widow. [Para 23]

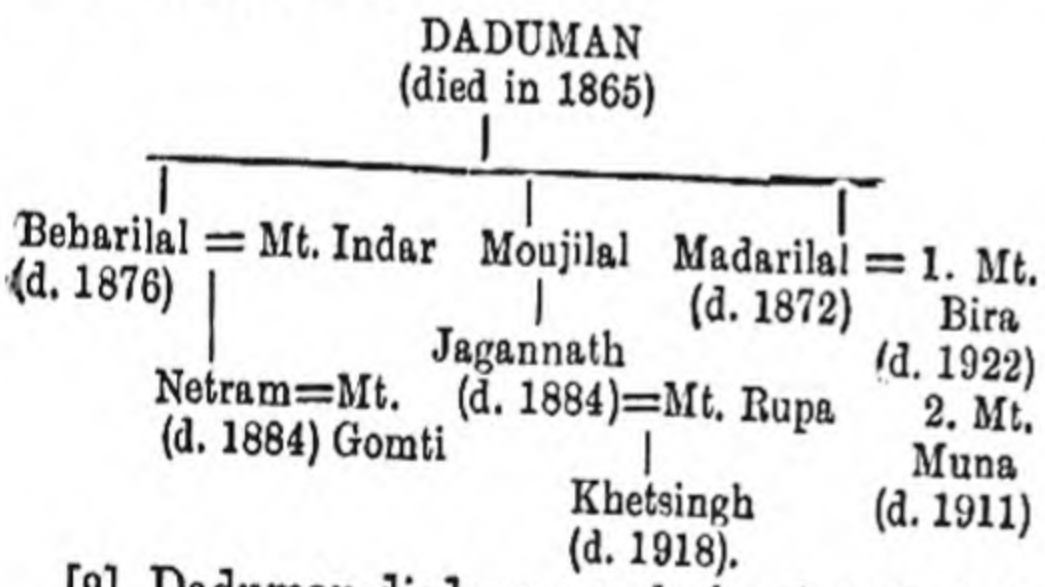
Cases referred.—

1. ('34) 9 Luck. 178 : 21 A. I. R. 1934 P. C. 130 : 61 I. A. 224 : 149 I. C. 480 (P.C.), Someshwar Dutt v. Tribhawan Dutt
2. ('14) 10 N. L. R. 51 : 1 A. I. R. 1914 Nrg. 21 : 24 I. C. 808, Balu Bai v. Tanu Bai.
3. ('28) 15 A. I. R. 1928 P. C. 251 : 55 I. A. 399 : 111 I. C. 483 (P. C.), Gauri Nath v. Mt. Gaya Kuer.
4. ('93) 16 Mad 1 : 19 I. A. 184: 6 Sar. 1 (P. C.), Sri Gajpati Radhamani v. Sri Pusapati Alakajeswari.
5. ('26) 13 A. I. R. 1926 Mad. 6 : 90 I. C. 881, Appalasuri v. Kannamma.
6. ('42) 29 A. I. R. 1942 All. 365 : I. L. R. (1942) All. 708: 203 I. C. 97, Krishna Pratap v. Prembada Kunwar.
7. ('35) 14 Pat. 518 : 23 A. I. R. 1936 Pat. 200 : 155 I. C. 213, Parbati Kuer v. Baijnath Prasad.
8. ('23) 45 M. L. J. 1 : 11 A. I. R. 1924 Mad. 75 : 74 I. C. 58, Ammani Ammal v. Periasami Udayan.
9. ('93) 20 Cal. 296: 19 I. A. 203 : 6 Sar. 224 (P. C.), Sarat Chander Dey v. Gopal Chander.
10. ('19) 42 Mad. 523 : 5 A. I. R. 1918 P. C. 196 : 46 I. A. 72 : 50 I. C. 498 (P.C.), Rangaswami Gounden v. Nachiappa Gounden.

R. S. Dabir — for Appellants.

V. K. Sanghi and A. L. Halve — for Respondents. Nos. 1 to 5; and No. 6, respectively.

Judgment.—This appeal has been filed by defendants 1 to 4 and 6 to 11 against the judgment and decree of the lower Court for possession in favour of the plaintiffs. It is expedient to set out briefly the material facts of this case which are no longer in dispute, and the following family tree will explain the position of the persons to be mentioned :


DADUMAN
(died in 1865)
Beharilal (d. 1876) = Mt. Indar
Moujilal
Madarilal (d. 1872) = 1. Mt. Bira (d. 1922) 2. Mt. Muna (d. 1911)
Netram (d. 1884) = Mt. Gomti
Jagannath (d. 1884) = Mt. Rupa
Khetsingh (d. 1918).

[2] Daduman died possessed of certain landed property in 1865 leaving behind Beharilal, Moujilal and Madarilal, his three sons. These three brothers were members of a joint Hindu family and owned certain joint family property in four villages. They owned two entire villages, Kanthora and Bilthara, and Re. 0-5-4 share in two other villages, namely, Padariya and Piparia in the Patan tahsil of the Jubbulpore District. Shortly after the demise of their father Daduman, they separated and partitioned the property equally some time in 1866 and each of the brothers got a one-third share in each of the said four villages. This partition, though it was challenged by the defendants in the lower Court, is now admitted by their counsel who has further admitted that Madarilal, the last male holder of the suit property, was the separate owner of his shares of Re. 0-5-4 in Kanthora, Re. 0-5-4 in Bilthara, Re. 0-1-9⅓ in Padaria and Re. 0-1-9⅓ in Piparia. Madarilal died in 1872 leaving two widows, Mt. Bira and Mt. Muna, surviving him. Muna died in 1911 and Bira died in 1922.

[3] Moujilal died leaving a son by name Jagannath, who died in 1884, leaving behind his widow Mt. Rupa and son Khetsingh. This Khetsingh died early in 1918.

[4] Beharilal died in 1876 leaving behind his widow Mt. Indar and son Netram, who died in 1884 leaving behind his widow Mt. Gomti. Mt. Gomti, however, remarried and thus severed her connexion with the family.

[5] After the death of Madarilal his two co-widows lived together for a couple of years and as they could not pull on together on account of frequent squabbles they partitioned their husband's property in suit in equal shares some time in 1874. After this partition Bira went to live with Beharilal's widow and son Netram, and Muna went to live with Moujilal's son Jagannath (who was her son born from Moujilal her former husband). It seems that she was first married to Moujilal from whom Jagannath was born and that after the death of Moujilal she remarried his younger brother Madarilal. After the partition between the three brothers their respective shares in all the four villages were separately recorded in their names in the revenue registers. It appears that when Muna went to live with her son Jagannath her property was looked after by him, and when Bira went to live with Netram her estate was looked after by Netram. After the death of Jagannath in 1884 his mother Muna got the name of her grandson Khetsingh mutated in the revenue records in respect of her own share in all the four villages in 1884-85 and thus put Khetsingh in possession thereof as owner. Thereafter Muna dropped out of the picture altogether, and it was this Khetsingh who remained in possession of his grandmother's estate and dealt with it as owner all along. By a sale-deed dated 11-1-1905 (Exs. 2, D-2) Khetsingh parted with a four-anna share in Kanthora and a four-anna share in Bilthara in favour of Madho Patel and others. He also made a mortgage of his four-anna share in Kanthora in favour of this Madho Patel and others, who later on obtained a final decree for foreclosure in Civil Suit No. 17 of 1907 on 18th Sep. 1907 in the Court of the Subordinate Judge, Jubbulpore. After the death of Madho Patel his successors Hazarilal and others by a sale-deed dated 13th Jan. 1915 (Exs. 2, D-1) sold an eight anna share in Kanthora and four-anna share in Bilthara for Rs. 9100 to Kunwarman Malguzar (the father of defendants 1 to 3). After the death of Kunwarman his sons,

the present defendants 1 to 3, came into possession of the said property.

[6] Khetsingh, who was the grandson of Moujilal, already owned shares of Re. 0 5-4 in Kanthora and Re. 0-5-4 in Bilthara in his own right, which two shares his grandfather Moujilal had obtained at the first partition in 1866. By virtue of the transfer and mutations effected in his favour (Khetsingh) by Muna, he got an additional share of Re. 0-2-8 in each of these two villages, with the result that he came to own an eight anna share in Kanthora and an eight-anna share in Bilthara. Subsequently Khetsingh transferred in 1906 the remaining four-anna share in Bilthara to one Purahlal, an infant son of Gotiram, who sold it to Babulal Guzar and others, who in their turn transferred it to Mohanlal Malguzar (defendant 4), who is now in possession of the said four-anna share in Bilthara. Khetsingh also owned a Re. 0-1-9⅓ share in Padariya and Piparia in his own right, as his share of the patrimony, and when he got the additional share of his grandmother Muna by virtue of the transfer and mutations, his share in each of these two villages became Re. 0-2-8. Both these shares were sold by Khetsingh and his mother Rupa by a sale-deed dated 17-3-1897 to Todar and Rupshah Kalars, who sold them to Dashadin Pande and others (predecessors-in-title of defendants 8 to 11) on 2-7-1921, and now defendants 8 to 11 are in possession thereof. Thus Khetsingh, by these various transactions, disposed of not only his own share of the patrimony, in the four villages, but also transferred his grandmother's shares (which he had obtained by the transfer and mutations in 1884-85).

[7] On 26-11-1897 Bira granted a mortgage of her Re. 0-2-8 share in Kanthora and Re. 0-2-8 share in Bilthara (which were allotted to her at the partition in 1874 with her co-widow Muna) for Rs. 1250 in favour of the two brothers Ramlal and Shamlal (predecessors of defendants 5 to 7), whose sons, on the strength of this mortgage, obtained a final decree for foreclosure against Bira, and are now in possession of the hypothecated estate.

[8] After the death of Netram his property was inherited by his widow Mt. Gomti, and in order to pay off the debts of her husband, she mortgaged her property with Patel Durag Singh and Thakurdas on 19-7-1886 (Ex. 8, D-27). By that time she had apparently remarried. In that instrument the name of Bira (Madarilal's widow) was included as a co-mortgagee. In order to pay off this mortgage of 1886 and certain other debts of Netram, a fresh mortgage-deed (Ex. 8, D-3) dated 27-1-1894, was executed by these two ladies and Mt. Indar widow of Beharilal, in favour of Bhawani, Todar and Rupshah, who later on assigned their mortgagee rights to defendant 8 and his father by a deed of transfer dated 19-6-1909 (Ex. 8, D-2). On 7-7-1920 Gomti and Bira sold a Re. 0-2-8 share in Piparia and a Re. 0-2-8 in Padaria by a sale-deed (Ex. 8, D-18) to defendants 8 to 11, who are now in possession thereof.

[9] The plaintiffs challenged all these alienations on the ground that they were the next immediate reversioners of Madarilal and that they were not bound by those alienations, which were effected by the two ladies Muna and Bira without any legal necessity. Mr. R. S. Dabir who appeared for the appellants did not dispute the relationship of the plaintiffs and also did not question their status as immediate next reversioners in this appeal. In fact his main ground of attack was that at the time when the two ladies effected a partition in 1874, they had entered into an agreement to relinquish their rights of survivorship so that after the partition they had had no concern with each other and that they could act and did act independently of each other in all their subsequent dealings, with reference to their respective shares. The material points on which the learned advocate on behalf of the appellants addressed his arguments may be summarised as under.

[10] In the first place it was said that the mutations of Muna's shares in the four villages, which were based upon a transfer, amounted to a valid surrender of a widow's estate by Muna in favour of the next reversioner Khetsingh, who consequently acquired the said shares as owner, under Hindu law. It is not disputed that in 1885 Khetsingh was the immediate next reversioner to Muna and her co-widow Bira, and it cannot also be disputed that the mutations were effected in respect of Muna's share in all the four villages. It is satisfactorily proved by the documents Exs. 1 D-3 and 2 D-3 (to be found typed at pp. 224 and 236 of Part II of the paper book) that mutations in respect of Muna's estate in Kanthora were made in the name of her grandson, on the basis of the transfer. It has, therefore, been rightly held by the learned Judge in the Court below that Muna had surrendered her half share in favour of her grandson, but he erred in holding that the act of surrender was confined only to two villages, namely, Kanthora and Bilthara. It is admitted by the plaintiffs in para. 4 of their plaint that Khetsingh got mutations effected in his name, in respect of Muna's entire property, and it was never suggested by them anywhere in their pleadings that the other two villages remained with her. Having regard to the clear admission of the plaintiffs and the documentary evidence on record, consisting of Exs. 1, D-1, 1 D-3 and 2 D-3,

we have no hesitation to hold that the surrender, apart from its legal effect, by Muna in favour of Khetsingh, who was then admittedly the next reversioner, was in respect of all her half interest in all the four villages.

[11] The second line of argument advanced for the appellants was that the surrender was justified as a valid surrender of a widow's estate under Hindu law, on the ground that the two widows had, at the time of their partition in 1874, relinquished their rights of survivorship and there was no prejudice likely to be caused to Bira's right of survivorship, which she had already given up at the time of the partition. This surrender, even though it was made by Muna alone, was valid in law and that it did accelerate the reversionary interest of Khetsingh, at least to the extent of that part of the widow's estate that Muna possessed in her own right.

[12] The main point for determination, therefore, is, whether the two ladies had agreed to relinquish their rights of survivorship at the time of their partition in 1874. But before we consider this point we think it is desirable to examine the pleadings of the different sets of the defendants in this case.

[13] The main defence set out by the first three defendants and defendants 8 to 11 in the Court below was that there was no disruption of the coparcenary, that there was no partition between the propositus Madarilal and his two brothers in 1866, and that after the death of Madarilal, the two branches had succeeded to his share by survivorship; whereas the defence put forward by defendants 4 to 7 in the Court below was that there was a partition in 1866 and that Madarilal died as a separate owner of the suit property. It was only defendants 1 to 3, who put forward an alternative plea that when the two ladies Bira and Muna effected a partition of their spouse's estate in 1874, they agreed to relinquish the rights of survivorship. It is very significant to note that this alternative defence of defendants 1 to 3 was not adopted by the other defendants. In the appeal before us, however, the learned counsel for the appellants has accepted the findings of the lower Court about the partition of the three brothers and has also adopted the alternative defence of defendants 1 to 3, that there was relinquishment of the rights of survivorship between the two widows at the time of their partition. It is quite apparent that, barring defendants 1 to 3, this plea is a new plea on their part and that it is an after-thought. We think that in these circumstances this plea will have to be strictly scrutinized.

[14] It is admitted by Mr. Dabir, that there is no direct evidence, oral or documentary, to prove that there was an agreement between the two widows to relinquish their rights of survivorship at the time of their partition. It is, however, contended by the learned advocate that there was an agreement in that behalf, which can be inferred from their subsequent course of conduct and the manner in which each of the two ladies dealt with her own share as owner, independently of the other.

[15] It is contended by the learned counsel appearing on behalf of the respondents that the alleged agreement was not specifically pleaded by the first three defendants. We think that there is much force in this contention, inasmuch as the plea that was put forward by the first three defendants about the alleged agreement is vague. That plea is:

> "That assuming though not admitting that both Mt. Muna and Mt. Bira inherited widow's estate from their husband and partitioned the same half and half as admitted by the plaintiffs in para 3 of the plaint, they did so conferring full power on each other to deal with their shares as they liked."

It is argued by Mr. Dabir, appearing in support of this appeal, that the agreement about relinquishment of the right of survivorship is implicit in this plea, inasmuch as the two ladies under the partition had agreed to confer full power on each other to deal with their respective shares as they liked. The issue with which we are concerned is issue 12. It runs thus:

> "Whether the two widows inherited Madarilal's share separately held by him and later partitioned it half and half between themselves as alleged by the plaintiffs?"

It is obvious that the lower Court did not frame any specific issue on the alleged agreement, for the simple reason that the agreement was not specifically pleaded, but it is rather curious to notice that the finding that was recorded by it was that there was a partition between the two widows, but it was not a partition, conferring on each, full power to deal with her share as she liked, so as to affect the surviving co-widow's right of survivorship or the right of the reversionary heirs. In these circumstances we are not inclined to stress the structure of the pleadings in this suit too strictly, as we think that fair notice of the case to be made out by the first three defendants had been given to the plaintiffs: *vide* 9 Luck. 178[1] at p. 184.

[16] It has been held in 10 N. L. R. 51,[2] that two or more co-widows of a Hindu, governed by the Benares School of the Mitakshara, who have inherited the property of their husband, are entitled, by agreement among themselves, to make an absolute partition of their own joint estate, so as to extinguish the right of survivorship *inter se*. Therefore the question that falls for consideration is whether there was such an im-

plied agreement between the two ladies at the time of their partition. Mr. Dabir has conceded, as we have already observed, that there is no direct evidence to prove any express agreement, and all that has been urged by him is that such an agreement should be inferred from the manner in which they effected various dealings, independently of each other. It is argued that when Muna surrendered her own estate in favour of her grandson Khetsingh, who was the next reversioner, in 1884-85, there was no protest from her co-widow Bira; nor did Bira take any steps to challenge it in a Court of law during her life-time. Even after the death of Muna in 1911, Bira did not repudiate the said surrender although she had *prima facie* succeeded to Muna's share by survivorship. It is argued that the whole course of conduct on the part of the two ladies amounts to a complete acquiescence in the separate dealings of each other and raises a strong inference that there was an agreement between the two widows at the time of their partition to relinquish their right of survivorship. The observations of the Chief Court of Oudh which have been quoted with approval by their Lordships of the Privy Council in A. I. R. 1923 P. C. 251[3] at P. 253 are a complete answer to the arguments of the learned counsel for the appellants. These observations are :

" The most that this evidence can establish is that Umrao Kunwar and Gaya Kunwar each acted independently of one another in making transfers. Each asserted a right, which was not possessed to deal absolutely with the property in her separate possession .... The circumstance that neither objected to a transfer made by the other cannot in our opinion be construed to mean more than that neither objected to the other making a transfer, provided that transfer did not affect her own interests in the event of her succeeding to the estate by survivorship ..... We find an absolute absence of evidence which would justify us in drawing a conclusion that Gaya Kunwar consented to the transfers in question."

The finding of the High Court that no consent on the part of one of the co-widows to the transaction of the other was given was consequently upheld by their Lordships of the Privy Council. We, therefore, hold that the defendants have failed to prove that there was any agreement, either express or implied, between Muna and Bira, at the time of their partition in 1874 to relinquish their right of survivorship.

[17] We also hold that Bira did not give her consent, either express or implied, to the act of surrender by Muna in favour of Khetsingh and that it did not accelerate his reversionary interest.

[18] Even assuming that the two widows had entered into an agreement to relinquish their rights of survivorship, at the time of their partition, it is beyond question that that fact cannot affect the rights of the plaintiffs. It has been laid down by their lordships of the Privy Council in 16 Mad. 1[4] that two or more widows cannot, by any agreement between them, affect the rights of the ultimate reversioners. It is contended by the learned counsel for the respondents that the alleged surrender by Muna in respect of her entire share of the widow's estate in favour of the next reversioner namely, Khetsing, was not a valid surrender, under Hindu law, inasmuch as it was not of the whole estate. It is argued that an alienation by a widow or other limited heir of the estate, inherited by her, may be validated, if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner, if there be only one, or of the whole body of reversioners, if there be more than one at the time of the alienation, and that if there are two or more widows, the surrender must be by all of them: *vide* Mulla's Principles of Hindu Law, Edn. 10th, para. 197, pages 212 and 213. In this case the surrender was by only one of the co-widows, namely Muna, and Bira — the other co-widow — did not join in the act of surrender nor did she surrender her own share of the husband's estate that she separately held under the arrangement of the partition. Consequently, there being no surrender by the two widows, acting together, of the whole estate that they had inherited from their husband Madarilal, the surrender was invalid and inoperative under Hindu law and it could not accelerate the reversionary interest of Khetsingh and convey to him any title in respect of Muna's property.

[19] Mr. Dabir in support of the appeal tried to justify this surrender as valid, only on the ground that the two co-widows had agreed to relinquish their rights of survivorship, but as we have already held that the said agreement has not been proved in the case, we do not think that the question of the validity of the surrender directly arises in this case. The question of the validity of surrender by one of the two co-widows, in respect of her entire share of the widow's estate, that she has obtained at a partition between her and the other widow, coupled with an agreement relinquishing the right of survivorship, does not, therefore, fall to be considered in this case. It is a question of purely academic interest, and we therefore refrain from giving any decision on the point. We are not so much concerned with the transfers that were made from time to time by Khetsingh, in respect of his grandmother Muna's shares in the four villages, which he had acquired under the surrender in 1885, for the simple reason that according to the appellants, the validity of these transfers depends entirely upon the existence of an agreement to relinquish

the rights of survivorship at the time of the partition between the two co-widows. In view of our finding that the said agreement is not proved, the contention of the appellants about the validity of the surrender falls to the ground. The surrender could not prejudice the rights of survivorship of Bira, as found by the learned Judge of the lower Court. We go a step further and hold that, even if there had been an agreement between the two co-widows to relinquish the rights of survivorship, that could not validate the surrender and make it binding upon the plaintiffs, as we have already observed that two or more widows cannot by any agreement between them affect the rights of the ultimate reversioners. We, therefore, agree with the lower Court in holding that Khetsingh had no right to transfer Muna's property, that the plaintiffs are not bound by his transfers, and that the decree of the learned 2nd Subordinate Judge, First Class in plaintiffs' favour for possession of Muna's property is correct.

[20] Next we turn to the alienations made by Bira in respect of her own share in the estate that she had obtained at the partition in 1874. She joined in the execution of two mortgages dated 19-7-1884 and 27-1-1894 respectively along with Indar (Beharilal's widow) and Gomti (ex-widow of Netram) for payment of debts which Netram owed to creditors. The mortgagee rights under the latter mortgage, viz., of 27-1-1894, were transferred by the mortgagees, Todar Kalar and others to defendant 8 and his father by a transfer dated 19-6-1909 (Ex. 8 D-2). Later on, the ex-widow Gomti and Bira executed a sale-deed on 7-7-1920 in favour of defendants 8 and 9 and others, in order to pay off Netram's debt (Ex. 8 D-18). The learned Judge in the Court below has found that the debts of Netram, for payment of which these alienations were made, were not binding on the estate of Madarilal, in the hands of his widow Bira and that there was no need for her to pay them. In our view the learned Judge in the Court below has rightly held that, in the absence of any legal necessity for Bira to sell her interest in the two villages, Padariya and Pipriya, the transaction of sale was not binding upon the plaintiffs and that they were entitled to recover possession of Bira's shares in the two villages from the defendants. The second alienation, which Bira made, was the mortgage of 26-11-1897, on the basis of which Ramlal Shamlal obtained the foreclosure decree against her. There is absolutely no evidence on record to show that Khetsingh, who was then the next reversioner, had consented to this mortgage, but it was found by the lower Court, on the evidence on record, that the said mortgage was executed by Bira for legal necessity. This finding has not been challenged by the learned counsel for the respondents on the facts, but it is contended by him that, although the mortgage was for legal necessity, still the mortgage, or the foreclosure decree based thereon, is not binding upon the plaintiffs, inasmuch as it was effected by Bira without the concurrence of her co-widow Muna. It is argued that the two ladies could partition the property so that each might separately enjoy the usufruct. It is not disputed that, if they had acted together, they could have alienated the corpus of the estate for debts contracted for legal necessity, but it is contended that one of them could not prejudice the rights of survivorship of the other, by alienations, even though for legal necessity, save with the consent of the other. The mere fact that a partition has taken place between them does not imply a right to prejudice the claims of the survivor: *vide* 16 Mad. 1[4] ; A. I. R. 1926 Mad. 6[5] and A. I. R. 1942 ALL. 365.[6] Even in a case where the arrangement between the two widows may be of such a character that each relinquishes her right of survivorship in the portion of the estate held by the other and where an alienation (with or without legal necessity and without the consent of the other) cannot be questioned by the other, it will not bind the reversioner: *vide* 14 Pat. 518,[7] 45 M. L. J. 1[8] and A. I. R. 1928 P. C. 251.[3] We, therefore, agree with the lower Court in holding that the plaintiffs are neither bound by the mortgage nor by the foreclosure decree thereon and that the lower Court was justified in decreeing the claim of the plaintiff for possession in respect of this property.

[21] The only point that now remains to be considered is whether plaintiff 1 is estopped from challenging the sale-deed dated 7-7-1920 (Ex. 8 D.18), executed by Bira and Gomti. This sale-deed was executed in favour of the predecessors of defendants 8 to 11, and so far as this transaction is concerned, there is absolutely nothing on record to show that plaintiff 1 had any concern with it. At the time of this transaction, Khetsingh was already dead, and the first two plaintiffs were admittedly the next reversioners. The transferees did approach plaintiff 2 and obtained his consent to the transaction in writing, and the lower Court has rightly held that so far as plaintiff 2 is concerned, he is estopped from challenging this transaction. In view of the fact that plaintiff 2's consent to the transaction was specifically asked for and obtained in writing, it is not improbable that the transferees approached plaintiff 1 also to obtain his consent, and it is, therefore, very significant that the transferees did not obtain his consent in writing, nor is there anything on record to show, as we have already observed, that plaintiff 1 assented to this transaction; but it is argued that the plaintiffs had had

knowledge of the previous transaction, which ultimately led to the execution of the sale dated 7-7-1920. For the appellants it has been contended by Mr. Dabir that plaintiff 1 attested the deed of assignment (Ex. 8 D-2), dated 19-6-1909 and has expressly mentioned in his attestation clause that he attested the document after reading the deed. This deed of assignment comprises three mortgages, viz., (1) executed by plaintiff 1 and others dated 25-7-1892, (2) another mortgage by Gomti, Indar and Bira dated 27-1-1894 and (3) by plaintiff 1 and others dated 16-4-1897. The two mortgages executed by plaintiff 1 and others have no concern whatsoever with the mortgage executed jointly by the three ladies, viz., Gomti, Indar and Bira, all the three being distinctly separate transactions. It is argued that inamuch as this deed of assignment relates to the mortgage by Bira and others and inasmuch as the deed of assignment was attested by plaintiff 1 after reading the instrument, it should be presumed that he consented to the valid and binding nature of the mortgage by Bira in 1894. In any case this is not a case of mere attestation by plaintiff 1 but a case of attestation, coupled with knowledge of the previous alienation by Bira. We think that plaintiff 1 Halkulal must have been asked to attest this deed of assignment by Todar, in favour of Pandit Thakur Prasad, because it comprised two mortgages executed by him, and the only reasonable inference that we can draw from his attestation is that he did not want to challenge the deed of assignment, in respect of his own mortgages.

[22] The other circumstance on which Mr. Dabir has relied in support of his plea of estoppel is that plaintiff 1 scribed the receipt (Ex. 8 D-4), dated 26th June 1918, that was executed by Bira and Gomti in favour of Todar relating to a dispute about the payment of Rs. 150. Plaintiff 1 also scribed the signature clauses of Bira and the ex-widow. It is, therefore, argued that he was aware of the previous mortgage that was executed by Bira and Gomti in favour of Todar and others, to clear off the debts of Netram and inasmuch as the receipt related to a dispute about a part of the consideration of the said mortgage, plaintiff 1 should be presumed to have accepted the validity and the binding nature of the mortgage of 1894 (Ex. 8 D-3). In our opinion mere knowledge of a previous transaction is neither here nor there, in the absence of any evidence of representation by plaintiff 1 to the predecessors of defendants 8 to 11. It is conceded that there is no other evidence in the case to support the plea of estoppel, beyond the fact that plainitff 1 attested the deed of assignment and scribed the receipt. It is futile to contend that the plea of estoppel can be sustained on such flimsy grounds. Their Lordships of the Privy Council have laid down in 20 Cal. 296[9] that:

"the main question, in determining whether estoppel has been occasioned, is whether the representation has caused the person to whom it has been made to act on the faith of it. The existence of estoppel does not depend on the motive, or on the knowledge of the matter on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act, or to abstain from acting, should have been fraudulent, or that he should not have been under a mistake, or misapprehension."

In the absence of any evidence on record that plaintiff 1 had made any representation and that the transferees had acted on the faith of it, in buying the property, under the sale-deed dated 7th July 1920, it is ridiculous to contend that the plea of estoppel is tenable in law.

[23] It should be borne in mind that, neither in 1909 nor in 1918, plaintiff 1, though a presumptive reversionary heir, was not entitled to claim possession of the property, for the simple reason that Bira was then alive and no inheritance had opened out. In 42 Mad. 523[10] at p. 538 their Lordships of the Privy Council have observed thus:

"But it is well settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption."

It cannot be disputed that either at the time of the date of assignment in 1909 or at the time of the receipt in 1918, plaintiff 1's character as the nearest reversionary heir was not affirmed, Bira being alive, and that he cannot be held to be estopped, merely because he did not challenge the alienation at its inception or merely because he attestsd the deed of assignment or scribed the receipt with knowledge of the previous transaction. The transaction was good and valid as long as Bira was alive and she was quite competent to enter into it in any manner she liked. In these circumstances, the grounds which have been urged before us by Mr. Dabir in support of the plea of estoppel are devoid of any substance.

[24] For the above reasons we affirm the decree of the lower Court and dismiss this appeal with costs.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 243 *[C N. 79.]*

HIDAYATULLAH J.

Hittu Bansi—Complainant—Applicant v. *Sheolal Dinaji and another—Accused—Non-applicants.*

Criminal Revn. No. 571 of 1946, Decided on 12-3-1947, from order of Addl. Sessions Judge, Balaghat, D/-22-7-1946.

(a) Criminal P. C. (1898), S. 161 — Answers to questions under S. 161 during investigation, whether absolutely privileged—Penal Code (1860), S. 500.

There is no absolute privilege in respect of the statements a witness is compelled to make from the witness-box and the rule of English law has not been incorporated in Indian Statute Law. The privilege is a qualified one : 24 A. I. R. 1937 Nag. 138, *Foll.* [Para 5]

Sub-section (2) of S. 161, Criminal P. C., allows a witness to refuse to answer questions which expose him to a criminal charge or to a penalty or forfeiture. It follows that a witness is not compelled to answer questions which would expose him to a charge of defamation. If he answers questions, the witness can only avoid a charge of defamation if he succeeds in bringing his answers under the exceptions mentioned in S. 499, Penal Code. There is no essential difference between S. 132, Evidence Act and S. 161 (2), Criminal P. C. If anything, the proviso to the former gives some privilege but the latter does not. Section 161 (2), Criminal P. C., does not go further than S. 132 of the Evidence Act. Answers given to questions under S. 161, Criminal P. C. during investigation are therefore not absolutely privileged. [Paras 5, 6]

Annotation:— ('46-Com.) Cr. P. C., S. 161, N. 10.

(b) Criminal P. C. (1898), S. 439 — Acquittal — Power to interfere in revision.

The High Court has the power to interfere in revision with acquittals in which by reason of a gross error of law or of procedure there has been a failure of justice. Cr. Revn. No. 1 of 1944, *Foll.* [Para 6]

Annotation:— ('46-Com.) Cr. P. C., S. 439, N. 12.

Cases referred :—

1. ('37) I. L. R. (1937) Nag. 425 : 24 A.I.R. 1937 Nag. 138 : 169 I. C. 429 : 38 Cr. L. J. 775, Chhotelal v. Phulchand.
2. ('93) 16 Mad. 235, Queen-Empress v. Govinda Pillai.
3. ('88) 11 Mad. 477, Manjaya v. Shesha Shetti.
4. ('38) 1938-1 M. L. J. 810, In re Ramaswami Mudaliar.
5. Cri Revn. No. 1 of 1944, Jhadoo v. Bapu.

Y. V. Jakatdar — for Applicant.

P. R. Padhye and D. B. Padhye — for Non-applicants.

Order.— This is an application for revision of the judgment of Mr. S. C. Rai, Additional Sessions Judge, Balaghat, in Criminal Appeal No. 125 of 1946 decided on 22-7-1946.

[2] The two non-applicants, Sheolal and Jagatrai were convicted under S. 500, Penal Code, and sentenced to pay fines of Rs. 100-0-0 and Rs. 50-0-0 respectively. It was alleged against them that during the investigation of an offence relating to a foetus found in a field the accused made a statement imputing illegitimate pregnancy and miscarriage or abortion to the applicant's unmarried sister Miss Kari.

[3] In the appeal before the lower Court, it was urged that the statement was not made and if it was it was privileged because S. 161 (2), Criminal P. C. compels a witness to answer all questions relating to an offence. The lower appellate Court held that there was such privilege and that the accused were entitled to an acquittal.

[4] In this revision it is urged that this is a wrong statement of the law and that there has been a miscarriage of justice and that the acquittal deserves to be set aside and the case remanded for a rehearing of the appeal.

[5] In connexion with S. 132, Evidence Act, it has been held by almost all the Courts in India that there is no absolute privilege in respect of the statements a witness is compelled to make from the witness-box and that the rule of English law has not been incorporated in Indian Statute Law. See I. L. R. (1937) Nag. 425[1] by which I am bound and also the rulings cited therein. The weight of authority is definitely in favour of a qualified privilege. In 16 Mad 235[2] and 11 Mad 477[3] this rule of English Law was extended to statements made to the police under S. 161, Criminal P. C. In my opinion sub-section (2) itself allows a witness to refuse to answer questions which expose him to a criminal charge or to a penalty or forfeiture. It follows that a witness is not compelled to answer questions which would expose him to a charge of defamation. If he answers questions the witness can only avoid a charge of defamation if he succeeds in bringing his answers under the exceptions mentioned in S. 499.

[6] The earlier Madras cases must be deemed to have been modified by the later cases of that Court in connexion with S. 132, Evidence Act, though 1938-1 M. L. J. 810[4] seem to follow the earlier decisions. There is no essential difference between S. 132, Evidence Act, and S. 161 (2), Criminal P. C. If anything the proviso to the former gives some privilege which the authorities cited above hold not to be absolute, but the latter does not. It is difficult to read S. 161 (2) as going further than S. 132, Evidence Act. In my opinion, therefore, the law was incorrectly stated by the lower appellate Court. The acquittal, therefore, deserves to be set aside and the appeal remanded to the lower appellate Court for disposal according to law. In ordering so I respectfully follow the precedent of Grille J. (now C. J.) in Cri. Revn. No. 1 of 1944.[5] I hold that this Court has the power to interfere in revision with acquittals in which by reason of a gross error of law or of procedure there has been a failure of justice. I accordingly set aside the acquittal and remand the appeal for a rehearing and disposal according to law.

S. C. *Application allowed.*

A. I. R. (35) 1948 Nagpur 244 *[C. N. 80.]*

POLLOCK J.

Emperor v. *Birdichand Chunnilal* — *Accused* — *Non-applicant.*

Criminal Revn. No. 45 of 1947, Decided on 24-9-1947, from order of Addl. Sessions Judge, Buldana, D/-20-12-1946.

Criminal P. C. (1898), S. 195 (1) (b) — False complaint to police of offence under S. 392, Penal Code — Police officer reporting it to Magistrate under S. 173, Criminal P. C.— Subsequently under orders of superior police officer he filing complaint under S. 211, Penal Code— S. 195 (1) (b) is no bar to prosecution of case.

One *B* made a complaint to the Station House Officer of an offence under S. 392, Penal Code. The Station House Officer after investigation came to the conclusion that the information was false and reported this to the Additional District Magistrate under S. 173, Criminal P. C. Subsequently under the orders of a superior police officer he filed a complaint against *B* under S. 211, Penal Code. It was objected that the Court had no jurisdiction to try the case in the absence of a complaint by the Additional District Magistrate:

Held, that the mere fact that a report was made under S. 173, Criminal P. C. did not mean that there were any proceedings in a Court. As there were no proceedings in any Court, S. 195 (1) (b) was no bar to the prosecution of the case : *Case law referred.*

[Para 2 and 4]

Annotation.— ('46 Com.) Cr. P. C., S. 195 N. 8 & 9.

Cases referred :—

1. ('36) 23 A. I. R. 1936 Lah. 238:161 I.C. 288 : 37 Cr. L. J. 426, Ghulam Rasul v. Emperor.
2. ('41) 28 A. I. R. 1941 Lah. 216 : 195 I. C. 102: 42 Cr. L. J. 667, Shah Mahomad v. Emperor.
3. ('43) 30 A.I.R. 1943 Lah. 31:I.L.R.(1942) Lah. 675 : 204 I. C. 572 : 44 Cr.L J. 305, Nota Ram v. Emperor.
4. ('41) 28 A. I. R. 1941 Bom. 294 : 196 I. C. 104 : 42 Cr. L. J. 814, J. D. Boywalla v. Sorab Rustamji.
5. ('46) 33 A. I. R. 1946 Bom. 7 : I. L. R. (1945)Bom. 1056:223 I. C. 35 : 47 Cr. L. J. 321, Bajaji Appaji v. Emperor.
6. ('35) 22 A. I. R. 1935 Nag. 69, Local Government v. Mt. Guji.
7. ('27) 23 N. L. R. 136 : 15 A.I.R. 1928 Nag. 17 : 105 I. C. 454 : 28 Cr. L. J 934, Bholu v. Punjaji.
8. ('39) I.L.R. (1939) Kar. 388 : 26 A. I. R. 1939 Sind 65 : 180 I. C. 650 : 40 Cr. L. J. 461, Mt. Raji v. Allauddin M. Samo.

W. B. Pendharkar, Addl. Govt. Pleader — for the Crown.

K. V. Tambey —for Non-applicant.

Order.—Birdichand made a complaint to the Station House Officer, Borakhedi, that two persons had taken Rs. 9 from him by putting him in fear, and the Station House Officer registered an offence under S. 392, Penal Code and investigated it. He came to the conclusion that the information was false and reported this to the Additional District Magistrate, Buldana, as required by S. 173, Criminal P. C. Subsequently under the orders of a superior police officer he filed a complaint against Birdichand under S. 211, Penal Code. It was objected that the Court had no jurisdiction to try the case in the absence of a complaint by the Additional District Magistrate, but that objection was overruled. The learned Additional Sessions Judge has reported the case with the recommendation that the proceedings should be quashed.

[2] Section 195 (1) (b), Criminal P. C. forbids a Court to take cognizance of an offence under S. 211, Penal Code when such offence is alleged to have been committed in or in relation to any proceeding in any Court except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. Here there never were any proceedings in any Court, and S. 195 (1) (b), in my opinion, is no bar to the present case. The mere fact that a report was made under S. 173, Criminal P. C., does not mean that there were any proceedings in a Court.

[3] The learned Additional Sessions Judge has referred to several cases in support of his view that the proceedings should be quashed. The decision in A. I. R. 1936 Lah. 238 [1] does support him, though I cannot agree with the view there expressed that the words in S. 195 (1) (b) 'in relation to any proceedings in any Court' apply if there was merely an intention that there should in consequence of the report to the police be a trial in a criminal Court. That decision was referred to, apparently with approval, in A. I. R. 1941 Lah. 216,[2] but in that case a complaint was made to a Magistrate after the report had been made to the police; it was held that there could be no complaint under S. 182, Penal Code as the case fell within the purview of S. 211, Penal Code, and that a complaint by the Magistrate was required. That decision, however, was overruled in A. I. R. 1943 Lah. 31,[3] where it was held that a prosecution could be launched under S. 182, Penal Code in such circumstances, even if there was a subsequent false complaint to a Magistrate amounting to an offence under S. 211, Penal Code.

[4] In A. I. R. 1941 Bom. 294[4] the accused was discharged by a Magistrate, and in A. I. R. 1946 Bom. 7,[5] there was a complaint to a Court; so those decisions are not in point. In A. I. R. 1935 Nag. 69[6], the complaint was preferred by a Sub-Inspector of Police under S. 211, Penal Code against a person who had, it was said, falsely accused him of rape, and it was not apparently suggested there that the sanction of any Court was required. In 23 N. L. R. 136,[7] it was held that a person against whom a false charge has been made to the police can institute, a complaint for an offence under S. 211, Penal Code independently of the provisions of S. 195, Criminal P. C. In I. L. R. (1939) Kar. 388[8] it was held that where a Magistrate gives a 'B' summary of a case that is an administrative and not a judicial act and does not bring the offence within the provisions

of S. 195 (1) (b). The meaning of S. 195 (1) (b) seems to me fairly clear, and it also seems clear in the present case that there have been no proceedings in any Court. Therefore the bar contained in that clause does not apply, and there is no reason why the present proceedings should be quashed. The reference is not accepted.

D.S. *Reference rejected.*

A. I. R. (35) 1948 Nagpur 245 *[C. N. 81.]*

SEN J.

Balkrishna Murlidhar Hadap—Accused—Appellant v. *Emperor.*

Criminal Appeal No. 199 of 1945, Decided on 29-6-1946, from order of Special Tribunal, Amraoti, D/- 8-10-1945.

(a) Government of India Act (1935), S. 270 (1)—Public servant — Prosecution for illegal gratification—Consent of Governor-General not necessary —Criminal P. C. (1898), S. 197.

To attract the provisions of S. 270 (1), it is not sufficient merely to establish that the person proceeded against was a public servant and that while acting as a public servant, or taking advantage of his position as a public servant, he did certain acts ; it must be established that the *act complained of* was an official act. The act of receiving illegal gratification cannot be an act done or purporting to be done in the execution of duty. The prior sanction of the Governor-General is therefore not necessary for the prosecution of a public servant for an offence under S. 161, Penal Code : 26 A. I. R. 1939 F. C. 43, *Rel. on* ; 31 A.I.R. 1944 F.C. 66, *Foll.* [Paras 5, 6]

Annotation : ('46-Com.) Cr. P. C., S. 197, N. 6.

(b) Penal Code (1860), S. 161 — Charge under — Evidence.

A charge under S. 161 is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature. These considerations cannot, however, be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If, after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that, however strong the suspicion raised against the accused, every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal : 31 A. I. R. 1944 F. C. 66, *Foll.* [Para 7]

Held, on facts that the charge against the accused was not proved beyond reasonable doubt and the accused was therefore entitled to an acquittal. [Para 24]

(c) Criminal P. C. (1898), S. 164—Confession not duly recorded—Other evidence of confession—Admissibility.

In the absence of any proof that the confession made to a Magistrate has been duly recorded, no other evidence is admissible to prove the confession : 23 A. I. R. 1936 P. C. 253 and 24 A. I. R. 1937 Nag. 220, *Rel. on.* [Para 17]

Annotation :—('46-Com.) Cr. P. C., S. 164, N. 2.]

(d) Evidence Act (1872), S. 114, Illus. (b) and 133—Accomplice—Evidence—Corroboration —Criminal P. C. (1898), S. 337.

A person who offers a bribe to a public officer is an accomplice and it is not safe to convict a public servant of receiving bribes upon his evidence, unless it is corroborated in material particulars by independent evidence : *Case law relied on.* [Para 24]

Annotation :—('46-Com.) Cr. P. C., S. 337, N. 17.

(e) Penal Code (1860), S. 161—Abetment — Person offering bribe to public officer.

A person who offers bribe to a public officer is guilty of abetment of the offence under S. 161, read with S. 109 or S. 116 according as the act abetted is committed in consequence of the abetment or not : 1942 N. L. J. 104, *Rel. on.* [Para 24]

Cases referred :—

1. ('39) 1939 F. C. R. 159 : 26 A.I.R. 1939 F. C. 43 : I. L. R. (1939)-Kar. F.C. 132 : I.L.R. (1940) Lah. 400 : 181 I. C. 317 : 40 Cr. L. J. 468 (F. C.), Hori Ram v. Emperor.
2. ('44) 1944 F. C. R. 262 : 31 A.I. R. 1944 F. C. 66 : I.L.R. (1944) Kar. F. C. 189 : 214 I. C. 199 : 23 Pat. 517 : 45 Cr.L.J. 75 (F.C.), H. T. Huntley v. Emperor.
3. ('36) 17 Lah. 629 : 23 A. I. R. 1936 P. C. 253 : 63 I. A. 372 : 163 I. C. 881 : 37 Cr. L. J. 897 (P. C.), Nazir Ahmad v. King-Emperor.
4. ('37) I.L R. (1937) Nag. 268:24 A.I.R. 1937 Nag. 220: 168 I. C. 962 : 38 Cr.L.J. 642, Neharoo v. Emperor.
5. ('42) 1942 N. L. J. 104, Provincial Government C. P. & Brar v. Murlidhar.
6. ('90) 14 Bom. 331, Queen-Empress v. Chagan Dayaram.
7. ('02) 26 Bom. 193, King-Emperor v. Malhar Martand.
8. ('29) 16 A. I. R. 1929 Nag. 215 : 114 I. C. 457 : 30 Cr. L. J. 311, Mahomad Usuf Khan v. Emperor.
9. ('45) 32 A.I.R. 1945 Mad. 358 : I.L.R. (1945) Mad. 821 : 221 I. C. 193 : 47 Cr. L. J. 113, In re Jadudas Appadurai Pillai.
10. ('10) 38 Cal. 96 : 8 I. C. 119 : 11 Cr. L. J. 560, Emperor v. Chaturbhuj Sahu.

Dr. T. J. Kedar, N. M. Dharaskar and S. K. Deshpande — for Appellant.

Hidayatullah, Advocate-General—for the Crown.

Judgment. — Balkrishna Murlidhar Hadap was convicted under S. 161, Penal Code, and sentenced to one year's rigorous imprisonment and a fine of Rs. 500 by the Special Tribunal, Amraoti, in Criminal Case No. 11 of 1945 on 8-10-1945. Pending the filing of an appeal, he was released on bail on that date by the Tribunal under S. 426 (2a), Criminal P. C. He filed an appeal in this Court on 17-10-1945 to set aside his conviction and sentence and he was allowed to remain on bail by Hemeon J.

[2] The Special Tribunal, Amraoti, was constituted under the Criminal Law Amendment Ordinance, 1943 (29 [XXIX] of 1943), and the trial of the appellant was held in accordance with the provisions thereof. Under S. 7 of the Ordinance, as originally promulgated no appeal lay against any sentence of a Tribunal. The section was amended and a new section was substituted by the Criminal Law (1943-Amendment) Second Amending Ordinance, 1945 (22 [XXII] of 1945) which was published in the Gazette of India, Extraordinary, on 4-7-1945. The complaint against the appellant was filed on 30-7-1945. Under the section as amended an appeal to this Court was competent because the offence was

alleged to have taken place at Tumsar Road within the local limits of the jurisdiction of this Court.

[3] Balkrishna Murlidhar Hadap was a goods clerk at the Tumsar Road Railway Station, B. N. Ry., in February 1945, and had put in 38 years service and was to retire after three months. Under S. 137 (1), Railways Act, 1890, every railway servant is deemed to be a public servant for the purposes of Chap. IX, Penal Code. The appellant was thus a public servant for the purposes mentioned in that chapter.

[4] The charge against the appellant was that on or about 23-2-1945, at Tumsar Road Goods Shed platform, he accepted Rs. 171 as a gratification other than legal remuneration from Ganpat Pandurang Teli as a reward for doing official acts and committed an offence punishable under S. 161, Penal Code.

[5] In Ground No. 1 of the memorandum of appeal the appellant urged that prior sanction of the Governor-General in Council was necessary for his prosecution, that for want of such sanction the trial was vitiated and that consequently his conviction was illegal. This contention was not pressed by Dr. Kedar, the learned counsel for the appellant. The contention has no force and is concluded by two decisions of the Federal Court in 1939 F. C. R. 159[1] and 1944 F. C. R. 262.[2] The observations in the latter case at pages 268 and 269 may be quoted as decisive of the contention raised :

"Section 270 (1) of the Constitution Act relates to proceedings instituted against a person 'in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown'."

In 1939 F. C. R. 159[1] this Court laid down that

"to attract the provisions of this section it was not sufficient merely to establish that the person proceeded against was a public servant and that while acting as a public servant, or taking advantage of his position as a public servant, he did certain act; it must be established that the *act complained of* was an official act. In this case the act complained of was the act of receiving illegal gratification. That surely could not be an act done or purporting to be done in the execution of duty."

On page 179, of (1939) F. C. R., Sulaiman J. observed:

"For instance, if a public servant accepts as a reward a bribe in his office while actually engaged in his official work, he is not accepting it even in his official capacity, much less in the execution of any official duty, although it is quite certain that he could never have been able to take the bribe unless he were the official in charge of some official work. He does not even pretend to the person who offers the bribe that he is acting in the discharge of his official duty, but merely uses his official position to obtain the illegal gratification."

[6] The sanction of the Governor-General under S. 270 (1) of the Government of India Act, 1935, was thus unnecessary for the prosecution of the appellant under S. 161, Penal Code. The trial of the appellant was not vitiated and his conviction cannot be challenged for want of sanction.

[7] In 1944 F. C. R. 262[2] at pp. 262, 271, Zafrulla Khan J, observed:

"A charge under S. 161, Penal Code is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused, every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal."

[8] These observations are important and have to be borne in mind in deciding a case under the section.

[9] The prosecution case was briefly stated as follows : S. N. Ghose (P. W. 6) was formerly an Assistant Station Master in the Bengal Nagpur Railway. Since May 1943, he was employed as a Station Officer attached to the Special Police Establishment. One of his duties was to inform his superior officer, Inspector, Kuar Sen, about corruption among the staff on the Bengal Nagpur Railway. Some time in September or October 1944 he received information that there was corruption among the staff at the Tumsar Road Railway Station. Kuar Sen instructed him to lay a trap in this connection, if possible. Ghose got in touch with Ganpat Pandurang (P. W. 9) who had been working as a Dalal (broker) at the station for Satyanarayan (P. W. 7) and four other merchants. Ghose had promised Ganpat that he will personally verify the reports against the railway staff at the goods-shed; but he could not do so as he was engaged in other cases at Jubbulpore. Two days after he first met him, Ghose sent him a letter (Ex. D 1) by post from Nagpur on 27th October 1944 intimating him that they were busy and he should wait for some time more. Ghose met him a month later, but nothing was settled about the laying of a trap. Ghose again met him about 17th or 18th February 1945 and finding that he was willing to help him, requested Kuar Sen to depute Sadasheo Tiwari (P. W. 8) Sub-Inspector of Police to arrange for a trap. Ghose met Tiwari at Nagpur on 21st or 22nd February 1945 and instructed him to establish direct contact with Ganpat. Ghose did not go to Tumsar Road Station on the day the trap was laid.

[10] Sadashiv Tiwari (P. W. 8), Sub-Inspector of Police, was entrusted with the duty of laying a trap. He had sent a word to Ganpat through Ghose that he will be at Tumsar Road on 23rd February 1945 and that Ganpat should be ready

with the money which he intended to pay as a bribe to the goods clerk and to pay it to him if he demanded it. On 22nd February 1945 Tiwari saw the District Magistrate, Bhandara, who empowered Mr. Janaswamy (P. W. 1), Extra Assistant Commissioner, to exercise first class magisterial powers in the Bhandara District by his order (Ex. P. 2) passed on that date and deputed him to witness the trap to be laid in this connection and directed Mr. T. N. Verma, Naib Tahsildar to proceed to Tumsar Road along with him.

[11] Tiwari reached Tumsar Road on 23rd February 1945 and saw Ganpat at his house in the city at about 11 A. M. and was with him for about an hour. Ganpat showed him the statement of account (Ex. P. 8) and the currency notes which he was going to offer as a bribe. They then went to the Dharamsala and on the arrival of Mr. Janaswamy at 2 P. M., Tiwari produced Ganpat before him. Mr. Janaswamy recorded his statement (Ex. P. 1).

[12] The substance of the statement of Ganpat recorded on 23rd February 1945 (Ex. P. 1) may now be stated : Hadap was a goods clerk and was charging 0 6-0 per tin as illegal gratification. Ganpat had despatched as a Dalal on behalf of Satyanarayan 856 tins of ghee, including 25 tins booked on that date. The total amount of illegal gratification for 856 tins worked out at Rs. 321. He stated that he had paid Rs. 150 to Hadap in three instalments on the following dates : Rs. 50 on 2nd February 1945; Rs. 50 on 5th February 1945; Rs. 50 on 12th February 1945; that he had still to pay Rs. 171, and that Hadap was dunning him for the payment of that amount and threatened him that he would not book further consignments unless the amount was paid. As Hadap was pressing him for payment he intended to pay him in the afternoon Rs. 171 in currency notes. He stated the numbers and the denominations of the notes, and showed a statement of account of the bribe.

[13] After recording the above statement, Mr. Janaswamy instructed Ganpat to give a signal by raising his cap after paying the money to the accused.

[14] Ganpat then went to the Tumsar Road Station which was at a distance of 3 miles from the Dharamshala. Tiwari proceeded to the Rest-House, Tumsar Road as directed by the Magistrate. Tiwari met Ganpat near the goods-shed between 3-30 and 4-30 P. M. and instructed him to keep a man near him so that he might overhear the conversation between him and the accused and witness the payment of the bribe to the accused.

[15] Mr. Janaswamy and Mr. Verma arrived at the Rest-House at about 3.55 P. M. Mr. Janaswamy was in the verandah of the Rest-House at the point marked '2' in the sketch map (Ex. P. 7) prepared by Ibrahim Khan Patwari (P. W. 2). Tiwari and Mr. Verma were in the bath-room which is marked '3' in the sketch. The point '4' is the goods-shed and '5' is the office of the goods-shed. '4' the goods-shed, is at a distance of 111 feet from the Rest-House. Point No. 6 on the open platform on the west of the goods-shed was the place where the money was stated to have been paid by Ganpat to the accused and was at a distance of 55 yards from point No. 5. In para. 2 of the complaint it was stated that from the bath-room of the Rest-House Mr. Verma and Tiwari could catch a signal from the broker. This was not however possible according to the evidence of Ibrahim Khan, who stated that between the goods-shed and the Rest-House, there is a hospital building and porters' quarter and near the hospital there is a fencing of mehdi plants and that if one were to see from room No. 3 in the sketch, one could not see any person standing on the west side of the goods-shed, but he could see from point No. 8. The evidence of the patwari was recorded on 19th September 1945. Mr. Verma was examined on 21st September and Tiwari on 2nd October 1945, and they stated that they saw Ganpat and the accused coming out of the goods-shed office at about 6 P. M., and that afterwards when they moved towards the western side of the goods-shed, these witnesses came out of the bath-room and watched them from the place marked '8' in the sketch, which was at a distance of 123 feet from point No. 6 where the money was alleged to have been given by Ganpat to the accused and the signal was raised. These witnesses further stated that they first saw Ganpat handing over a paper to the accused and thereafter a bundle to him. It is very doubtful whether they could have observed this from such a long distance at about 6-30 P. M. especially when both Ganpat and the accused were moving to and fro on the platform. This is however not material as the accused admitted that Ganpat had given him the money and a statement of account. The witnesses (P. Ws. 5 and 8) saw the signal given by Ganpat, sent a word to Mr. Janaswamy and they reached the goods-shed platform a few minutes later. They stated that the accused produced the currency notes for Rs. 171 and the statement of account (Ex. P-8) when he was asked to do so.

[16] Mr. Janaswamy compared the numbers of the notes produced by the accused with the numbers as recorded in the statement of Ganpat (Ex. P-1) and found that the numbers tallied. The currency notes were seized under seizure memo Ex. P. 3. The accused had with him other currency notes for Rs. 676 and small change for

Rs. 1-8-9, and they were seized under seizure memo, Ex. P-4 under which the statement of account (Ex. P-8) was also seized. Mr. Janaswamy then recorded the statement of Ganpat (Ex. P-1-A) and Bakaram (Ex. P-5) and placed the accused under arrest. He also recorded the statement of the accused which has not been filed in the case and which has not been used to support the conviction of the accused. The Magistrate wrote the order-sheet (Ex. P-6) at about 10 P. M. and released the accused on bail.

[17] In the order-sheet there is a reference to a confessional statement of the accused. The order-sheet is not signed by the accused and he was not asked about it in his examination as an accused under S. 342, Criminal P.C., The confessional statement in the order-sheet cannot be used as evidence in the case against the accused and has not been used by the Special Tribunal to support the conviction of the accused. The learned Advocate-General did not rely on that statement in his argument. The confession of the accused, if it was duly recorded by the Magistrate as required by S. 164, Criminal P. C., was admissible against the accused. The confession of the accused recorded by the Magistrate has not been filed and there is no proof that it was duly recorded. In the absence of such proof, no other evidence was admissible to prove the confession of the accused made to the Magistrate: *see* 17 Lah. 629[3] and I. L. R. (1937) Nag. 268[4] The statement of the accused recorded by the Magistrate in his order-sheet must therefore be ignored.

[18] Mr. Janaswamy exercised the magisterial powers in this case. He ordered Tiwari, Sub-Inspector of Police, under S. 155 (2) of the Criminal P. C. to investigate this case. He recorded the statements of Ganpat Pandurang and Bakaram. He arrested the accused and recorded his statement and subsequently released him on bail.

[19] Dr. Kedar, counsel for the appellant, contended that Mr. Janaswamy could not exercise the magisterial powers, while the learned Advocate-General contended that he could.

[20] Mr. Janaswamy was formerly a Tahsildar and he was subsquently appointed a temporary Extra-Assistant Commissioner, Balaghat, on the 25th March 1943. In exercise of the powers conferred by sub-section (1) of S. 12, Criminal P. C. the Provincial Government appointed him on 29th April 1943 to be a Magistrate of the first class in the Balaghat District. He went on leave for four months, but was permitted to return to duty before the expiry of the leave and was appointed a temporary Extra-Assistant Commissioner, Raipur. On 7th September 1944 he was transferred in the same capacity to the Bhandara district. On 12th December 1944 the Provincial Government issued the following notification:—

"In exercise of the powers conferred by sub-s. (1) of s. 12 read with s. 39, Criminal P. C. 1898 (V of 1898), the Provincial Government is pleased to direct that all Tahsildars exercising powers of a Magistrate of the second class shall, on their appointment as temporary Extra-Assistant Commissioners, stand invested with the powers of a Magistrate of the first class.

The Provincial Government is further pleased to direct that such Tahsildars shall, in the event of their reversion to the substantive post, continue to hold such powers unless such powers or any of them are expressly withdrawn."

The District Magistrate empowered Mr. Janaswamy to exercise the magisterial powers with which he had been invested. Mr. Janaswamy had been invested with the powers of a Magistrate first class in the Balaghat district and could exercise the same powers in the Bhandara district by virtue of S. 40, Criminal P. C., and by reason of the notification quoted above.

[21] After the accused was released, he made a report (Ex. D-9) to the Station Master about the incident to the effect that while he was busy in his work Ganpat Dalal handed over to him Rs. 271 (*sic*) and one sheet of paper and left the place stating that he was returning. While the accused was going to report to the Station-Master against Ganpat, he was arrested on the ground that Ganpat Dalal had given him *baxis*. The Station-Master sent a telegram (Ex. D-10) to the District Commercial Officer communicating the report made by the Goods-clerk to him.

[22] The accused admitted that he was a Goods-clerk at the Tumsar Road Railway-Station in February 1945, but denied that he had anything to do with the despatch of goods, or that there was any settlement of accepting *mamul* or illegal gratification at the rate of annas six per tin of ghee, or that Ganpat paid Rs. 100 in two instalments to him and Rs. 50 to Mone on account of illegal gratification. The accused admitted that Ganpat had handed over to him some notes rolled with paper, Ex. P-8, asking him to hand over the same to Mone, the shed-clerk, as reward. The accused asked Ganpat to accompany him to the Station-Master to whom he was going to make a report against him. While the accused was going to the Station-Master for making a report, he was accosted by Inspector Tiwari and on his asking him he handed over the notes and Ex. P-8 to Tiwari. The accused stated that Mone had detected smuggling of some goods by Ganpat of another merchant and had brought this to his notice. The accused had reported to the Station-Master and Ganpat had to apologise to the Station-Master. The suggestion was that Ganpat made a false charge against him out of revenge.

[23] The conviction of the accused is based on

the evidence of Ganpat Pandurang and Bakaram and the fact that the notes for Rs. 171 and the statement of account (Ex. P-8) were produced by the accused immediately after the incident. The Special Tribunal considered that Ganpat was not technically an accomplice but that his evidence required to be considered carefully and corroborated. The Special Tribunal held that the evidence of Ganpat was corroborated by the evidence of Bakaram and the conduct of the accused and rejected the explanation of the accused as not true.

[24] Ganpat, on his own statement, was an associate in crime. He alleged that he had paid Rs. 150 in three instalments on different dates as bribe to the accused and Mone, shed-clerk; and that when he took the sum of Rs. 161-10 from Satyanarayan on 22-2-1945, he intended to give the sum as bribe to the accused. A person who offers bribe to a public officer is guilty of abetment of the offence under S. 161, Penal Code, read with S. 109 or S. 116, Penal Code, according as the act abetted is committed in consequence of the abetment or not : *see* 1942 N. L. J. 104.[5] The person who offers a bribe to a public officer is an accomplice; *see* 14 Bom. 331,[6] 26 Bom. 193,[7] A. I. R. 1929 Nag. 215[8] and A. I. R. 1945 Mad. 358.[9] In 1944 F. C. R. 262[2] at p. 271 the evidence of such a person was treated as that of an accomplice. In 38 Cal. 96[10] a distinction was drawn between a person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence and a person who is associated with an offence with a criminal design. The former is not an accomplice and his evidence does not require corroboration but the weight to be attached to it depends on the character of the individual witness. But in the case of the latter, he is an accomplice, and his evidence requires corroboration. Ganpat was an accomplice and it is not safe to base a conviction upon his evidence unless it is corroborated in material particulars by independent evidence. The learned Advocate-General conceded that the evidence of Ganpat required corroboration. The question for decision in this appeal is whether the evidence of Ganpat was reliable, and whether it was corroborated in material particulars by independent evidence. (His Lordship discussed the evidence and held that the guilt of the accused had not been proved beyond reasonable doubt and set aside the conviction and the sentence passed on the appellant under S. 161, Penal Code.)

V.B.B. *Conviction set aside.*

A. I. R. (35) 1948 Nagpur 249 *[C. N. 82.]*

HEMEON J.

Emperor v. *Dau Sitaram Balwant Singh*—*Non-applicant.*

Criminal Revn. No. 520 of 1947, Decided on 23-1-1948, from decision of Dist. Magistrate, Drug, D/ 9-10-1947.

Criminal P. C. (1898), S. 517—Upon conviction of accused, under S. 379, Penal Code, the rightful owner and not the bona fide purchaser of property from accused, without knowledge of its being stolen, is entitled to its return.

A was convicted under S. 379, Penal Code, for the theft of a bullock belonging to *B*. The bullock was purchased by *C* from *A* not knowing it to be stolen. The purchase was bona fide :

Held that *B* and not *C* was entitled to the return of the bullock under S. 517: 29 A.I.R. 1942 Nag. 82, *Disting.*; 15 A.I.R. 1928 Oudh 277 and 27 A.I.R. 1940 Cal. 346, *Rel. on.* [Para 5]

Annotation : ('46-Com) Cr. P. C., S. 517 N. 15 Pt. 2.

Cases referred :—

1. ('42) I. L. R. (1942) Nag. 769 : 29 A.I.R. 1942 Nag. 82 : 200 I. C. 347 : 43 Cr. L. J. 698, Budhu Lal Har Narayan v. Sukhman.
2. ('28) 3 Luck. 494 : 15 A. I. R. 1928 Oudh 277 : 112 I. C. 103 : 29 Cr. L. J. 983, Mahomed Hadi Husain Mirza v. Emperor.
3. ('40) 27 A. I. R. 1940 Cal. 346 : 189 I. C. 714 : 41 Cr. L. J. 791, Akshoy Kumar Shah v. Naba Kumar Singh.

W. B. Pendharkar, Addl. Government Pleader—for the Crown.

K. B. Tare—for Non-applicant.

A. V. Khare and T. B. Pendharkar—for applicant.

Order.—The non-applicant, Sitaram (P. W. 5.) lost a bullock which was worth about Rs. 150, in March 1947 while it was grazing and a report was duly made to the police. Sukhau, who was thereafter prosecuted, was convicted under S. 379, Penal Code, and bound over under S. 562 (1), Criminal P.C., by the First Class Magistrate, Drug, who directed the bullock to be returned to Mt. Fulwati (P. W. 3) who had bought it from Sukhau for Rs. 80.

[2] The District Magistrate, Drug, has now reported the case under S. 438, Criminal P. C., with a recommendation that the bullock should be returned to its owner Sitaram from the possession of Mt. Fulwati who was not entitled to it.

[3] Fulwati was not aware that the bullock was stolen property and her purchase of it was undoubtedly bona fide. Her learned counsel contended, therefore, that the trial Court's order was proper and in support of his proposition referred me to I. L. R. (1942) Nag 769[1] in which Niyogi J. held that a person who has come into possession in a lawful manner of articles subsequently recovered from him is entitled to get them back under S. 517, Criminal P. C. That was a case, however, which ended in an acquittal and in which, as Niyogi J. himself pointed out, it had to be presumed that the accused came in lawful possession of the property and that he

transferred the custody of it to the applicant in a lawful manner.

[4] Here, the position is otherwise. Sukhau had stolen the bullock and could not, therefore, legally sell it to Fulwati. In 3 Luck 494[2] a Division Bench held that jewellery which had been dishonestly retained was rightly restored to the real owner of it, although the procedure might have been different if there had been a bona fide dispute as to title. In A. I. R. 1940 Cal 346[3] the facts were that currency notes which had been mis-appropriated by Bucha, the manager of a firm, were deposited by him with another firm to redeem bills of exchange which he had pledged on his own account with that firm. The notes, which had been handed over to that firm, were identified by their numbers and most of them were seized by the police. The Magistrate directed this firm to return the currency notes to the firm of which Bucha was manager, and Edgeley J. held that this was a proper order under S. 517, Criminal P. C.

[5] I am in respectful agreement with these views and accordingly accept the learned District Magistrate's recommendation that the bullock be returned to Sitaram by Mt. Fulwati.

R.G.D. *Order accordingly.*

A. I. R. (35) 1948 Nagpur 250 *[C. N. 83.]*

POLLOCK J.

Ramnath Sheonarayan — Accused — Applicant v. *Sonaji Krishnaji — Complainant — Non-applicant.*

Criminal Revn. No. 794 of 1946, Decided on 23-9-1947, from order of 3rd Addl. Sessions Judge, Akola, D/- 29-10-1946.

Criminal P. C. (1898), S. 522 (3) — Court of revision — High Court hearing revision against order restoring or refusing to restore possession is Court of revision within S. 522 (3).

A High Court hearing a revision application not against an order of conviction but against an order restoring or refusing to restore possession under S. 522 (1), is a Court of revision within the meaning of S. 522 (3), and therefore has jurisdiction to make an order under S. 522 (1): 29 A. I. R. 1942 Bom. 148; 12 A. I. R. 1925 Pat. 689; 20 A. I. R. 1933 Pat. 617 and 26 A. I. R. 1939 All. 662, *Foll.*; 19 A.I.R. 1932 Cal. 750; 19 A.I.R. 1932 Lah. 210 and 24 A. I. R. 1937 Pesh. 7, *Dissent.*

[Para 4]

Annotation:— ('46-Com.) Cr. P. C., S. 522; N. 10.

Cases referred:—

1. ('42) I. L. R. (1942) Bom 249 : 29 A.I.R. 1942 Bom. 148 : 200 I. C. 724 : 43 Cr. L. J. 708, Savlaram Sadoba v. Dnyaneshwar Vishnu.
2. ('25) 4 Pat. 438 : 12 A. I. R. 1925 Pat. 689 : 91 I. C. 809 : 27 Cr. L. J. 137, Rameshwar Singh v. Emperor.
3. ('33) 12 Pat. 787 : 20 A. I. R. 1933 Pat. 617 : 145 I. C. 327 : 34 Cr. L. J. 940, Fida Hussain v. Sarfaraz Hussain.
4. ('39) I. L. R. (1939) All. 863 : 26 A. I. R. 1939 All. 662 : 184 I. C. 384 : 40 Cr. L. J. 958, Emperor v. Nihal Singh.
5. ('32) 59 Cal. 1153 : 19 A. I. R. 1932 Cal. 750 : 140 I. C. 66 : 33 Cr. L. J. 868, Ashwini Kumar Das v. Shashanka Mohan.
6. ('32) 19 A. I. R. 1932 Lah. 210 : 135 I. C. 679 : 33 Cr. L. J. 191, Ghazan v. Mt. Bhag Bhari.
7. ('37) 24 A. I. R. 1937 Pesh. 7 : 166 I. C. 872 : 38 Cr. L. J. 333, Said Umar v. Abdul Qadir.

N. B. Chandurkar — for Applicant.

E. J. Moharrir — for Non-applicant.

Order.— On the complaint of the non-applicant Sonaji the applicant Ramnath was prosecuted and convicted under S. 447, Penal Code, of criminal trespass in a field and was fined Rs. 10. Within a week of the conviction the complainant applied to the learned Magistrate for an order under S. 522, Criminal P. C. restoring him to possession of the field from which he had been dispossessed. If the learned Magistrate had then read S. 522 a good deal of trouble would have been saved. Unfortunately he did not, and issued notice and eventually passed the order asked for after the lapse of more than one month, although sub-section (1) of S. 522 clearly states that the order may be passed at any time within one month from the date of the conviction. The learned Additional Sessions Judge held that he himself had jurisdiction to pass the order, apparently as a Court of revision, and therefore considered that there was no ground for interference with the order passed by the learned Magistrate. Against that decision the present application for revision has been filed.

[2] In view of the clear words of sub-section (1) of S. 522 that the Court may pass such an order within one month from the date of the conviction I do not think that it had any jurisdiction to pass such an order after the lapse of more than one month, and on that point there seems to be no difference of opinion. No appeal lay against the learned Magistrate's decision, as he was a Magistrate of the first class, and the learned Additional Sessions Judge was not a Court of revision and had no power to interfere in revision. He therefore had no jurisdiction to make such an order himself.

[3] Under sub-section (3) of S. 522 an order under this section may be made by any Court of appeal, confirmation, reference or revision. No limitation is laid down for such an order, and it appears to me that it was not intended to prescribe any period of limitation. It obviously could not be one month from the date of conviction as an appellate or revisional Court seldom deals with a case within such period. On this point also there is fairly general agreement.

[4] The point on which there is considerable difference of opinion is whether the High Court has power under sub-section (3) to make such an order if the High Court is hearing not an appeal or a revision application against the conviction

but merely an application against the order restoring or refusing to restore possession. The view taken by Beaumont C. J. in I. L. R. (1912) Bom. 249,[1] was that a High Court hearing a revision application against an order restoring or refusing to restore possession is a Court of revision within the meaning of S. 522 (3) and therefore has jurisdiction to make an order under S. 522 (1). The same view has been taken in 4 Pat. 438,[2] 12 Pat. 787[3] and I. L. R. (1939) All. 863.[4] A contrary view has been taken in 59 Cal. 1153,[5] A. I. R. 1932 Lah. 210[6] and A. I. R. 1937 Peah 7.[7] I prefer the view taken by Beaumont C. J. and do not think that S. 522 (3) should be construed too narrowly. This Court is a Court of revision when hearing the present application and has therefore, in my opinion, jurisdiction to make an order under S. 522 (1).

[5] It has been suggested that criminal force or intimidation was not used and that the complainant was not dispossessed or at least that there is no express finding to that effect. There is a clear finding by the learned Magistrate in his order under S. 522 that the complainant was dispossessed by force and criminal intimidation, and there is also a finding to that effect by the learned Additional Sessions Judge. The order placing the complainant in possession was passed on 22-7-1946 and I should ordinarily be reluctant to reverse that order at this stage. The complainant himself was in no way to blame for the delay. The result is that the order placing the complainant in possession will stand and the application for revision is dismissed.

S.C. *Application dismissed.*

A. I. R. (35) 1948 Nagpur 251 *[C. N. 84.]*

BOSE J.

Sahebrao Bajirao — Applicant v. *Suryabhan Ziblaji and another — Non-applicants.*

Criminal Revn. No. 385 of 1947, Decided on 21-10-1947, from order of Sessions Judge, Wardha, D/- 15-7-1947.

Criminal Procedure Code (1898), S. 188—"Found" means "found" by Court— How accused got there, is immaterial.

"Found" in S. 188 means found by the Court at the time when the matter comes up for trial, that is to say, any Court which is otherwise competent to try the offence can take seisin the moment the accused appears in its presence. How the accused gets there is immaterial. It does not matter whether he comes voluntarily or in answer to a summons or under illegal arrest. It is enough that the Court should find him present when it comes to take up the matter. The authority which has to do the finding is the Court and not any other authority. This may give several Courts jurisdiction. There is no harm in this. It is common for different Courts to have concurrent jurisdiction in certain matters. Any conflict which arises can always be resolved by some higher tribunal which can decide where the accused should be tried. If Court A "finds" an accused present and enters upon the trial, it is evident that Court B would not entertain the same matter. But if it did, a reference to a higher tribunal, such as the High Court, would at once set the matter right. [Paras 8, 12]

Offence under Marriage Restraint Act was committed in Bhopal State. Accused resided at Amraoti. He attended the Court at Wardha upon the summons served on him by the police at Amraoti. The question was whether the accused was "found" at Amraoti or at Wardha:

Held that the accused was "found" at Wardha which Court therefore had jurisdiction to try him; and not at Amraoti where the summons was served: 23 A. I. R. 1936 Nag. 152; 35 Bom. 225; 6 Bom. 622; (1858) 27 L. J. M. C. 48; 13 Bom. 147 and (1850) 19 L, J. M. C. 31, *Rel. on.* [Para 8, 12, 17]

Annotation:—('46-Com.) Cr. P. C., S. 188, N. 6.

Cases referred:—

1. ('36) 23 A. I. R. 1926 Nag. 152: 164 I. C. 687 : 37 Cr. L. J. 979, W. Y. Zincke v. Emperor.
2. ('11) 35 Bom. 225 : 10 I. C. 956 : 12 Cr. L. J. 356, Emperor v. Vinayak Damodar.
3. ('82) 6 Bom. 622, Empress v. Maganlal.
4. (1858) 27 L. J. M. C. 48, Queen v. Lopez.
5. ('89) 13 Bom. 147, Queen-Empress v. Daya Bhima.
6. (1850) 19 L. J. M. C. 31, Queen v. Smythies.
7. (1840) 2 Moo. P. C. 186, Reg. v. Whiby.

R. S. Dabir and H. V. Kulkarni — for Applicant.

G. J. Ghate — for Non-applicant 1.

Order.— The question here is whether the Wardha Court has jurisdiction to try the applicant under the Child Marriage Restraint Act.

[2] The marriage was celebrated at Bhopal and three persons are being proceeded against in respect of it. The applicant Sahebrao is the guardian and custodian of the minor girl who is said to have been married in contravention of the Act. The prosecution seek to implead him also as an accused. It is admitted that this can only be done if his case falls under S. 188, Criminal P. C.

[3] The relevant portion of the section is contained in the words I have underlined in the following extract:

"he may be dealt with in respect of such offence as if it had been committed at any place within British India *at which he may be found (here italicised).*"

It is admitted that the offence, if any, was committed in the "territory of a Native Prince." It is also admitted that the applicant resides in Amraoti beyond the normal jurisdiction of the Wardha Court. What the prosecution allege is that he was "found" in Wardha when he attended the Court in response to the summons served on him. The applicant, on the other hand, states that he was "found" at Amraoti when the police served the summons on him there and states that he cannot be "found" a second time. It will be seen that the matter turns on the meaning of the word "found" in S. 188.

[4] In my opinion, the whole question here is who is to do the "finding." It is evident that no person or object can be said to be "found" unless somebody "finds" him or it. The whole

question, therefore, is who is the person or authority contemplated by the section.

[5] It was argued that Ss. 68 and 70 furnish the necessary clue. The former deals with the issue and serving of a summons, and the latter states that:

"where the person summoned cannot with the exercise of due diligence be found etc."

It was said that it is obvious that this means "found" by the police because S. 68 (2) prescribes that the summons shall in the normal course be served by a police officer. It was argued that when a word is used in a statute it must be given the same meaning throughout unless there is something to indicate the contrary in the statute itself.

[6] I do not deny that the expression "found" as used in S. 188 can be interpreted in different ways, but in view of the fact that it has been judicially interpreted in a certain sense over many years, I do not feel I will be justified in taking a different view, particularly as it accords with my own ideas as to what will best carry out the intent of the section.

[7] I do not feel that the argument relating to Ss. 68 and 70 is conclusive because there is material in these sections to indicate that the "finding" is to be by a police officer or other person specially designated for the purpose. Section 188 contains no such limitation and as Ss. 68 (2) and 70 are expressly confined to police officers or their substitutes, while S. 188 is not. I do not feel it incumbent on me to impose limitations in S. 188 where none exists simply because a special limitation appears in the other two.

[8] In my opinion, "found" in S. 188 means found by the Court at the time when the matter comes up for trial, that is to say, any Court which is otherwise competent to try the offence can take seisin the moment the accused appears in its presence. How the accused gets there is immaterial. It does not matter whether he comes voluntarily or in answer to a summons or under illegal arrest. It is enough that the Court should find him present when it comes to take up the matter.

[9] In A. I. R. 1936 Nag. 152[1] the offence was committed at a place in the Bhopal State, the accused resided at Itarsi in the Hoshangabad District and was tried by a Hoshangabad Court. It is not clear how he got to Hoshangabad but it was held that he must be taken to have been found where he was actually present and so the Hoshangabad Court had jurisdiction. By this I understand the learned Judge to mean that as he was found to be present in the Hoshangabad Court at the relevant time that Court had jurisdiction. I do not think anything turned upon his residence at Itarsi because the section does not deal with residence, nor do I think it mattered how he reached the Hoshangabad Court. The only relevant point was that he was found to be present in Court at the proper time and that gave the Court jurisdiction.

[10] This follows the view taken in 35 Bom. 225[2] and 6 Bom. 622[3] as also in the English case reported in (1858) 27 L. J. M. C. 48.[4] There is also a case in 13 Bom. 147.[5] In all these cases the principle applied has been that it does not matter how the accused reaches the Court: he must be taken to have been "found" wherever he is actually present and by that I take it is meant found by the Court. I cannot see how the fact of illegal arrest outside jurisdiction and a forcible and wrongful bringing into Court can make him to be "found" within jurisdiction and not a voluntary appearance or one in answer to a summons.

[11] In all these cases the finding was, in my opinion, done by the Court and not by the police or any other body or person. So far as the police are concerned, they "found" their man at the place where they arrested him and that was outside jurisdiction. They could not be said to have re-found him the moment they entered jurisdiction or at any of the places through which they passed; therefore, the matter could not have turned upon their finding. The only authority left was the Court and, in my opinion, the decisions mean and lay down the broad general proposition that an accused is "found" for the purposes of S. 188 at any Court with jurisdiction otherwise in which he happens to be present irrespective of how he got there.

[12] It is objected as to this that this would give several Courts jurisdiction. I can see no harm in this. It is common for different Courts to have concurrent jurisdiction in certain matters. Any conflict which arises can always be resolved by some higher tribunal which can decide where the accused should be tried. But I do not think the question would be likely to arise. If Court A "finds" an accused present and enters upon a trial, it is evident that Court B would not entertain the same matter. But if it did, a reference to a higher tribunal, such as the High Court, would at once set the matter right.

[13] So far as England is concerned, the question has been resolved in this sense through various statutes for many years. Thus in cases of forgery, an old Statute of George IV required the trial to be either in the place in which the prisoner was apprehended or where he shall "be in custody". In (1850) 19 L. J. M. C. 31[6] Parke, B. held and the other Judges concurred that:

"the prisoner falls within the words of the statute 'be in custody' here."

This was in 1849. The learned Judge also pointed out that the report of an earlier case in the year (1840) 2 Moo. P. C. 186,[7] was wrong. The report suggests that the conviction had been quashed, whereas Parke, B., who was a member of the tribunal, pointed out that it had been upheld by nine of the eleven Judges who considered the matter.

[14] In (1840) 2 Moo. P. C. 186[7] it was argued for the Crown that the words "being in custody" were added :

"to provide for a man being apprehended in one county and brought in custody to another."

The later English cases in (1858) 27 L. J. M. C. 48[4] and *Queen* v. *Sattler*, decided in 1858 took the same view of the expression "found" in 19 and 20 Vict. C. 91, S. 21. That section corresponds to S. 188 and also uses the word "found". Welsby arguing for the Crown contended that

"the expression in the above-named Act, where the foreigner shall be 'found', does not mean where the man is discovered, but where he shall be at the time of trial."

I gather this construction was accepted. Lord Campbell said at p. 51 :

"It is clear the prisoner was found within the jurisdiction of the Central Criminal Court. Ballantyne, Serj. has contended that a man brought into a place against his will cannot be said to be found there. But we are of a different opinion. We think the Act of Parliament is framed for the purpose of providing against any such questions being raised. A man is found wherever he is actually present."

[15] As regards the Indian cases, 6 Bom. 622[3] was under the Foreign Jurisdiction and Extradition Act, XXI of 1879, while the other cases I have cited were under S. 188, Criminal P. C.

[16] Turning to the dictionary-meaning of the word, it is defined in the Oxford English Dictionary as meaning not only a discovery but also "to come upon in the course of events" and "to perceive or recognise the presence of."

[17] I am clear that the authority which has to do the "finding" is the Court and if a person is present in Court, the Court either "comes upon him in the course of events" or "perceives or recognises his presence." The application fails and is dismissed.

R.G.D. *Application dismissed.*

A. I. R. (35) 1948 Nagpur 253 *[C. N. 85.]*

POLLOCK AND SHEVDE JJ.

Mt. Maltibai and another — Plaintiffs — Appellants v. *Wamanrao Sheoram and others —Defendants—Respondents.*

First Appeal No. 41 of 1940, Decided on 12-8-1947, from decree of First Class Sub-Judge, Chanda, D/- 14-11-1939.

Limitation Act (1908), Arts. 142 and 144—There can be adverse possession against minor.

It cannot be stated as a general proposition that there can be no adverse possession of property which belongs to a lunatic or a minor during the continuance of the lunacy or minority of the owner, and the question has in each case to be decided with reference to the anterior relationship between the person taking possession and the minor or lunatic and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic : 9 A. I. R. 1922 Mad. 12 ; 19 A. I. R. 1932 Bom. 23 ; 20 A. I. R. 1933 Bom. 287 ; 32 A. I. R. 1945 Bom. 63 and 15 A. I. R. 1928 Oudh 481, *Approved*. [Para 6]

Annotation :— ('42-Com.) Lim. Act, Arts. 142 and 144, N. 24, Pt. 13.

Cases referred :—

1. ('22) 45 Mad. 361 : 9 A. I. R. 1922 Mad. 12 : 70 I. C. 678, Seetaramaraju v. Subbaraju.
2. ('32) 19 A. I. R. 1932 Bom. 23 : 134 I. C. 366, Shidlingava v. Rajava.
3. ('33) 57 Bom. 488 : 20 A. I. R. 1933 Bom. 287 : 145 I. C. 262, Fakirgowda v. Dyamawa.
4. ('45) 32 A. I. R. 1945 Bom. 63 : 219 I. C. 166, Rachappa v. Madivalawa.
5. ('28) 15 A. I. R. 1928 Oudh 481 : 113 I. C. 258, Mt. Ram Dulari v. Sher Bahadur.
6. ('40) 27 A. I. R. 1940 Cal. 589 : 193 I. C. 168, Lalit Kumar v. Nogendra Lal.
7. ('40) I. L. R. (1940) Kar. 534 : 28 A. I. R. 1941 Sind 50 : 194 I. C. 137, Khemchand v. Dayaram.
8. ('24) 48 Bom. 411 : 11 A. I. R. 1924 P. C. 137 : 51 I. A. 220 : 79 I. C. 971 (P. C.), Kalyandappa v. Chanbasapa.

D. T. Mangalmurti and M. R. Indurkar — for Appellants.

M. R. Bobde, R. G. Siras and P. R. Padhye — for Respondent 1.

Judgment.—The property in dispute, which consists of a 16-anna proprietary share in *mauza* Bodegaon with 43.24 acres of *sir*, 2.58 acres of *khudkasht* and 16.71 acres of occupancy land, and a house therein, 47.19 acres of *malik-makbuza* land and a house in *mauza* Dighori, and 22.18 acres of *malik-makbuza* land in *mauza* Arher-Nawergaon in the Brahmapuri tahsil of the Chanda District, belonged at one time to Jairam, the natural son of Vinayak Bhat and the adopted son of Ganesh Bhai, whose family trees are as below :

GANESH BHAI
|
Jairam = Gangabai
(adopted son, died on 10-11-1910)
|
Janardan = Maltibai (Plaintiff)
(adopted on 21-3-1910, died on 27-7-1921)

VINAYAK BHAT

Jairam (adopted by Ganesh Bhai)	Sheoram
	Waman (defendant 1)
	Janardan (adopted by Jairam.)

[2] Jairam admittedly adopted Janardan, the natural son of Sheoram, on 21-3-1910 and died on 10-11-1910. On his death, his entire estate devolved

on Janardan by survivorship. It is alleged and has been held by the lower Court that Jairam made a will (Ex. 1 D-39) on 20-3-1910 by which he devised the property in dispute to Waman (defendant 1), the son of his natural brother Sheoram, 167.39 acres of *malik-makbuza* land in *mauza* Mangli to his wife Gangabai for her lifetime, and the rest of his considerable estate to Janardan, whom he had decided to adopt. On the death of Jairam, Waman obtained mutation of the proprietary share of *mauza* Bodegaon and of the *malik-makbuza* lands in *mauzas* Dighori and Arher-Nawergaon in his name, and he was appointed lambardar of Bodegaon. Janardan was then a minor. It is immaterial for the purposes of this case whether Janardan came of age in 1913, as alleged by the defendants, or in 1918, as alleged by the plaintiff, and the lower Court's finding that he came of age in 1913 has not been challenged in this Court. Janardan died in 1921, and his estate then devolved on his widow Maltibai, the plaintiff. At the settlement in 1921 the property in dispute was recorded in the name of Waman, shortly after the death of Janardan. Maltibai came of age in 1926, and she brought this suit in December 1936 to recover possession of the property in dispute. The other defendants are transferees of small portions of the property in dispute from Waman.

[3] The plaintiff contended that the will was a forgery. It was apparently attested by five respectable witnesses, and there is ample evidence, as the learned Subordinate Judge has pointed out, to prove their signatures. The will was produced by Waman before the revenue authorities when he applied for mutation of the property in dispute in his name after the death of Jairam in 1910, and a certified copy of the will was retained with the revenue records. The will was mentioned in a mortgage executed by Gangabai and Waman in favour of Sir Gangadhar Chitnavis in 1911 (Ex. 1 D-17). Purshottam (P. W. 1), who said that he had never heard of any will, was obviously aware that the land in Mangli had been given to Gangabai for her maintenance, as will appear from his letter (Ex. 1 D-31) written in 1928. There is direct evidence, as the lower Court has shown, to prove that Janardan was aware of this will after he came of age, and the authenticity of it was never challenged until 1933 when Maltibai sued the transferees of Gangabai for possession of the Mangli *malik-makbuza* land. All the evidence one way or the other has been carefully considered by the lower Court, and we agree with it that there is no reason to doubt the authenticity of this will.

[4] The will was admittedly invalid in the sense that it could not defeat Janardan's right by survivorship to the entire estate, but it has been contended by the defendants that Janardan after attaining majority ratified this will and thereby validated it. We have no doubt that Janardan was aware of the existence of this will and that he tacitly acquiesced in it, either because he was ignorant of his rights or because he was willing to allow his natural brother Waman a share, which we are told was about a quarter, in a very considerable estate. On the death of Jairam the entire estate vested in Janardan, and nothing occurred during Janardan's minority to divest him of it. The question is whether he could subsequently divest himself of it by tacitly acquiescing in the will. The dispositions in an invalid will of this sort may be treated as valid, not by virtue of the will but by virtue of a subsequent family settlement, if there is such a settlement. Whether a subsequent tacit acquiescence in the will can be said to amount to an effective family settlement is a point which we do not propose to decide, as we consider that the plaintiff's suit must fail on the ground of adverse possession.

[5] The will directed that if Janardan were a minor at the time of Jairam's death, Waman should manage the whole of Janardan's property in accordance with the opinions and directions of Gangabai, who was of course the legal guardian of Janardan. Gangabai appointed Waman as one of her agents. Waman applied to the revenue authorities to have the estate mutated according to the dispositions of the will, and that was done. The proprietary share of Bodegaon and the *malik-makbuza* land in Dighori and Arher-Nawergaon were recorded in his name and he was appointed lambardar of Bodegaon. Janardan was appointed lambardar of *mauza* Minthur and presumably of any other villages in the estate, and Waman was appointed lambardar-gumashta. At the settlement of 1921, as we have said, Waman was recorded as the proprietor of Bodegaon and the *malik-makbuza* land in Dighori and Arher-Nawergaon, and he has ever since 1910 been in open and undisputed possession of this property. The plaintiff and Purshottam (P. W. 1), her agent and apparently her principal adviser, admittedy assumed until 1934 that this was Waman's property. The suit was not brought until December 1936.

[6] The plaintiff's contention that the suit is not barred by limitation rests almost entirely on the contention that there can be no adverse possession against a minor. That question was considered at length in 45 Mad. 361,[1] and the conclusion of the learned Judges was that it cannot be stated as a general proposition that there can be no adverse possession of property which

belongs to a lunatic or minor during the continuance of the lunacy or minority of the owner, and that the question has in each case to be decided with reference to the anterior relationship between the person taking possession and the minor or lunatic and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic. That decision has been followed or cited with approval in A. I. R. 1932 Bom. 23,[2] 57 Bom. 488,[3] A. I. R. 1945 Bom. 63[4] and A. I. R. 1928 Oudh 481.[5] Mr. Mangalmurti for the plaintiff-appellant referred us to certain remarks in A.I.R. 1940 Cal. 589[6] and 57 Bom. 488[3] where it was said that adverse possession would not run against the plaintiffs during their minority; but those statements must be read in relation to the facts of those cases, and we do not think that there was any intention to lay down any general proposition. In I. L. R. (1940) Kar. 534[7] Lobo J., after an analysis of the case-law deduced the proposition that minority is no bar to the acquisition of title by adverse possession if the person claiming such adverse possession does not bear to the person against whom he claims it any anterior relationship such as that of agent, bailee, trustee, etc. Subsequently, however, he went on to say that he could not see how title by adverse possession could originate during the minority of the owner as no knowledge of the assertion of a hostile title could be attributed to him. It is not necessary that ouster should be brought to the notice of the competitor, and it is sufficient if the possession is overt and without concealment so that the competitor, if he exercised due diligence, ought to be aware of the ouster; and in 48 Bom. 411,[8] Lord Phillimore remarked that to assume that you cannot impute knowledge to a minor is a view which is certainly not in accordance with the facts of human nature. We, therefore, respectfully agree with the view taken in 45 Mad. 361[1] that there may be adverse possession against a minor.

[7] After Jairam's death, Waman, Janardan and Gangabai all lived and messed together, and Waman managed all the family property. The accounts for the various villages were kept separately, but all the income was treated as common. The lower Court has held that Janardan after he left school in 1917 took part in the management of his estate and made entries in his diary showing that the will was apparently taken to Sayagata on 28-1-1921, that Rs. 150 was entered in the account of Waman on 4-2-1921 on account of the establishment of the Arber-Nawergaon fields, and that Waman was the owner of the fields in Dighori: *see* Exs. 1 D-35, 40, 41, 42, 43 and 44. The small items of 0-3-0 and 0-1-6 shown in the diary (Ex. 1-D-35), as expenditure incurred when the will was taken to Sayagata, appear also in the account books produced by the plaintiff, but a small portion has been eaten or cut out so that the purpose for which this money was spent is not shown there. The plaintiff contends that this portion was eaten by white ants. It is a curious coincidence that just this portion should be missing, and it does not look to us as if white ants were responsible for this. There is the evidence of Prabhakar (D. W. 8) and Vishwanath (D. W. 18), as well as that of Waman himself (D. W. 1), to show that these entries in the diary of Janardan were made by Janardan, and we see no reason to suspect otherwise. There is considerable evidence, as the lower Court has pointed out, to show that Janardan took part in the management of his property, and it was natural enough that he should show Waman as the owner of the Dighori land.

[8] Janardan as a lambardar would naturally have been summoned before the Settlement or Assistant Settlement Officer, and there is the evidence of a very respectable witness, Wamanrao (D. W. 2), a Tahsildar and landlord, that he and Janardan both appeared before the Assistant Settlement Officer of Brahmapuri in the beginning of 1921. Janardan must also have been well aware that he was not the lambardar of Bodegaon. It has been argued that possession can never be adverse if it can be referred to a lawful title, and that Waman was in a fiduciary position in regard to Janardan, as he was the agent of Janardan's guardian. In accordance with the terms of the will Waman looked after the property left to Janardan by that will, and in so far as that property was concerned it may be said that he stood in a fiduciary relationship to Janardan. Waman was the natural brother of Janardan, but Janardan had passed into another family, and Waman was not his guardian, and as regards the property left by the will to Waman, Waman was under no obligation to Janardan. Waman clearly entered into possession on his own account, and the possession cannot be referred to a lawful title. It is said that because the income from all the family property was thrown into the hotchpot Waman's possession is not adverse; the mere fact, however, that they happened to live together and treated the income as common property as a matter of convenience while they lived together would not show that Waman's possession was permissive and not adverse to Janardan. In 1922, after Janardan's death Waman left the house and had no further connexion with Gangabai and Maltibai and thereafter his possession

was adverse beyond all dispute because he was recorded at the settlement of 1921 as the owner of the property in suit. Once it is held that there can be adverse possession against a minor, it follows that, whatever the position was before 1922, the possession was adverse from 1922 onwards and that any suit would be barred after 1934. Therefore, whether Art. 142 or Art. 144 applies, the position is the same and the suit must fail as barred by limitation.

[9] The appeal fails and is dismissed with costs.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 256 *[C. N. 86.]*

HEMEON J.

Suwabai w/o Radhakisan — Plaintiff — Appellant v. *Krishna Ravji and others — Defendants — Respondents.*

Second Appeal No. 145 of 1943, Decided on 22-10-1946, from appellate decree of Addl. Dist. Judge, Amraoti, D/-16-11-1942.

(a) Limitation Act (1908), Art. 132 — Suit for contribution by person acquiring right of subrogation — Starting point of limitation.

Subogation being a mere substitution, does not create any fresh right but puts the claimant in the shoes of the creditors. Consequently, the acquired rights are capable of being enforced only within the statutory period within which they could be enforced by the original creditor. Hence, under Art. 132 time for a suit for contribution, by a person who has paid off the mortgage, begins to run from the date of the mortgage paid off and not from the date of payment: 29 A. I. R. 1942 Nag. 111, *Foll.* [Para 8]

Annotation:—('42-Com.), Lim. Act, Art. 132, N. 10, Pt. 4; N 14, Pt. 2.

(b) Civil P. C. (1908), S. 11, Expln. 4 — Person paying off prior mortgage — In suit by subsequent mortgagee such person though impleaded as party not pleading his right of subrogation — Subsequent suit by him for foreclosure based on right of subrogation is barred.

One *A* mortgaged fields X and Y with M and then again mortgaged fields X, Y and Z with *R*. A subsequantly sold field Y to *P*. *M* brought a suit against *A*, *R* and *P* and obtained a decree for foreclosure. *P* then deposited the full decretal amount and a final decree for full satisfaction was passed. *R* brought a suit against *A* and *P* on his mortgage and got a decree and took possession of the fields. In this suit *P* not only entered appearance but claimed that he had no knowledge of the mortgage or its consideration and expressed willingness to pay the amount in proportion to his share. He did not however plead his right of subrogation. *P* subsequently brought a suit in order to enforce the encumbrance under *M*'s mortgage-deed on the ground that he was, by his payment of the full amount of that deed, subrogated to the mortgagee's position and had a right to foreclose:

Held that *P*'s claim was barred by *res judicata* in virtue of Expl. 4 to S. 11, Civil P. C.: 32 A. I. R. 1945 Mad. 151; 39 Cal. 527 (P. C.); 24 All. 429 (P. C.); 10 A. I. R. 1923 Pat. 290; 18 A. I. R. 1931 Pat. 33 and 19 A. I. R. 1932 Oudh 268, *Rel. on*; 6 A. I. R. 1919 Nag. 57, *Disting.* [Para 9]

Annotation:—('44-Com.). C. P. C., S. 11, N. 35, Pt. 4.

(c) T. P. Act (1882), S. 95 — Interest — Suit by way of subrogation — Interest, when allowed.

Where one of several mortgagors alone redeems the mortgaged property, he is not *prima facie* entitled under S. 95, T. P. Act to claim interest against his co-mortgagors on the amount of their proportion of the expenses so incurred; and his claim, if any to interest must be based on some ground outside the section, as, for instance, on notice given to his co-mortgagors that he would claim interest against them on the expenses so incurred if they wished to redeem their shares. Where no such notice is given and there is a great delay in filing a suit, there are no equities in plaintiff's favour and he is not entitled to interest by way of damages or otherwise: 12 A. I. R. 1925 Bom. 484, *Rel. on.* [Para 12]

Annotation: — ('45-Com.), T. P. Act, S. 95, N. 4.

Cases referred:—

1. ('42) I. L. R. (1942) Nag. 393 : 29 A. I. R. 1942 Nag. 111 : 201 I. C. 472, Balchand v. Ratanchand.
2. ('17) 13 N. L. R. 217 : 4 A. I. R. 1917 Nag. 152 : 42 I. C. 796, Nathuram v. Sheolal.
3. ('45) 32 A. I. R. 1945 Mad. 151, Seshamaraju v. Subramania Sastri.
4. (12) 39 Cal. 527 : 39 I. A. 68 : 14 I. C. 496 (P. C.), Mohamed Ibrahim Hosain Khan v. Ambika Pershad Singh.
5. ('02) 24 All. 429 : 29 I. A. 118 : 8 Sar. 293 (P. C.), Sri Gopal v. Pirthi Singh.
6. ('23) 2 Pat. 435 : 10 A. I. R. 1923 Pat. 290 : 71 I. C. 948, Lal Bebari Singh v. Gur Prasad Singh.
7. ('30) 9 Pat. 816 : 18 A. I. R. 1931 Pat. 33 : 130 I. C. 168, Brijmohan Singh v. Dukhan Singh.
8. ('33) 8 Luck. 103 : 19 A. I. R. 1932 Oudh 268: 139 I. C. 358, Kanhaiya Lal v. Mt. Ikram Fatima.
9. ('19) 15 N. L. R. 114 : 6 A. I. R. 1919 Nag. 57 : 52 I. C. 82 (F.B.), Laxminarayan v. Vithoba.
10. ('25) 49 Bom. 591 : 12 A. I. R. 1925 Bom. 484: 88 I. C. 658, Gafur Imam v. Amir Isab.

P. K. Tare — for Appellant.

Y. S. Tambe — for Respondents.

Judgment. — Raoji (deceased) and his son Krishna (defendant 1) mortgaged fields, Survey Nos. 140/2 and 69/1 on 14th July 1923, with Raghunath Gulji Marwari, and, on 23rd May 1925, Krishna and his brother Motiram (defendant 2) mortgaged the same two fields and third field Survey No. 111/1 with Ramkisan (defendant 3). On 22nd December 1925, they sold field No. 69/1 to the plaintiff-appellant Radhakisan (now deceased). Raghunath Gulji Marwari thereafter instituted Civil Suit No. 37 of 1928 against the mortgagors, Ramkisan and Radhakisan and on 18th September 1928, obtained a decree for foreclosure. He assigned this decree to Narayan who was substituted as plaintiff in lieu of him in that suit. On 28th September 1929, Radhakisan deposited the full amount of the decree and a final decree for full satisfaction was drawn up.

[2] Ramkisan then instituted Civil Suit No. 29 of 1930 to enforce his mortgage against the mortgagors and Radhakisan and, having secured a preliminary and final decree, took possession of the fields on 5th March 1932. On 29th August

1941, Radhakisan filed the present suit in order to enforce the encumbrance under Raghunath Gulji Marwari's mortgage deed on the ground that he was by his payment of the full amount of that deed subrogated to the mortgagee's position and had a right to foreclose. Pandurang (respondent 4) was joined as a defendant as Ramkisan had sold field Survey No. 140/2 to him.

[3] The defendants Krishna and Motiram were proceeded against *ex parte* and the defendant Pandurang, who admitted his purchase of field Survey No. 140/2, claimed that the suit was time-barred in respect of him. The most active contestant was the defendant Ramkisan who admitted the two mortgages and the subsequent sale in the plaintiff's favour but denied that the plaintiff by making payment was substituted for the original mortgagee and asserted that he had no right to recover the amount paid or to foreclose the property. He also contended that he was estopped from pleading subrogation as he had not raised that plea in the mortgage suit filed by him (Ramkisan), that under the sale deed of 22nd December 1925, the right of subrogation was expressly excluded and that the plaintiff had paid the consideration as the mortgagors' agent and acquired the property for less than its value with the burden of the prior mortgages. Ramkisan also claimed that the suit was liable to be dismissed because the plaintiff had not brought a proper suit for contribution and because it was barred by limitation.

[4] The trial Court in dismissing the suit found as follows :

(i) The plaintiff was subrogated in place of the decree-holder in Civil Suit No. 37 of 1928.

(ii) The present suit was not maintainable without a suit for contribution.

(iii) The plaintiff was estopped from claiming the amount in question as he had not claimed it in Civil Suit No. 29 of 1930.

(iv) The present suit was not tenable without redemption of the decree in Civil Suit No. 29 of 1930.

(v) The suit was barred by limitation against the defendant Pandurang.

(vi) The plaintiff was not entitled to the amount including interest claimed by him.

[5] In appeal the Additional District Judge, Amraoti, held that the plaintiff should have set up his claim for being redeemed in respect of the mortgagee's rights in Civil Suit No. 37 of 1928 and was now estopped from doing so by record and by the principle of *res judicata* as against Ramkisan. It was also decided that the present suit for foreclosure was not tenable without a suit for contribution and that the plaintiff was not entitled to any relief from the defendant Pandurang. The appeal was accordingly dismissed.

[6] In second appeal the plaintiff-appellant's learned counsel frankly conceded that the plaintiff's claim against Pandurang was rightly held to be time-barred.

[7] In Civil Suit No. 29 of 1930 instituted by Ramkisan to enforce his mortgage against the mortgagors and Radhakisan, the latter not only entered an appearance but, as his written statement Ex. 3-D-6 shows, claimed that he had no information of any kind regarding the mortgage deed in the suit or its consideration, admitted that he had purchased field Survey No. 69/1 from Raoji and expressed his willingness to pay the amount that "would be calculated in proportion to his share in case the sale deed in the dispute would be proved". He had not then pleaded subrogation although that is the stand now taken by him in the present suit. In the circumstances, he is entitled only to enforce the mortgage dated 14-7-1923.

[8] In I. L. R. (1942) Nag. 393[1] there is the following passage at page 397 :

> " Subrogation, being a mere substitution, does not create any fresh rights but puts the claimant in the shoes of the creditors. It would therefore be evident that the rights which a person acquires by subrogation and is entitled to enforce are the very rights which the original creditor was entitled to do. Consequently, the acquired rights are capable of being enforced only within the statutory period within which they could be enforced by the original creditor.. It is on this principle that it was held in 13 N. L. R. 217 [2] that under Art. 132, Limitation Act, 1908, time began to run from the date of the prior mortgage and not from the date of payment."

It follows that although a suit for contribution would have been within time by reason of the fact the present suit was filed within 12 years from 28-9-1929, the date on which the plaintiff deposited the decretal amount in C. S. No. 37 of 1928, the present suit was time-barred as it had been filed on a date subsequent to the expiry of a period of 12 years from 14-7-1923, the date of the mortgage in suit.

[9] I am also of the view that the claim was barred by *res judicata* in virtue of Expln. IV to S. 11, Civil P. C. In A.I.R. 1945 Mad. 151[3] reliance was placed on the case in 39 Cal. 527,[4] in which a subsequent mortgagee had a right by subrogation to priority to another mortgage, but when he was impleaded in the suit filed by the prior mortgagee, he failed to prefer his right by subrogation to the priority. The Division Bench of the Madras High Court which had, as stated, relied on that decision, also was of the view that if a subsequent mortgagee has priority by reason of a right to subrogation, he was obliged to put forward that right. Their Lordships of the Judicial Committee of the Privy Council had also

held in 24 ALL. 429 [5] that where, to a suit by a mortgagee on a mortgage bond of certain property, a prior mortgagee of the same property is made a party and omits to set up his prior charge and claims to have it redeemed, a suit subsequently brought by him for that purpose is barred by Expln. II to S. 13, Civil P. C. (present Expln. IV to S. 11).

[10] In 2 Pat. 435 [6] it was held that where a person who is impleaded in a suit on a mortgage on the allegation that he is a puisne mortgagee files a written statement alleging that he is a prior mortgagee, but does not otherwise contest the suit, and the judgment in that suit proceeds on the assumption that he is a puisne mortgagee, he is not entitled subsequently to allege in a suit on his own bond that he is a prior mortgagee. So also in 9 Pat. 816[7] at p. 828 the view taken was that when the party impleaded is a puisne mortgagee and, therefore, a necessary party, but claims priority, he must assert and prove his priority, otherwise he is barred. In 8 Luck. 103[8] it was decided that where it is the duty of a person to set up a prior charge in defence to a claim for the recovery of a certain sum of money by sale of a certain property, but no priority is set up, a subsequent suit for a declaration that he has a prior charge is barred by Expln. IV to S. 11, Civil P. C.

[11] The appellant's learned counsel relied on the Full Bench case in 15 N. L. R. 114[9] in which there was the following decision:

"Where a decree for foreclosure is passed *ex parte* against a person joined as defendant on the sole ground that he is in possession of the mortgaged property, but no express adjudication upon the question of title is given, though the final decree orders delivery of possession and possession is accordingly delivered, the aforesaid defendant is not barred by the rule of *res judicata* from setting up a paramount title in the subsequent suit."

In that case, however, the decree for foreclosure was passed *ex parte* against a person joined as defendant on the sole ground that he was in possession of the mortgaged property, whereas Radhakisan had not only entered an appearance in the present suit but had strenuously contested in the manner adumbrated above.

[12] I am also of the view that the plaintiff was rightly held by the two Courts below not to be entitled to interest. The suit was by way of subrogation and in 49 Bom. 591 [10] a Division Bench held that where one of several mortgagors alone redeems the mortgaged property, he is not *prima facie* entitled under S. 95, T. P. Act, to claim interest against his co-mortgagors on the amount of their proportion of the expenses so incurred; and his claim, if any, to interest must be based on some ground outside the section, as for instance, on notice given to his co-mortgagors that he would claim interest against them on the expenses so incurred if they wished to redeem their shares. In the case before me such notice was not given and there was great delay in filing the suit. In other words, there were no equities in the plaintiff's favour and he was not entitled to interest by way of damages or otherwise. In the result the appeal fails and is dismissed with costs.

S. C. *Appeal dismissed.*

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* **A. I. R. (35) 1948 Nagpur 258** *[C. N. 87]*

FULL BENCH

POLLOCK, HEMEON AND PADHYE JJ.

Narayan Sonaji Sagne — Applicant v. Sheshrao Vithoba and others — Non-Applicants.

Civil Revn. No. 275 of 1947, Decided on 30-10-1947.

***(a) Civil P. C. (1908), S. 115 — Order amending or refusing to amend plaint or other pleading is open to revision.**

(Per *Full Bench*) : 33 A. I. R. 1946 Nag. 5 was rightly decided in so far as it holds that an order amending or refusing to amend a plaint or other pleading is open to revision. [Para 95]

Annotation :— (44-Com.) Civil P. C., S. 115, N. 5.

(b) Civil P. C. (1908), S. 115 — Revision can be entertained touching proper interpretation by lower Court of remand order, question of amendment of pleading and question relating to framing of issue.

(Per *Full Bench*) High Court has jurisdiction to entertain revisions touching (i) the proper interpretation by a lower Court of a remand order, (ii) a question of amendment of a pleading and (iii) a question relating to the framing of an issue. [Para 95]

As to whether the High Court as a matter of discretion ought to entertain revision applications on such questions, no hard and fast rule can be laid down. Each case should depend on its own facts and circumstances and the discretion should be exercised judicially and according to correct and well established principles. [Para 95]

Annotation : — ('44 Com.) Civil P. C., S. 115, N. 5.

(c) Civil P. C. (1908), S. 115—Revisional jurisdiction in civil cases is derived from Civil P. C.

(Per *Padhye J.*) The revisional jurisdiction of the High Court in civil cases is derived from the Civil Porcedure Code (S. 115) and not from Letters Patent. [Para 67]

Annotation :—('44 Com.) Civil P. C., S. 115, N. 1.

(d) Civil P. C. (1908), S. 115 — Order not by itself appealable to High Court—Revision lies even if appeal would lie from decree which may be ultimately passed in suit.

The jurisdiction to entertain a revision does not depend on the order sought to be revised being interlocutory or final. Nor does it depend upon the particular matter disposed of by that order. The High Court has jurisdiction to entertain revision against orders deciding a particular matter provided the three conditions mentioned in the first part of S. 115 are satisfied. According to one of those conditions the order sought to be revised must not by itself be appealable to the High Court. It is immaterial that an appeal would lie

to the High Court from the decree which may ultimately be passed in the suit : 29 A. I. R. 1942 Mad. 247, *Rel. on.* [Para 77]

Annotation : — ('44-Com.) Civil P. C., S. 115, N. 7.

(e) Civil P. C. (1908), S. 115 — Issue of jurisdiction is always open for revision.

Though the subordinate Court decides that a certain matter lies within its jurisdiction that order is not a nullity but where such an order results in the usurpation of jurisdiction which that Court does not possess, to that extent that order is open to revision. In other words, where the issue is an issue of jurisdiction it is always open for revision. [Para 81]

Annotation :—('44-Com.) Civil P. C., S. 115, N. 10, 11 & 12.

(f) Civil P. C. (1908), S. 115—Revisional jurisdiction should not be so liberally exercised as to convert revision into appeal.

The revisional jurisdiction of the High Court under S. 115 should not be so liberally exercised as to convert a revision into an appeal and further every order of the subordinate Court should not be interfered with only because it was wrong either in law or on facts. [Para 94]

Annotation : — ('44-Com.) Civil P. C., S. 115, N. 3.

(g) Civil P. C. (1908), S. 115 (c)—There must be error of procedure and not merely of law.

There must be an error of procedure and not merely of law to justify interference under cl. (c), It must be something independent of the decision itself ; an irregularity or illegality in the manner of arriving at it, not in the conclusion reached. [Para 99]

Annotation :—('44-Com.) Civil P. C., S. 115, N. 12.

Cases referred : —

1. ('45) I. L. R. (1945) Nag. 634 : 33 A. I. R. 1946 Nag. 5, Liladhar v. Firm, Radhakishan Ramsahaya.
2. ('43) I. L. R. (1943) Nag. 176 : 30 A. I. R. 1943 Nag. 117 : 206 I. C. 286 (F. B.), Rajeshwar v. Dashrath.
3. ('40) 27 A. I. R. 1940 Nag. 17 : I. L. R. (1940) Nag. 394 : 186 I. C. 402 : 41 Cr. L. J. 289 (F. B.).
4. ('46) 33 A. I. R. 1946 P. C. 151 : 25 Pat. 601 : 73 I. A. 174 : 226 I. C. 148 : 47 Cr. L. J. 905 (P. C.), Ramanugrahsingh v. Emperor.
5. ('36) I. L. R. (1936) Nag. 73 : 23 A. I. R. 1936 Nag. 157 : 164 I. C. 848, Devidas v. Nilkanthrao.
6. ('41) I. L. R. (1941) Nag. 543 : 28 A. I. R. 1941 Nag. 278 : 198 I. C. 34, Keshorao v. Ganeshrao.
7. ('17) 40 Mad. 793 : 4 A. I. R. 1917 P. C. 71 : 44 I. A. 261 : 40 I. C. 650 (P. C.), Balakrishna Udayar v. Vasudeo Ayyar.
8. ('88) 11 Mad. 26 : 14 I. A. 160 : 5 Sar. 54 (P.C.), Minakshi Naidu v. Subramanya Sastri.
9. ('13) 40 Cal. 21 : 39 I. A. 197 : 16 I. C. 188 (P. C.), Rangoon Batatoung Co. Ltd. v. Collector of Rangoon.
10. ('28) 9 Lah. 284 : 14 A. I. R. 1927 P. C. 242 : 54 I. A. 421 : 106 I. C. 156 (P. C.), Delhi Cloth and General Mills Co. v. Income-tax Commr. Delhi.
11. (1905) 74 L. J. P. C. 77 : 1905 A. C. 369 : 92 L. T. 738, Colonial Sugar Refining Co. v. Irving.
12. ('41) I. L. R. (1941) Nag. 588 : 29 A. I. R. 1942 Nag. 8 : 198 I. C. 824, In re Shrikishandas.
13. (1854-57) 6 M. I. A. 134 (P. C.), Nusserwanjee Pestonjee v. Meer Mynoodeen Khan.
14. ('76) 2 Cal. 131 : 3 I. A. 221 (P. C.), In the matter of, Hadjee Abdoollah.
15. ('01) 25 Bom. 332 (P. C.), Pestonji M. Modi v. Queen Insurance Co.
16. ('14) 41 Cal. 323 : 1 A. I. R. 1914 Cal. 388 : 23 I. C. 977, Sheo Prosad Bungshidhr v. Ramchunder.
17. ('38) I. L. R. (1938) Nag. 106 : 25 A. I. R. 1938 Nag. 122 : 173 I. C. 329 (F. B.), Balaji Bhumnaji v. Mt. Mukta Bai.
18. ('21) 48 Cal. 138 : 8 A. I. R. 1921 Cal. 34 : 58 I. C. 806 (F.B.), Hirday Nath v. Ramchandra.
19. ('89) 16 Cal. 749 : 16 I. A. 104 : 5 Sar. 362 (P.C.), Muhammed Yusuf-Khan v. Abdul Rahman Khan.
20. ('15) 37 All. 485 : 2 A. I. R. 1915 P. C. 99 : 42 I. A. 171 : 30 I. C. 849 (P. C.), Rajwant Prasad v. Ram Ratan.
21. ('01) 25 Bom. 337 : 27 I. A. 216 : 7 Sar. 739 (P. C.), Malkajan v. Narhari.
22. ('91) 18 Cal. 23 : 17 I. A. 122 : 5 Sar. 560 (P. C.), Durga Chowdhrani v. Jawahir Singh.
23. ('35) 57 All. 810 : 22 A. I. R. 1935 All. 310 : 156 I. C. 1088, British India Corporation, Ltd. v. Shanti Narain.
24. ('87) 14 Cal. 768, Dhapi v. Ram Pershad.
25. ('35) 62 Cal. 61 : 22 A. I. R. 1935 Cal. 336 : 156 I. C. 126, Saratchandra Sen v. Mrityunjay Ray.
26. ('24) 3 Pat. 980 : 11 A. I. R. 1924 Pat. 673 : 80 I. C. 667, Mani Lal v. Durga Prasad.
27. ('36) 15 Pat. 330 : 23 A. I. R. 1936 Pat. 85 : 161 I. C. 22, Raghunandan Gir v. Deoraj Gir.
28. ('38) 25 A. I. R. 1938 Pat. 22 : 16 Pat. 766 ; 172 I. C. 840 (F. B.), Ram Khelawan Sahu v. Surandra Sahi.
29. ('17) 13 N. L. R. 203 : 3 A. I. R. 1916 Nag. 123 : 42 I. C. 746, Bisandayal v. Bodulal.
30. ('31) 27 N. L. R. 251 : 18 A. I. R. 1931 Nag. 17 : 130 I. C. 145, Laxman Das v. Chunilal.
31. ('38) 25 A. I. R. 1938 Nag. 210 : I. L. R. (1940) Nag. 463 : 175 I. C. 107, Krishna Kumar v. Radhelal.
32. ('38) 25 A. I. R. 1938 Nag. 358 : I. L. R. (1940) Nag. 280 : 179 I. C. 865, Bhaiya Saheb v. Ramnath.
33. ('42) I. L. R. (1942) Nag. 258 : 28 A. I. R. 1941 Nag. 205 : 193 I. C. 707, K. C. Mujumdar v. Suraj Singh.
34. ('26) 48 All. 175 : 12 A. I. R. 1925 All. 610 : 90 I. C. 180 (F. B.), Ram Sarup v. Gaya Prasad.
35. ('40) I. L. R. (1940) All. 564 : 27 A. I. R. 1940 All. 448 : 191 I. C. 294, Jagdish Saran v. Bhagwat Saran.
36. ('35) 57 All. 678: 22 A.I.R. 1935 P.C. 185 : 62 I.A. 257 : 157 I.C. 894 (P.C.), Atma Ram v. Beni Prasad.
37. ('28) 3 Luck. 650 : 15 A. I. R. 1928 Oudh 355 : 111 I. C. 161 (F. B.), Sahdeo Singh v. Chanun Kaur.
38. ('24) 5 Lah. 288 : 11 A. I. R. 1924 Lah. 425 : 84 I. C. 259 (F. B.), Lalchand Mangal Sen v. Behari Lal Mehrchand.
39. ('43) I. L. R. (1943) Lah. 257 : 30 A. I. R. 1943 Lah. 65 : 206 I. C. 157 (F. B.), Prithvi Raj Khosla v. Mahomed Baksh.
40. ('42) I. L. R. (1942) Mad. 455 : 29 A. I. R. 1942 Mad. 247 : 201 I. C. 261, Khaja Moideen v. Abdul Gaffoor.
41. ('85) 11 Cal. 6 : 11 I. A. 237 (P. C.), Amir Hasan Khan v. Sheo Baksh Singh.
42. ('37) I. L. R. (1937) All. 805 : 24 A. I. R. 1937 All. 598 : 170 I. C. 567 (F. B.), Raghubir Singh v. Mulchand.
43. ('32) 56 Bom. 585 : 19 A. I. R. 1932 Bom. 584 : 140 I. C. 381, Bai Chandan v. Chhotalal.
44. ('35) 58 Mad. 936 : 22 A. I. R. 1935 Mad. 547 : 157 I. C 173, Seetarammayya v. Subrahmanyam.
45. ('40) 15 Luck. 641 : 27 A. I. R. 1940 Oudh 342 : 187 I. C. 835, Mahomed Ihtisham Ali v. Lachhman Prasad.
46. ('45) I. L. R. (1945) All. 604 : 32 A. I. R. 1945 All. 348, Mt. Sukhia v. Kripa Ram.
47. ('46) 25 Pat. 58 : 33 A. I. R. 1946 Pat. 316 : 223 I. C. 336, Kamani Devi v. Kameshwar Singh.
48. ('46) I. L. R. (1946) Mad. 640 : 33 A. I. R. 1946 Mad. 90 : 223 I. C. 325, Bagya Lakshmi v. Bapu.

49. ('46) 21 Luck. 167 : 33 A. I. R. 1946 Oudh 88 : 223 I. C. 40, Ram Sunder v. Parasram.
50. ('21) 48 Cal. 110 : 8 A. I. R. 1921 P. C. 50 : 47 I. A. 255 : 57 I. C. 606 (P. C.), Charan Das v. Amir Khan.
51. ('21) 48 Cal. 832 : 9 A. I. R. 1922 P. C. 249 : 48 I. A. 214 : 63 I. C. 914 (P. C.), Ma Shwe Mya v. Maung Mo Hnoung.
52. ('39) I. L. R. (1939) Nag. 194 : 25 A. I. R. 1938 Nag. 388 : 176 I. C. 728, Lakshman Singh v. Mahendralal Choudhari.

R. S. Dabir and W. W. Bhole — for Applicant.

B. R. Mandlekar — for Non-Applicants Nos. 1 and 2 Respectively.

ORDER OF REFERENCE.

Bose J. — The question here is whether the High Court has jurisdiction to entertain a revision under S. 115, Civil P. C., against an order of trial Court dealing with an amendment of a pleading and the framing of certain issues consequent on the amendment.

[2] This is the sort of question which arises frequently and as Judges of this Court hold such widely divergent views on the subject, I feel the matter should be settled, at any rate in principle, by a Full Bench, particularly as it is one of great practical importance and seriously affects the conduct of trials, in the first Court, as also the length and costs of litigations.

[3] The immediate cause of the reference is a recent decision of Sen J. in I. L. R. (1945) Nag. 634[1] at p. 640 with which with the utmost respect, I disagree, particularly as I have taken the contrary view in a series of cases. This conflict requires to be resolved.

[4] The facts are as follows. The suit as originally framed was for possession, the plaintiff basing his title on a document which purported to be a sale-deed. The defence to the action was that it was not a sale but a mortgage, and that accordingly the suit did not lie.

[5] This issue was fought through three Courts and eventually a Division Bench of this Court held in a Letters Patent appeal (revising a decision of mine) that the document was a mortgage and not a sale. As a corollary to this the Division Bench permitted the plaintiff to amend his plaint and sue for foreclosure on the basis of the same document now held to be a mortgage. In a foot-note to its judgment the Division Bench said,

"Liberty to defendants to amend Written Statement if desired to contest new matter introduced but not otherwise."

[6] The defendants availed themselves of this permission and were permitted to amend by the first Court, that is, the Court to which the case had been remanded for a fresh trial on the basis of the amended plaint. Having permitted the amendment, the first Court struck certain issues —numbers 3 to 7 inclusive—on the basis of the amended written statement. These issues raise questions which had been raised, but not tried before the remand and which were repeated in the amended written statement. Plaintiff 1 objected, but the lower Court overruled his objections in the order now under revision, and the question now is whether the High Court has jurisdiction to entertain this revision.

[7] I have long refused to entertain revisions of this interlocutory nature and very strongly hold the view, first, that the High Court has no jurisdiction in cases of this kind, and secondly that if it has, then, revision being a matter of discretion, it ought not to interfere.

[8] Touching first the question of jurisdiction I will repeat what I have endeavoured to expound at length in a number of cases including the Full Bench case in I.L.R. (1943) Nag. 176[2] and a Full Bench in a criminal case reported in *Crown* v. *Dattatraya Sadashiv Kharve*[3] where the view I took regarding the extent of a jury's jurisdiction has now been taken by the Privy Council in A. I. R. 1946 P. C. 151[3] at pp. 153, 154; also when sitting as a single Judge in I.L.R. (1936) Nag. 73,[5] and again in I. L. R. (1941) Nag. 543[6] at pp. 548, 550.

[9] To begin with I think it is elementary that no appeal can be claimed as of right on grounds of justice or as inherent in the very nature of things. Unless a right of appeal is expressly conferred by statute there can be no remedy by way of appeal against an order of a Court made with jurisdiction however erroneous the order may seem to be. The Privy Council has so decided in 40 Mad. 793[7] at p. 801, 11 Mad. 26,[8] 40 Cal 21,[9] 9 Lah. 284[10] and in (1905) 74 L.J. P. C. 77[11] and so has this Court on many occasions, as for example, in I.L.R. (1941) Nag. 588[12] at p. 592. If this basic principle is accepted then it must follow that there is some fundamental distinction between a revision and an appeal. It is idle for the Privy Council to lay down this principle again and again if Courts are going to entertain an appeal in the guise of a revision whenever an appeal is not allowed by law. And that is what must happen, and in fact does happen, when a clear cut distinction is not drawn between an appeal and a revision, and not merely drawn in theory but rigidly adhered to in practice.

[10] Now, it is indubitable that the High Court has been vested with jurisdiction to entertain revisions in certain cases, but it is not an unlimited jurisdiction any more than its jurisdiction in second appeal is unlimited. As long ago as 1855, their Lordships of the Privy Council observed in 6 M. I. A. 134[13] at p. 155, that :

"Wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has

the same effect as an Act of Parliament), and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with the jurisdiction does not arise."

[11] I fully agree that the existence of jurisdiction usually involves the decision of some question of fact collateral to the main issue, and when that is the case

"The general rule is that where the jurisdiction of any tribunal depends upon facts, it has power to determine those facts. (Halsbury's Laws of England, Hailsham Edn., Vol. 26, page 279)."

Therefore, when the High Court decides that a certain matter lies within its revisional jurisdiction its order is not a nullity however wrong it may be. (See 2 Cal. 131[14] at p. 141). But that, in my opinion, is no justification for usurping a jurisdiction which this Court does not possess if that is in fact the case, and to that extent the observations of the Privy Council which I have just cited stand.

[12] It will perhaps be advisable to explain this at greater length, for, on the face of it, the matter seems anomalous. The truth is that term jurisdiction is used in two senses, one absolute and the other limited. In its absolute sense there is a complete lack of jurisdiction. Thus if the station master of some railway station purports to write a judgment and pass a decree there is complete absence of jurisdiction, and his so-called order is a complete nullity. The same applies if a Civil Court attempts to encroach upon a province exclusively reserved by the legislature for a revenue tribunal and vice versa.

[13] But in its second sense, though the matter touches jurisdiction, the order of a properly constituted Court vested with authority to decide the facts on which its jurisdiction rests is not necessarily a nullity. I will give two illustrations.

[14] It is well known that the jurisdiction of the lower Courts is limited as to value. If a lower Court is invested with jurisdiction to entertain claims up to Rs. 5,000 it cannot proceed to decide cases in which the value of the subject-matter is say Rs. 7,000/- or even Rs. 5001/-. But it is obvious that some authority must be vested with jurisdiction to determine what the correct value of the claim is. That tribunal is the Court in which the suit is launched. If it holds that the value of the subject matter is below Rs. 5000/- then *prima facie* it is invested with jurisdiction to try the case, and if its order is not challenged or reversed either in appeal or by revision no objection on that score can be taken at a later stage. The decree cannot, for instance, be challenged in execution or in a subsequent suit. But as the question of valuation touches jurisdiction as it is one of the basic elements which go to build up the fabric of jurisdiction, the matter is revisable, because, however much the Court has authority in the first instance to decide whether it has jurisdiction nevertheless the fact which it is determining is not an issue on the merits but an issue of jurisdiction, and such an issue is always revisable. It is something which touches the Court itself.

[15] The second illustration is taken from the Privy Council decision reported in 25 Bom. 332.[15] One of the ingredients as to jurisdiction is as regards the person. A Court has no jurisdiction (except in certain cases which do not arise here, as for example, in matters which operate *in rem*) to decide matters for or against persons who are not before it, that is to say, against persons who have not been joined to the action and who have not been noticed. Thus, if X wants a decree against A he cannot get it by joining B to the action and omitting A. But if a question arises regarding the identity of A and B appears before the Court and contends that he is B and not A, and the Court holds that he is A in spite of the fact that he is B then B is bound by the decree even if it is passed in A's name however grievous the Court's error may be, unless B has the matter set right by an appropriate tribunal.

[16] Here again, the matter would be revisable. The Court is invested with jurisdiction to determine, in the first place, whether it has jurisdiction, that is to say, whether the person who appears before it is B or A. But the question it is determining is not one on the merits but whether it has jurisdiction. It is someting which touches itself, and if it decides that B is A and not B (that was what happened in the Privy Council case) and if B does not have the error set right by the proper tribunal (which is also what happened in the Privy Council case) then B is bound by the decision and cannot challenge it either in execution or in a subsequent suit. That was what the Privy Council decided.

[17] But that sort of situation can only arise in matters touching jurisdiction. It does not arise when the matter touches not jurisdiction, that is to say the right to entertain a claim at all, but the merits, that is to say, a decision by a competent Court, by which I mean a Court competent to entertain that sort of claim and to decide that sort of issue. Exactly what those matters include and embrace may sometimes give rise to difficulty, but in general there is no doubt. However, I will deal with this later.

[18] This explains what is sometimes puzzling on the surface and explains what their Lordships of the Privy Council mean by saying that the Court has no jurisdiction to entertain second appeals on facts or revisions on the merits but nevertheless uphold their decrees and orders in

subsequent proceedings despite that fact. It also explains the passage from Halsbury which I have just quoted.

[19] The High Court is not invested with revisional jurisdiction in civil cases by the Letters Patent. Therefore, its sole authority to act in such cases is derived from the Civil Procedure Code.

[20] Now, the Code is clear regarding appeals. It provides for appeals from original decrees under S. 96 and for appeals from appellate decrees in S. 100. It also provides for appeals from certain orders under S. 104. Then Ss. 101, 102 and 104 say that there shall be no other appeals apart from those expressly provided. I take it that that is intended to have some meaning.

[21] Then as regards revisions, S. 115 expressly limits them to the three cases mentioned therein. All three relate to jurisdiction. It will, therefore, be necessary to examine the meaning of jurisdiction.

[22] It is defined in Halsbury's Laws of England (Hailsham Edn.) vol. 8. p. 531), to mean :

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted."

[23] One of the tests given by Halsbury in an earlier passage regarding the superior Courts is, "An objection to the jurisdiction of one of the superior Courts of general jurisdiction must show what other Court has jurisdiction, so as to make it clear that the exercise by the superior Court of its general jurisdiction is unnecessary."

That does not apply in its entirety to a lower Court, but the test is nevertheless of value. If the lower Court had no jurisdiction to decide the matter in hand then what other Court had?

[24] Now, we are concerned here with the amendment of a pleading and the framing of an issue. We are also concerned with the interpretation of a remand order by this Court. Let us consider the last of these first. When this Court makes a remand order and issues directions to a lower Court, which is the proper Court to read that order and interpret it? Surely, the only Court which can do that is the Court to which the matter is remanded. It may err in its interpretation but that is something quite different from its jurisdiction to entertain the remand and read and construe the order. The *only* Court which can do that is the Court to which the remand is made. If therefore the Court entertains the matter after remand, considers and construes the order of remand and reaches a judicial conclusion therein then, whether the conclusion is right or wrong, no question of jurisdiction is involved. It had jurisdiction and it exercised it.

[25] Next consider the question of amendment. Has a trial Court, whether before or after remand, jurisdiction to allow or to disallow an amendment of a pleading? The answer is obvious. Order 6, R. 17, Civil P. C., specifically provides for amendment and states that "The Court may at any stage of the proceedings etc. . . ."

[26] Now, which Court is referred to? Surely, not the High Court. It is patent on the face of it that the application for amendment must be made to the Court which is at the moment of the application seised of the proceedings. It is equally patent that an application for amendment cannot be allowed automatically any more than it can be disallowed without consideration. There are rules which govern these matters and so some authority has to decide whether the application in question falls within the purview of those rules or not, and the only possible authority is the Court to which the application has to be made. In that event it is patent that that is the Court which is vested with jurisdiction to determine this matter, and if that Court entertains the application and considers it in accordance with the prescribed forms of law, that is to say, after hearing the parties and so forth, and reaches a conclusion judicially, that is to say, after formally setting out reasons in writing, I find it impossible to say either that that Court has not exercised a jurisdiction vested in it by law or that it has refused to exercise such a jurisdiction. What else is it doing when it decides the matter and either allows or disallows the amendment? What other Court has the authority and the power to entertain the application and decide it?

[27] The same reasoning applies to the framing of issues. O. 14, R. 1 of the Code deals with the matter and lays down a set of rules. It is clearly for the Court which is seised of the proceeding to decide whether a particular issue arises or not and to decide the form in which it should be couched. As I say apply the test given in Halsbury. If that is not the Court to do this then what other is there? If the Code provides for a certain matter it is obvious that some Court must have the jurisdiction to deal with it, and if it is not the Court trying the case then what other Court is there?

[28] It is perfectly true that after the case has been finally decided the appellate Court becomes seised of the matter if an appeal is preferred, and then it can, under S. 107, exercise all the powers of the first Court. But if the Code expressly prohibits an appeal till the appropriate stage surely it equally prohibits the exercise of

those interlocutory powers except in the narrow circumstances prescribed by S. 115. In any case it is obvious, to my mind, that the Court vested with jurisdiction to frame issues is the Court which is at the moment seised of the proceedings. Therefore, when it either frames an issue or refuses to frame one I find it impossible to say that it is not exercising jurisdiction, and even more impossible to hold that it is failing to exercise jurisdiction.

[29] The distinction between an error of fact or law committed in the exercise of jurisdiction and an inherent lack of jurisdiction is brought out by the Privy Council in 2 Cal. 131[14] at p. 141.

"In the first case "(that is, when a Court of appeal is correcting an error of law made by a lower Court)" the Appellate Court reverses the order, because the Judge has erred in the mode in which he has exercised a judicial discretion; in the latter case "(that is, when the order is made without jurisdiction)", it quashes the order, because there was no discretion at all to be exercised."

[30] This analysis reveals, to my mind, that cases like the present can in no event fall within clauses (a) and (b) of S. 115. I turn now to clause (c):

"To have acted in the exercise of its jurisdiction illegally or with material irregularity".

[31] I am clear that the words "illegally" and "material irregularity" do not cover either errors of fact or of law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been duly complied with both in letter and in spirit. As I have said in I. L. R. (1936) Nag. 73[5] at p. 77.

"It must be something independent of the decision itself; an irregularity or illegality in the manner of arriving at it, not in the conclusion reached."

[32] I do not wish to be precise regarding this in fact that is impossible as well as undesirable. But, generally speaking, certain matters are now regarded as essential for a fair and proper trial. For example, both sides must be given an opportunity of appearing and of being heard. If they appear they must be heard. They must be given a chance of presenting their cases. The Judge must reach his conclusion judicially and not arbitrarily, and so forth. Therefore, if a Judge refuses to hear the parties or one of them, or if he flips a coin instead of applying his mind to the case and giving a judicial decision, or if he acts arbitrarily such as deciding on the colour of a man's eyes or that of his hair, or if he gives no reasons in cases where the law requires reasons to be recorded, then he is not complying with the procedure which the law prescribes for a fair and proper trial. In that event interference is called for under clause (c). But if he does all that and acts fairly and judicially the matter cannot, in my judgment, fall within clause (c).

[33] I am in good company in so thinking. Sir Lawrence Jenkins C. J. so held in 41 Cal. 323[16] and so did Woodroffe J. Sir Lawrence Jenkins said at page 338.

"It appears to me that S. 115 can only be called in aid when the failure of justice (if any) has been due to one or other *of the faults of procedure* indicated in that section. If there was an error committed by Mr. Dobbin, it was an error of law *and not of procedure.*"

And at page 337 the learned Chief Justice placed in a nutshell the exact position which applies in all these cases. He said:

"But how can it be fairly said that the Court failed to exercise a jurisdiction vested in it by law? It dealt with the matter; it was prepared to exercise its jurisdiction, but the learned Judge considered as a matter of law that there was no relationship of landlord and tenant. The Court was entitled to come to that conclusion even if it was erroneous, and if it did come to that conclusion it cannot be said that the Court has failed to exercise a jurisdiction vested in it by law."

So also Woodroffe J. said at page 339,

"Then as regards the alleged irregularity, this according to the general trend of the cases applies to the commission of an error of procedure."

I followed this in. I L. R. (1936) Nag. 73[5] at p. 77 and again in principle in I. L. R. (1943) Nag. 176,[2] and in the latter case the Full Bench agreed with me; also in I. L. R. (1938) Nag. 106[17] at p. 112 that was actually the decision of another Full Bench regarding the construction of S. 115 (c). and still later of a Division Bench in I. L. R. (1941) Nag. 543[6] at pp. 556, 557. I cannot see how any other conclusion is possible in view of a series of Privy Council decisions quite apart from the intrinsic logic of the position.

[34] In 40 Mad. 793[7] at p. 799 the Privy Council in dealing with S. 115 said:

"It will be observed that the section applies to *jurisdiction alone*, the irregular exercise, or non-exercise of it, or the illegal assumption of it. *One section is not directed against conclusion of law or fact in which the question of jurisdiction is not involved*".

[35] Those words appear to me to be emphatic and to be free from any sort of ambiguity. But even if there is difficulty it is resolved by the illustrations given by their Lordships. One is (p. 799):

"If the civil Court should absolutely and whimsically decline to exercise its jurisdiction and to make any orders etc . . . .".

Another at p. 800:

"Any order made . . . . . *in disregard of the requirements of natural justice*, such, for instance, as proceeding without giving the member sought to be removed notice, or affording him an opportunity of defending himself".

[36] Other attributes of jurisdiction will be found set out in Halsbury's Laws of England (Hailsham Edn) Vol. 8, pp. 531 to 537. They are as to area (territorial), as to value (pecuniary), as to subject-matter, and as to person. The ques-

tion was elaborately discussed by Mookerji Ag. C. J. in a Calcutta Full Bench, 48 Cal. 138[18] at pp. 148, 150, and that decision was followed by me in I. L. R. (1936) Nag. 73[5] at p. 76.

[37] This was the view of the Privy Council as early as 1884 under the old Code of Civil Procedure. Their Lordships said, construing S. 622 which corresponded to S. 115:

"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. *Whether they decided it rightly or wrongly, they had jurisdiction to decide the case and even if they decided* wrongly, they did not exercise their jurisdiction illegally or with material irregularity".

[38] The questions which the lower Courts had to decide in that case were of *res judicata* and of what is now O. 2, R. 2 under the present Code of Civil Procedure. The lower Courts there held that the suit was not barred for either reason and proceeded with the trial. The Court of the Judicial Commissioner entertained a revision and set aside the orders of the lower Courts on the ground they were wrong. The Privy Council held :

"The Judicial Commissioner *had no jurisdiction in* the case".

And this not because the lower Courts were right but because *whether they were right or wrong* they had jurisdiction and accordingly the Judicial Commissioner *had no jurisdiction* to sit in judgment over them in revision.

[39] I fail to see how anything can be stronger and more emphatic than this. I equally fail to see how an issue of *res judicata* or of O. 2, R. 2, is less fundamental or goes less to the root of a case than a question of amendment or the framing of an issue. After all the issues were framed by the lower Courts in that case and the Privy Council held that whether they were rightly framed or wrongly, whether the decision was right or wrong, the Judicial Commissioner had no jurisdiction to interfere in revision.

[40] This decision was followed by the Privy Council 5 years later. The head-note in 16 Cal. 749[19] runs:

"A decision by judgment of a competent Court *whether right or wrong* which by law is final *and without appeal*, were the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, *cannot be set aside under* S. 622, *Civil P. C.*".

[41] This was reiterated for a third time in 37 ALL. 485[20] at pp. 494, 495:

"Their Lordships think it is very trite and very familiar that a challenge of the *method of the exercise of the jurisdiction of a Court* can never in law justify a denial of the *existence of such jurisdiction*. The former has reference to the *merits of the case*".

[42] Now, it is pertinent to observe that with these three decisions before it the legislature did not see fit to alter S. 622 in any material respect when it enacted S. 115. I take it that that was done with deliberate intent and I think it is elementary that Courts in India are expected faithfully to carry out the intention of the Legislature and to obey the decisions of the Privy Council also to follow their own Full Bench rulings. This is particularly so when their Lordships have continued to construe the section as before in clear and emphatic terms. I have already referred to their decision in 40 Mad. 793[7] at p. 799. I have also referred to the Nagpur Full Bench in I. L. R. (1938) Nag. 106[17] at p. 112.

[43] In 25 Bom. 337[21] at p. 347 the Privy Council again stressed the distinction between an error of law and an order made without jurisdiction. Their Lordships said :

"In doing so the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken "[and I would add, if that course is not open under the law]," the decision, however wrong, cannot be disturbed."

[44] I might mention here that in cases where the High Court has wrongly interfered in second appeal on questions of fact the Judicial Committee have made the matter one of jurisdiction : See, for example, 18 Cal. 23[22] at p. 30 :

"It is enough in the present case to say .... that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be."

[45] That, to me, seems obvious. If the law is that no appeal shall lie except where a statute expressly provides for one and if a statute permits an appeal only under circumscribed conditions it seems obvious that if a Court entertains an appeal in circumstances which the law does not warrant it travels beyond its jurisdiction; and what applies to appeals appears to me to apply with even greater force to revisions. However, as revisions are so often entertained on discretionary grounds on matters touching the merits and having nothing to do with jurisdiction I will deal with that aspect also in case my views on the other matter do not meet with the approval of the Full Bench but before doing so I wish to repeat what I said as a member of the Full Bench in I. L. R. (1943) Nag. 176[2] at p. 197. As I said there :

"I am not enamoured of the view that the High Court has the right to interfere on questions of law but that it need not do so unless it thinks fit and that it will not think fit unless there has been 'substantial injustice' and the like."

I will not repeat here the reasons I gave there. All I will say is that :

"If the matter falls squarely within the ambit of its powers it cannot shirk a decision and it must act and decide according to the principles and laws which are

administered in Courts of justice. It cannot pick and choose."

[46] Now, the usual ground given for interference at an interlocutory stage is that it cuts short litigation and saves the time of the Courts and the money of the parties. But is that really so? And in any event is it a valid consideration? I do not think so.

[47] In one sense, of course, a decision by the High Court saves time and money except the time and money of the State. But if that is a valid consideration every preliminary issue of law ought to be sent up to the High Court immediately. It will save time, the time of the first Court spent in hearing the arguments and in writing an order. Why bother about the decision of the first Court? And so also preliminary issues of fact. Let the first Court record the evidence and send the records to the High Court direct. Also, if it is legitimate for the High Court to cut short litigation by entertaining preliminary issues regarding limitation and *res judicata* and on questions of amendment in cases where an appeal from the decree would go to a lower appellate Court (as it would in the normal course in this case) then why is it not legitimate to skip a lower Court of appeal, come straight up to the High Court in revision and be done with it? Regarded from that angle the matter is obvious, but if so, where is the logic or the consistency in advancing the particular reason as a ground for interference in revision? The usual rule undoubtedly is that questions of limitation and *res judicata* and the like should be decided by the lower appellate Court in cases open to second appeal. A remedy by appeal is provided and so no revision lies; and that, with all due respect, is what S. 115 says. Apart from the limitations regarding jurisdiction the section lays down a second limitation, namely, 'and in which no appeal lies.'

[48] Now, of course, it is perfectly obvious that no appeal lies from an interlocutory decision of the nature we have here but an appeal does lie regarding the subject-matter of the decision and express provision for this is made in S. 105 of the Code. It states in substance that no appeal shall lie from interlocutory orders of the nature we are considering here but

"where a decree is appealed from any error, defect or irregularity in any order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

Therefore, an appeal is directly provided, and as such questions do not touch jurisdiction S. 115 expressly bars their entertainment in revision. I do not see how Courts can ignore such express provisions on grounds of convenience.

[49] Next, consider the absurdly illogical conclusions which flow from such a practice. Consider first a question of limitation or *res judicata*. If a Court proceeds to decide either or both of these questions as a preliminary issue and reaches the conclusion that the suit is not barred, according to the view under consideration, a revision lies to the High Court. But if the Court reaches the other conclusion and dismisses the suit then an appeal lies to the lower appellate Court, and the matter cannot reach the High Court except by way of second appeal. In other words, if one side fails it has direct access to the High Court whereas if its opponent fails on the same issue he has to go to a lower Court. The same sort of situation can arise on a question of amendment.

[50] Then consider another anomaly. Revisions are heard by single Judges whereas second appeals above a certain value are entertained by a bench of two Judges. In this very case I am asked to decide questions, sitting singly, which, in the normal course, would have been decided by a Division Bench. The anomaly is even greater in suits above the value of Rs. 10,000. The same point in the same litigation is decided by one Judge if one side loses and by two if the other side loses. Surely, any practice which leads to such absurdities is not only undesirable but must be radically wrong.

[51] Next consider the sheet anchor on which this practice is usually defended, namely the shortening of litigation and the saving of costs and doing 'justice.'

[52] Now statistics show that a large percentage of cases which reach this Court are in the end dismissed. I do not know the exact figure but I am told it is in the neighbourhood of 75 to 80 per cent. The exact figure does not matter but the percentage is large. I refer here to cases which are dismissed after being set down for hearing parties. I do not include in this those which are dismissed summarily. Therefore, what does this argument amount to in the end? In the majority of such cases the litigation is not shortened, on the contrary it is unduly prolonged and everybody's time and money are wasted. The result is that cases are admitted on this basis not in the hope of shortening litigation as a whole but in the sure knowledge that 75 per cent of litigants in this class of cases must be penalised in the hope that 25 per cent will benefit, and that their litigation must be lengthened and not shortened. That hardly seems fair or just.

[53] I am strongly of opinion that justice delayed is justice denied and hold the view that anything which can reasonably be done to shorten litigation as a whole should be done. I am clear that it was never the intention of the legislature that cases should be tried piecemeal—bits by this Court, bits by another and the rest by a

third. The whole scheme is to vest certain Courts with jurisdiction to try certain classes of cases and to leave them to try it, and leave them to decide the matter right or wrong. After the matter is finally concluded by a decree then and only then, save in special cases expressly provided for, can a higher Court entertain the question, and not even then if no appeal is allowed.

[54] The High Court is given judicial superintendence over Courts subordinate to it but only for determining whether they are in fact vested with jurisdiction to try the issue in question and if so, to see whether the trial is proceeding in accordance with the usual and recognised forms of procedure. The revisional jurisdiction of the High Court does not, in my opinion, extend beyond that.

[55] If it is legitimate to interfere on a question of amendment then why is it not proper to interfere when a Judge allows or disallows a question during the examination of a witness, or when he rejects a document? Once the principle which I am contesting is conceded it will be almost impossible to draw the line and the High Court will be flooded with applications as is being attempted now, and, if logic is to have any place, the High Court will be bound virtually to try the bulk of the cases in the Province.

[56] I refer the following questions for decision by a Full Bench:

(1) Was I. L. R. (1945) Nag. 634[1] rightly decided in so far as it holds that an order amending or refusing to amend a plaint or other pleading is open tc revision?

(2) Has the High Court jurisdiction to entertain revisions touching

(i) the proper interpretation by a lower Court of a remand order,

(ii) a question of amendment of a pleading and

(iii) a question relating to the framing of an issue; and

(3) If there is jurisdiction ought the High Court, as a matter of discretion, to entertain such applications on such questions?

OPINION

[57] **Padhye J.**—The following questions have been referred to us for decision:

(1) Was I. L. R. (1945) Nag. 634[1] rightly decided in so far as it holds that an order amending or refusing to amend a plaint or other pleading is open to revision?

(2) Has the High Court jurisdiction to entertain revisions touching

(i) the proper interpretation by a lower Court of a remand order,

(ii) a question of amendment of a pleading, and

(iii) a question relating to the framing of an issue; and

(3) If there is jurisdiction ought the High Court, as a matter of discretion, to entertain such applications on such questions?

[58] Civil Revision No. 275 of 1945 which came for hearing before Bose J. gave rise to this reference by the learned Judge. This revision was against an order passed by the trial Court in Civil Suit No. 37 of 1933 allowing an amendment of the defendants' written statement and framing additional issues on the basis of the amended statement.

[59] Civil Suit No. 37 of 1933, as originally instituted, was for possession of a field on the strength of a deed dated 24th April 1923 which, according to the plaintiffs, was a deed of sale with a condition for reconveyance, but according to the defendants was a mortgage by conditional sale. The plaintiffs succeeded in the trial Court and in the first and a second appeal and a decree for possession was passed in their favour. In the Letters Patent appeal by the defendants, a Divisional Bench of this Court held that the deed dated 24th April 1923 on which the suit was based was a mortgage with a condition of foreclosure and the plaintiffs' remedy was not to sue for possession as purchasers but to enforce and to foreclose the mortgage. The plaintiffs were permitted by the appellate Court to amend the plaint so as to convert it into a plaint for the enforcement of the mortgage. The defendants were also given liberty to amend their written statement, if desired, and to contest such new matter as might be introduced by the plaintiffs by way of amendment of the plaint but not otherwise.

[60] The defendants' application for amendment of the written statement was opposed by the plaintiffs mainly on the ground that the amendment sought was not necessary to contest any new matter introduced by the plaintiffs. The trial Court overruled the plaintiffs' objection and allowed the amendment and further struck additional issues (issues 3 to 7). This order was challenged in Civil Revision No. 275 of 1945 before Bose J. and the question before the learned Judge was whether the order could and should be interfered with by the High Court in its revisional jurisdiction.

[61] In para 7 of the order of reference Bose J. had made it clear that in his view the High Court has no jurisdiction to entertain revisions of this interlocutory nature and even if it has, then a revision being a matter of discretion it ought not to interfere. In his view the decision of Sen J. in I. L. R. (1945) Nag 634[1] in which the learned Judge in his revisional jurisdiction set aside the order of the subordinate Court disallowing amendment was not correctly decided. The learned Judge being however aware that other Judges of this Court held widely divergent views on the subject decided to refer the questions stated above for decision by a Full Bench so

that the matter could be settled at least in principle.

[62] In Halsbury's Laws of England (Hailsham Edition) vol. 8, p. 532 the learned author observed:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted."

[63] In 48 Cal. 138[18] the Full Bench of the Calcutta High Court observed:

"The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and the subject-matter the decision of all other questions arising in the case is but an exercise of that jurisdiction."

[64] These observations are noted with approval by Bose J. in I. L. R. (1936) Nag. 73[5] at p. 76.

[65] In the present reference, as I understand it, Boes J. has raised questions both regarding the jurisdiction to entertain revisions of an interlocutory nature and to the exercise of that jurisdiction in a particular way only, i. e., by refusing to interfere with the order of the lower Court. Though the words used are not quite unambiguous, I understand Bose J.'s view to be that the High Court has no jurisdiction to entertain revisions against interlocutory orders, i. e, against orders not disposing of the suit one way or the other but such orders as are passed from time to time in a pending suit deciding matters necessary for the further progress and the final disposal of a suit and that the High Court should never interfere with such orders of the subordinate Courts, even assuming that it has power in the exercise of its revisional jurisdiction to interfere.

[66] The material points which need consideration in this reference are, in my opinion, as follows: (i) Whether the High Court has jurisdiction to entertain revisions against interlocutory orders particularly the orders mentioned in question (2) and (ii) If the High Court has jurisdiction, then revision being a matter of discretion, can the High Court lay down and should it lay down a positive rule that it should always exercise its jurisdiction in refusing to interfere in such revisions? I have not been able to find any principle on which the particular interlocutory orders which are specifically mentioned in question (2) are distinguished from other interlocutory orders.

[67] It is pointed out correctly in para 19 of the order of reference that the revisional jurisdiction of the High Court in civil cases is derived from the Civil Procedure Code (S. 115), and the proper analysis of that section is of great help in answering the points noted in para 8 above and in fact in deciding the questions referred to the Full Bench. In this respect I find the observations of the Divisional Bench of the Allahabad High Court in 57 ALL. 810[23] at p. 821 very instructive and they are reproduced below with approval:

"A preliminary objection is one that challenges the competence of a Court to hear and decide a particular case before it ... ... All that is necessary to bring into play the revisional jurisdiction of this Court under S. 115 is that (i) there be a case decided, (ii) the decision be of a Court subordinate to this Court, and (iii) the decision be not appealable.'

The question whether or not the Court below exercised its jurisdiction illegally or with material irregularity is tantamount to the consideration of the revision on merits. It is one thing to say that the High Court has no jurisdiction to entertain an application in revision against a particular order passed by a particular Court, and it is quite another thing to say that, though this Court can entertain the revision application, it ought to reject it as in passing the order the lower Court did not assume jurisdiction that it did not possess or fail to exercise jurisdiction that it did possess or act in the exercise of its jurisdiction illegally or with material irregularity.

[68] It is thus clear that the first part of S. 115, Civil P. C., deals with the jurisdiction of the High Court to entertain revisions; that jurisdiction is made dependent on three conditions set out therein, and the power to exercise that jurisdiction is dealt with in the second part of the section and is dependent on the subordinate Courts being guilty of what is stated in cls. (a), (b) and (c) of the section. It is not disputed that the revisional powers are discretionary both in the matter of entertaining revisions and interfering with the order of the subordinate Court.

[69] Out of the three conditions necessary for the exercise of jurisdiction to entertain revisions there is in the present case no dispute regarding two conditions, viz. that the order sought to be revised is passed by a Court subordinate to High Court and that no appeal from that order lies to the High Court. The question is whether the third condition on which the jurisdiction depends, namely whether it is a 'case decided' is satisfied.

[70] For a long time the exact meaning and scope of the word 'case' was a subject of keen difference of opinion between different High Courts in India. The word 'case' is not defined in the Civil Procedure Code or in the General Clauses Act or in any other Act. The dictionary meaning of the word is "the state of facts juridically considered." It is not clear whether it

means the state of facts of the whole case or a branch of a case, and whether the word 'case' is synonymous in its scope with the word 'suit' or it is wider. This gave rise to two interpretations of the word 'case'. According to one interpretation which was favoured by a group of High Courts, the word was wide enough to include not only the order finally disposing of the 'lis' but also an interlocutory order, while according to the other and a narrower interpretation favoured by another group of the High Courts the words 'case decided' do not include a part of the case decided; in other words, the words do not include interlocutory orders.

[71] The Calcutta High Court always favourd the wider interpretation, as is clear from 14 Cal. 768[24] and 62 Cal. 616.[25] This is the view approved and followed by the High Courts of Madras and Bombay. The view of the Patna High Court appears by no means consistent, as is clear from the different views taken in 3 Pat. 930[26] and 15 Pat. 340.[27] This inconsistency is however now removed and a wider interpretation of the word 'case' is accepted in a Full Bench decision in A. I. R. 1938 Pat. 22.[28] The view of the Calcutta High Court was always accepted as correct by the Nagpur Judicial Commissioner's Court and also by the Nagpur High Court. These cases have been noted by Sen J. in I. L. R. (1945) Nag. 634[1] and need not be repeated fully here. In 13 N. L. R. 203[30] at p. 208 Stanyon A. J. C. observed:

"I am not in favour of using S. 115, Civil P. C., in a narrow and technical way. I regard it as a section which gives plenary powers of interference by this Court."

[72] In 27 N. L. R. 251[30] Niyogi A. J. C. laid down quite unequivocally that the word 'case' in S. 115, Civil P. C., is wide enough to cover an interlocutory order.

[73] These dicta have been followed by the Nagpur High Court in several cases.

[74] In A. I. R. 1938 Nag, 210[31] Bose J. held that the word 'case' used in S. 115 is wide enough to include an interlocutory order and the High Court has power to interfere with such orders provided they otherwise fulfil the requirements of S. 115, Civil P. C. In another decision reported in A.I.R. 1938 Nag. 358[32] Bose J. observed that the High Court would not ordinarily exercise its revisional jurisdiction in a purely interlocutory matter, namely, about the admission of a certain piece of evidence, but it may do so in certain circumstances involving the question of jurisdiction or inflicting irreparable injury on the party. In I.L.R. (1942) Nag. 258[33] Bose J. interfered in revision in a case where the party on whom interrogatories were served filed a reply but the affidavit was sworn to not by the party personally but by his agent and therefore the lower Court asked that party to file answers again in a proper form.

[75] The other group of High Courts which at a time favoured the narrow view and held that no revision could be entertained against interlocutory orders consisted of the Allahabad, Lahore and Lucknow High Courts. Even these Courts have however changed their views and are now in line with other High Courts in adopting liberal interpretation of the word 'case.' So far as the Allahabad High Court is concerned this change is apparent from the decision in 48 ALL. 175.[34] In I. L. R. (1940) ALL. 564[35] the Allahabad High Court held that an order refusing an amendment of the plaint is a case decided within the meaning of S. 115, Civil P, C., and a revision lies against it. In 57 ALL. 678[36] it was held that where an application to join a party to a suit was disposed of without proper consideration and on a misapprehension of its nature a revision lies against that order under S. 115, Civil P. C.

[76] In 3 Luck. 650[37] an order of stay in a pending suit was held to be within the purview of S. 115, Civil P. C. In 5 Lah. 288[38] consisting of five judges it was held by majority that the word 'case' should be read in a restricted sense so as not to include interlocutory orders. That High Court in a later Full Bench decision in I. L. R. (1943) Lah. 257[39] reconsidered its earlier Full Bench decision and after considering the entire case law on the subject held that the word 'case' in S. 115, Civil P. C., is wide enough to include interlocutory orders. In that case the order of the subordinate Court staying the suit on receipt of a *robkar* from the Debt Conciliation Board was held to be a case within the meaning of S. 115 of the Code. The divergence of view can now be said to have been resolved in favour of the liberal interpretation of the word according to which the word 'case' includes interlocutory orders.

[77] It is thus clear that the jurisdiction to entertain a revision does not depend on the order sought to be revised being interlocutory or final. Nor does it depend upon the particular matter disposed of by that order. The High Court has jurisdiction to entertain revision against orders deciding a particular matter provided the three conditions mentioned in the first part of S. 115 are satisfied. It may be noted that according to one of those conditions the order sought to be revised must not by itself be appealable to the High Court. It is immaterial that an appeal would lie to the High Court from the decree which may ultimately be passed in the suit. In this connection the following obser-

vations of the Madras High Court in I. L. R. (1942) Mad. 459.[10] are worth noting :

"The fact that a finding on a question of jurisdiction could be challenged in an appeal from the decree passed in the suit does not preclude the High Court from interfering in revision on a question of jurisdiction when it arises at a preliminary stage in a suit."

[78] It does not however follow that the High Court will interfere with every order against which a revision is entertainable. The interference will depend firstly upon whether the requirements of clauses (a), (b) and (c) of S. 115 Civil P. C., are satisfied and secondly on the Court's regarding it a proper case where the discretionary power of revision should be exercised.

[79] It was pointed out by Woodrooffe J. in 41 Cal. 323[16] that S. 115 could only be called in aid when the failure of justice, if any, has been done due to one or other fault of procedure mentioned in clauses (a), (b), and (c) of S. 115, Civil P. C. The High Court would not exercise its revisional jurisdiction only because the subordinate Court has gone wrong on facts or on law. Their Lordships of the Privy Council very aptly pointed out in 11 Cal. 6[41] that when a Court decides a suit with jurisdiction that decision cannot, merely on account of the fact that it was wrong, be said to be without jurisdiction as a Court acting with jurisdiction has jurisdiction to decide rightly or wrongly.

[80] In 40 Mad. 793[7] their Lordships again pointed out:

" It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

[81] Clauses (a) and (b) of S. 115 which deal with usurpation of jurisdiction and the non-exercise of jurisdiction are simple enough, and Bose J. has correctly pointed out that though the subordinate Court decides that a certain matter lies within its jurisdiction that order is not a nullity; but where such an order results in the usurpation of jurisdiction which that Court does not possess to that extent that order is open to revision. In other words, where the issue is an issue of jurisdiction it is always open for revision. The real difficulty is experienced in the application of clause (c) of S. 115 where the subordinate Court is accused of having acted within its jurisdiction illegally or with material irregularity.

[82] It is difficult to lay down exhaustively what constitutes acting illegally or with material irregularity and also to narrate the circumstances when the High Court should and when it should not exercise its discretionary power of revision. These matters have to be decided on the facts and circumstances of the individual case judged in the light of the rules of procedure and the principles which can be gathered from the several reported decisions, a few of which are noted below :

[83] In I.L.R. (1937) ALL. 805[42] it was held that where the Court failed to consider a material question and did not apply its mind at all to the mandatory provisions of the law relevant on the question it acted in the exercise of its jurisdiction with material irregularity.

[84] In 57 ALL. 668[36] it was observed that where an application to join a party was disposed of without proper consideration and on a misapprehension of its nature it is a material irregularity.

[85] In 56 Bom. 585[43] at p. 589 it is observed that a wilful disregard or apparent violation of any provision of law amounted to acting with material irregularity.

[86] In 58 Mad. 936[44] it was held that there the previous order of the Court was misinterpreted or misconstrued and as a result the Court did not go into the application under O. 21 R. 97. Civil P.C. it amounted either to a failure to exercise jurisdiction or to the exercising of the jurisdiction with material irregularity.

[87] In 15 Luck 641[45] it was held that where a Judge proceeds with a suit as a result of misinterpretation of law, for example, S. 10, Civil P. C., he acts with material irregularity.

[88] A wrong interpretation of the provision of law renders the orders of the subordinate Court open to revision as held in I. L. R. (1945) ALL. 604.[46] In 25 Pat. 58[47] it was held that where the Court misinterprets the statutory provision and commits a mistake with regard to the ambit of its jurisdiction its order is open to revision. In I. L. R. (1946) Mad. 640[48] it was held that an abuse of the powers of the executing Court is a ground for revision. In 21 Luck. 167[49] it was held that the High Court should interfere if non-interference would result in multiplicity of suits, delay and unnecessary expenses to the parties. Many more cases can be collected, and in fact some of them were cited at the Bar in which the High Court either interfered or refused to interfere in revision. I however think it needless to refer to them. The aforesaid citation is sufficient to show that no hard and fast rule can be laid down for the application or otherwise of clause (c) of S. 115, Civil P. C. or for the exercise of the revisional jurisdiction which is after all discretionary and each case must be considered on the facts and circumstances of that case.

[89] Before the High Court entertains a revision it shall have in every case to decide (i) whether it has jurisdiction to entertain a revision, i. e., whether the conditions mentioned in Part 1 of S. 115 are satisfied, (ii) whether it has power to interfere with the order of the lower Court, i. e.

whether the subordinate Court has committed an error which fell under clauses (a), (b) and (c) of S. 115, (iii) and whether in the circumstances of the case it should in its discretion exercise the revisional power and interfere with the order of the subordinate Court and pass any suitable order in the case. It would indeed be trenching on the province of legislature to lay down that particular order or an order dealing with a particular subject should not be interfered with or that the High Court should, as a rule, exercise its jurisdiction in not interfering with the interlocutory orders of the subordinate Court because they deal with particular subjects or only because they are interlocutory.

[90] The trial Court has no doubt a jurisdiction to interpret the order of remand. It does not however follow that the High Court has no jurisdiction to entertain a revision and to interfere with the lower Court's order passed as a result of its interpretation and that such a revision should always be rejected. A patent mistake in interpreting the remand order and the violation of well-established principles of interpretation would amount to acting with material irregularity specially when the interpretation is so unjustified or patently wrong that the lower Court could not be deemed to have applied its mind in interpreting the remand order. Where, moreover as in this case, the interpretation of the remand order is linked with the question of jurisdiction of the subordinate Court after remand it would be open to revision if by putting a wrong interpretation the subordinate Court either enlarges its own jurisdiction or narrows it down.

[91] In 58 Mad. 936[44] the executing Court passed an order in a claim petition under O. 21, R. 58, Civil P. C. It was dismissed subject to note that whatever interest the defendant has in the lands be put to auction and the petitioner's rights are not prejudiced thereby. This order was misinterpreted by the Court and it consequently declined to go into the merits of the case when an application was filed by the claimant for enquiry into his claim that he had permanent occupancy rights. It was held that the order of the Court was liable to be revised. In the present case, the jurisdiction of the trial Court in the matter of allowing or refusing amendment of the defendants' written statement was limited by the remand order and the interpretation of that order was therefore linked up with the question of jurisdiction.

[92] It is true that under O. 6, R. 17, Civil P. C., the power to allow or refuse amendment is in the discretion of the trial Court. It has, however, to exercise that discretion according to judicial principles which are well recognised and according to the rules laid down for the guidance of the subordinate Courts, as will be found in the reported cases e. g., 48 Cal. 110[50] and 48 Cal. 832,[51] I. L. R. (1939) Nag. 194[52] and others. The High Court before refusing to interfere with the order of the subordinate Court has to satisfy itself that the subordinate Court did judicially exercise its discretion and did not merely make a show of doing so. It has further to satisfy itself that the subordinate Court has not passed its order by violating the well-established principles of law and relevant rules on the subject. Where a subordinate Court is however found to have acted illegally or with material irregularity, in either not allowing or allowing amendment, such an order, even though discretionary, would be open to revision. According to O. 6, R. 17, 'all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.' In a case reported in I.L.R. (1945) Nag. 634[1] Sen J. found that the order of the subordinate Court refusing to allow amendment sought to be revised in that case deprived the party of the opportunity of placing his case before the Court so as to enable it to determine the real question in controversy between the parties. This was contrary to O. 6, R. 17, Civil P. C., and the subordinate Court was guilty of either not exercising jurisdiction vested in it by law or of exercising it with material irregularity. It is on this ground that Sen J. interfered with the order of the subordinate Court and allowed the amendment which fell within the ambit of O. 6, R. 17 of the Code. I do not find anything wrong with this decision.

[93] The subject of settlement of issues is dealt with in O. 14, Civil P. C. and Rule 1 (3) of the Order provided that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. The material propositions as defined by R. 1 (2) of O. 14 are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. If a Court refused to frame an issue on a material proposition affirmed by one party and denied by the other, it would be guilty of not exercising jurisdiction vested in it by law requiring it at the first hearing of the suit to record issues on which the right decision of the case depends. If, on the other hand, it framed issues which do not arise out of the material propositions of law or fact affirmed by one party and denied by the other, it would be acting either in excess of its jurisdiction or with material irregularity, and in either case the order of the subordinate Court may be open to

revision. In fact, by refusing to frame an issue which actually does arise in the case, the Court shuts out a trial of a part of his case. In such a case it would be necessary for the High Court to interfere in revision and to set the matter right so as to avoid waste of time and costs: 21 Luck. 167.[49]

[94] I am however in agreement with Bose J. that the revisional jurisdiction of the High Court under S. 115, Civil P. C., should not be so liberally exercised as to convert a revision into an appeal and further that every order of the subordinate Court should not be interfered with only because it was wrong either in law or on facts. I also agree that the revision against an interlocutory order should not be encouraged unless it was necessary to interfere with the order at that stage in order to shorten litigation and to avoid waste of time and money. It is however necessary, on the other hand, that S. 115, Civil P. C., should not be too narrowly and too technically construed as it provides a salutary check on the careful discharge of functions by the subordinate Court. It is necessary in the interests of justice that there should be a tribunal where patent injustice can be removed, and removed in due time. Section 115, if properly construed, affords sufficient guarantee against unwarranted use of the revisional powers of the High Court. It is neither proper nor permissible that new terms and conditions should be introduced by Courts into S. 115 and on which either the entertaining of a revision or the exercise of the power of interference should be made dependent. It is equally not proper and not permissible that a rigid rule should be laid down by the High Court that particular revisions should either be not entertained or that those revisions should always be dismissed.

[95] In the light of what has been said above, my answers to the questions referred are: Question 1: In the affirmative. Question 2: In the affirmative. Question 3: No hard and fast rule can be laid down; each case should depend on its own facts and circumstances and the discretion should be exercised judicially and according to correct and well-established principles.

[96] **Pollock J.** — I agree in the answers proposed by Padhye J. but I wish to add a few words.

[97] I am not quite sure what Bose J. means by "entertain revisions" in the second question that he has posed. If there has been a case decided by a civil Court and no appeal lies, then it is clear from S. 115, Civil P. C., that the High Court has power to send for the record. If Bose J. meant more than that by "entertain revisions" and was asking whether the High Court has power to interfere in revision, then that depends on whether in such a case the subordinate Court has acted in a way hit by cl. (a) or (b) or (c) of Section 115.

[98] I agree with Bose J. that, if the lower Court has jurisdiction to decide a point and has decided it, then neither cl. (a) nor cl. (b) can ordinarily apply, but I think there may be cases in which, as Bose J. has put it, the fact which the Court is determining is not an issue on the merits but an issue of jurisdiction, in which case the finding may be revisable. When a case has been remanded to the lower Court for decision of a particular issue I do not think that the Court has jurisdiction to decide any other issue, nor has it jurisdiction to misinterpret the order of remand so as to get jurisdiction to decide some other issue, and therefore there may be cases in which it is permissible to interfere under cl. (a). So also it may be permissible to interfere under cl. (b) if the Court refuses to decide the issue sent down for trial. These difficulties however could be avoided if remand orders were more clearly worded.

[99] In most cases, however, there is no question of exercising a jurisdiction that is not vested in the Court or refusing to exercise a jurisdiction that is vested, and the question turns on whether the Court has acted illegally or with material irregularity. I agree with the dictum of Sir Lawrence Jenkins C. J. in 41 Cal. 323[16] that there must be an error of procedure and not merely of law to justify interference under cl. (c). I also agree with what Bose J. said in I. L. R. (1936) Nag. 73[5] that "It must be something independent of the decision itself; an irregularity or illegality in the manner of arriving at it, not in the conclusion reached," though I find some difficulty in reconciling that dictum with his decision in I. L. R. (1938) Nag. 106[17] where he held in effect at p. 112 that a wrong decision by a Court that the court-fee paid is inadequate is a material irregularity, however correct the procedure may have been because it shuts the plaintiff out from all hope of redress in the suit itself, assuming of course that he refuses to pay the additional court-fee demanded, with the result that the application for revision is treated as if it were an appeal. It is, however, I think impossible to define what is meant by "illegally or with material irregularity," as Bose J. himself has recognized[4]; but I think that there may be an illegality or material irregularity if the Court acts in obvious disregard of some statutory enactment or some well-established principle. That, in my opinion, might amount to an error of procedure and not merely an error of law.

[100] I would therefore say that there may be cases in which the High Court has power to

interfere in revision with the lower Court's interpretation of a remand order or on a question of amendment of a pleading or on a question relating to the framing of an issue, and I would say that I. L. R. (1945) Nag. 634[1] was rightly decided in so far as it held that such an order may be open to revision. On the question whether the Court rightly interfered in revision in that particular case I think it unnecessary to express any opinion.

[101] Finally, I agree with Bose J. that the less interference by this Court in interlocutory matters the better, and that, while interference in some cases may do good, interference on the whole probably does more harm than good. The harm is done when notice is issued. If, after the issue of notice and the lapse of perhaps two or three years, the parties appear before the Court and the case is argued, then the Court might as well interfere and put the matter right. Ordinarily, however, I would say that the interests of justice are better served by allowing the lower Court to proceed in its own way and that it is undesirable to delay the decision in many cases in order to do good in a few. I do not, however, think it possible to lay down any hard and fast rule about how this jurisdiction to interfere should be exercised.

[102] **Hemeon J.**—I concur in the answers given by Padhye J. and in the observations of Pollock J. and have nothing to add.

D.S. *Answered accordingly.*

A. I. R. (35) 1948 Nagpur 272 *[C. N. 88]*

HIDAYATULLAH J.

Deorao Suryabhanji — Decree-holder — Appellant v. *Ramchandra Amrutlal Rathi — Judgment-debtor — Respondent.*

Misc. Second Appeal No. 41 of 1942, Decided on 22-8-1947, from order of Add. Dist. Judge, Ellichpur, D/- 24-10-1941.

(a) Civil P. C. (1908), S. 48 —Fresh application— Application for execution against new items of property is fresh application.

Application for execution against new items of property is a fresh application within the meaning of S. 48. 32 A. I. R. 1945 Nag. 239 and Misc. Appeal No. 165 of 1943, *Foll.* [Para 4]

Held, that the application for amendment of the previous application seeking execution against movable property by seeking execution against immovable property must be treated as a fresh application for execution. [Para 5]

Annotation : ('44-Com.) C. P. C., S. 48, N. 7.

(b) Civil P. C. (1908), S. 48 — Subsequent order — It can be passed both by original as well as executing Court.

A subsequent order can be passed by both the original Court as well as the executing Court. [Para 5]

Where the executing Court granted certain time to the judgment-debtor for payment of the decretal amount, in computing the period of 12 years' the decree-holder is entitled to exclude such period : 18 A. I. R. 1931 Nag. 50, *Foll.* [Para 6]

Annotation : ('44-Com.) C. P. C., S. 48, N. 11.

(c) Civil P. C. (1908), S. 48— Limitation — S. 48 is controlled by S. 15, Limitation Act.

Section 48, Civil P. C., is controlled by S. 15, Limitation Act, and the decree-holder in suitable cases can exclude period during which he was prohibited from executing his decree. 31 A. I. R. 1944 Nag. 155, *Foll.* [Para 6]

Annotation : ('44-Com.), C. P. C., S. 48, N. 14.

(d) Civil P. C. (1908), O. 21. R. 17 — Amendment — Application for amendment of previous application—Such application in fact is fresh application—Application not complying with O. 21, R. 11 —Court should allow it to be amended under R. 17.

When an application is made for amendment of the previous execution application by seeking execution against new items of property, it is really a fresh execution application and when it does not comply with O. 21, R. 11 the executing Court should allow the decree-holder to put in a proper application with all the details required by R. 11, as an amendment under O. 21, R. 17 is within the competence of the Court. [Para 6]

Annotation : ('44-Com) C. P. C., O. 21, R. 17, P. 3.

(e) Civil P. C. (1908), S. 48 (2) — Fraud — Word 'fraud' has to be given more liberal meaning in connection with S. 48 (2) — Plea of fraud can be allowed to be taken even at late stage.

The word 'fraud' in connection with S. 48 (2) has to be given a more liberal meaning. In cases arising under S. 48 (2), Courts do allow a plea of fraud to be taken even at a late stage. Ordinarily, a plea of fraud cannot be added by way of amendment at such a late stage as in second appeal, but in connection with executions where property is prevented from being brought before the executing Court due to the fraud of the judgment-debtor, Courts have permitted the plea of fraud to be taken at a late stage : 12 A. I. R. 1925 Nag. 82 and 33 A.I.R. 1946 Mad. 172, *Foll.* [Para 7]

Annotation : ('44-Com.) C. P. C., S. 48, N 12,

Cases referred :—

1. ('39) 14 Luck 192 : 26 A. I. R. 1939 P. C. 80 : I. L. R. (1939) Kar. P. C. 136 : 66 I. A. 84 : 180 I. C. 378 (PC), Oudh Commercial Bank Ltd. v. Bind Basni Kuer.
2. ('45) I. L. R. (1945) Nag. 555 : 32 A. I. R. 1945 Nag. 239, Bhaskar v. Chandrabhan.
3. ('41) I. L. R. (1941) 2 Cal. 251 : 29 A. I. R. 1942 Cal. 306 : 201 I. C. 31, Shekender Ali v. Abdul Gafur.
4. ('40) 27 A. I. R. 1940 Mad. 19 : 187 I. C. 334, Jhorama v. Latchanna Dora.
5. ('18) 40 All. 198 : 5 A. I. R. 1918 All. 216 : 44 I. C. 24, Jurawan v. Mababir Dube.
6. ('25) 49 Bom. 695 : 12 A. I. R. 1925 Bom. 503 : 88 I. C. 949, Apte v. Tirmal Hanmant.
7. ('39) I. L. R. (1939) All. 647 : 26 A. I. R. 1939 All. 403 : 183 I. C. 242 (F.B.), Drigpal Singh v. Pancham.
8. ('31) 27 N. L. R. 150 : 18 A. I. R. 1931 Nag. 50 : 132 I. C. 456, Lalji Dayaldas v. Jugal Kishore.
9. ('44) I. L. R. (1944) Nag. 250 : 31 A. I. R. 1944 Nag. 155 : 217 I. C. 298, Sitram Chunnilalsa.
10. ('26) 22 N. L. R. 67 : 12 A. I. R. 1925 Nag. 82 : 80 I. C. 905, Khairull v. Dhanrupmal.
11. ('46) 33 A. I. R. 1946 Mad. 172, Venkanna v. Kotayya.
12. ('22) 44 All. 319 : 9 A. I. R. 1922 All. 145 : 65 I. C. 877, Lalta Prasad v. Suraj Kumar.

V. L. Prabhune — for Appellant.

A. L. Halve — for Respondent.

Judgment. — This is a miscellaneous second appeal against the order of Mr. B. S. Divekar, Additional District Judge, Ellichpur, in Miscellaneous Civil Appeal No. 4 of 1941, decided on 24-10-1941.

[2] The matter arises in execution proceedings of a decree dated 6-8-1928. According to S. 48, Civil P. C., the last date by which execution application could be made was 6-8-1940. Accordingly on 29-1-40 the decree-holder applied for execution. At first the application was for transfer of the decree to Akola so that he could proceed against the immovable property, but by an application dated 10-2-40 the decree-holder asked for execution against the movable property in the hands of the judgment-debtor. This property was attached and made over to a *supratdar*, but it could not be sold as the judgment-debtor prevented the *supratdar* from bringing the property into Court. Several attempts were made by the decree-holder to get at the movable property. Ultimately he compromised by accepting Rs. 100 from the *supratdar* in lieu of the property entrusted to him. On 22-1-1941 the decree-holder applied for amendment of his application and asked for permission to proceed against the immovable property of the judgment-debtor. This application was made more than 12 years after the date of the decree but the executing Court allowed the application for amendment and ordered the attachment of the fields. Against this order, an appeal was filed and the lower appellate Court reversed the decision of the executing Court and ordered that the execution having become time-barred, the application be dismissed. The reasons given by the lower appellate Court were that the application dated 22-1-1941 involved a change in the mode of execution and the amendment could have been sought much earlier than 22-1-1941. The application for amendment was treated as a fresh application for execution and was held not to comply with O. 21, Rr. 13 and 14, Civil P. C. The lower appellate Court, therefore, ordered the executing Court to recall the *C* form which, it appears, had been issued in the meantime.

[3] This appeal raises three grounds. The first contention is that the application for amendment was not a fresh application within the meaning of S. 48 (1), Civil P. C., and that it did not involve any change in the mode of execution. In deciding whether an application is an application for amendment of an earlier application or a fresh application the Court must see the substance rather than the form : *See* 14 Luck 192.[1] In the present case the first application was for execution against the movables and that application was substantially exhausted because the decree-holder accepted Rs. 100-0-0 in lieu of the movables left with the *supratdar*.

[4] The present application for amendment seeks to proceed against the immovable property and therefore the mode of execution is certainly different. In I. L. R. (1945) Nag. 555,[2] a *C* form had been sent and sale had taken place of some property mentioned in the *C* form. On ratable distribution the decree of the decree-holder in that case was not satisfied. He applied for amendment of the first application by inclusion of some other items of property. It was held on the authority of the cases cited in this ruling that this was a fresh application for execution and not an application for amendment. It has been held in some other High Courts that amendment can be allowed in suitable cases and the Courts are not limited by O. 21, R. 17, Civil P. C., if it does not alter the execution proceedings. This has been laid down in I. L. R. (1941) 2 Cal. 251[3] and A. I. R. 1940 Mad. 19.[4] The view of this Court, however, has been to treat applications for execution against new items of property as fresh applications. Another case in point is Miscellaneous Appeal No. 165 of 1943, decided on 29-3-45. I am bound by these two cases of this Court, especially I. L. R. (1945) Nag. 555[2] which is a Division Bench case. Even if I disagreed with the view propounded therein, I do not consider this case suitable for reference because the present appeal can be decided on other grounds. I accordingly treat the application for amendment as a fresh application for execution filed beyond the statutory limit of 12 years.

[5] This brings me to the second contention of the decree-holder and it is that by a subsequent order the executing Court granted time for payment to the judgment-debtor from 18-3-32 to 15-1-33. He claims, therefore, to exclude this period from calculation and as this is more than sufficient to cover the delay in the making of the fresh application, he claims that he is within time. There is no doubt that the judgment-debtor was granted time to make payment by the executing Court. It was, however, contended by the respondent that the "subsequent order" mentioned in S. 48, Civil P. C. refers to an order made by the original Court and not the executing Court. This was no doubt the view of the Allahabad High Court in 40 ALL. 198,[5] and certain other Allahabad cases which followed the authority cited by me. The Allahabad case was, however, dissented from in 49 Bom. 695[6] and has recently been overruled in I. L. R. (1939) ALL. 647.[7] In this Court the view has been taken that a subsequent order can be passed by both the original Court as well as the executing Court: *see* 27 N. L. R. 150.[8]

[6] It was contended by the learned counsel

for the respondent that the time which was granted was by way of an adjustment, but he ignores that 27 N. L. R. 150[8] was also a case of adjustment. I therefore hold that in computing the period of 12 years the decree-holder is entitled to exclude the period from 18-3-32 to 15-1-33. This is more than sufficient to bring his second application within the time prescribed by the Civil Procedure Code. In this connection I may also refer to I. L. R. (1944) Nag. 250[9] where it has been held that S. 48, Civil P. C., is controlled by S. 15, Limitation Act, and the decree-holder in suitable cases can exclude period during which he was prohibited from executing his decree. This brings his application for amendment within the period of 12 years. It is true that the application did not comply with O. 21, R. 11, Civil P. C., but an amendment under O. 21, R. 17 is within the competence of the Court and the executing Court could have allowed the decree-holder to put in a proper application with all the details required by R. 11. In my opinion, therefore, the decision of the lower appellate Court is wrong.

[7] There was yet a third contention of the decree-holder appellant and it is that under S. 48 (2), Civil P. C., he is entitled to bring his application for execution even after the statutory period of 12 years if the judgment-debtor was guilty of fraud. There is no doubt in my mind that if it was necessary the decree-holder could have fallen back upon S. 48, sub-s. (2), Civil P. C. A mere perusal of the order-sheets shows that the judgment-debtor prevented the *supratdar* from bringing the movable property into Court so that it could be sold. 'Fraud' in connection with S. 48 (2) has to be given a more liberal meaning: *see* 22 N. L. R. 67[10] at pp. 78 and 79. It was contended that no such plea was taken before the executing Court and the fraud which is now pleaded was never pleaded before. In cases arising under S. 48(2), Civil P.C., Courts do allow a plea of fraud to be taken even at a late stage. Ordinarily, a plea of fraud cannot be added by way of amendment at such a late stage, but in connection with executions where property is prevented from being brought before the executing Court due to the fraud of the judgment-debtor, Courts have permitted the plea of fraud to be taken at a late stage: *see* A. I. R. 1946 Mad. 172.[11] I respectfully agree with the observations of Bell J. in that case where he says:

"In my opinion, however, different considerations arise when applying the provisions of sub-s. (2) of S. 48. Section 48 sets a time limit on executions. In order to prevent a dishonest and fraudulent debtor from preventing the execution of the decree for the period of 12 years it says that if fraud can be shown then the time limit may be extended. It is not a question of making specific allegations in a plaint or written statement against the reputation or character of the opposite side. It is a case of being able to show even at the eleventh hour and afterwards that the time limit laid down by S. 48 should not prevail where the conduct of the judgment-debtor is such as to have prevented the execution of the decree within twelve years. It is said that 'Judges ought to take a broad view of conduct deliberately adopted by judgment-debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections which are dishonest upon the face of them.'

See 44 ALL. 319.[12]

[8] Since it is not necessary to decide this case on this ground of fraud, I say nothing more about it except to indicate that if it was necessary I would have accepted the plea of fraud urged by the decree-holder against the judgment-debtor and allowed him to plead it even at this late stage. As it is, his application is within time but does not strictly comply with O. 21, R. 11. That of course is a matter for amendment. I therefore set aside the order of the lower appellate Court and order execution to proceed on the basis of the application dated 22-1-1941 which, the executing Court will give the decree-holder an opportunity to amend so as to bring it in line with the requirements of law.

[9] The appeal is allowed with costs throughout.

S.C. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 274 *[C. N. 89.]*

HEMEON J.

Shyamrao Krishnarao—Accused — Applicant v. *Emperor.*

Criminal Revn. No. 465 of 1946, Decided on 9-1-1947, from order of Addl. Sessions Judge, Raipur, D/- 28-5-1946.

Government of India Act (1935), S. 270 (1) — Telegraph messenger riding bicycle while on duty rashly and negligently—Prosecution under S. 337, Penal Code — Consent of Governor-General, if necessary.

The accused who was a telegraph messenger, while on duty, was riding a bicycle belonging to his department. The bicycle was defective by reason of brake deficiencies and absence of bell. In spite of this the accused failed to ride at a safe speed and to be vigilant and knocked down a small girl. He was prosecuted and sentenced under S. 337, Penal Code. No consent of the Governor-General was obtained for the prosecution under S. 270 (1), Government of India Act.

Held that the act of the accused was an act purporting to be done in the execution of his duty and the proceedings against him were ultra vires, as the consent of the Governor-General had not been obtained to their institution under S. 270 (1), Government of India Act: 31 A.I.R. 1944 Nag. 337 and 24 A.I.R. 1937 P. C. 306, *Foll.* [Para 7]

Cases referred :

1. ('39) 26 A.I.R. 1939 F. C. 43 : I. L. R. (1940) Lah. 400 : 181 I. C. 317 : 40 Cr. L. J. 468 (F. C.), Hori Ram Singh v. Emperor.
2. ('44) 31 A. I. R. 1944 F. C. 66 : I. L. R. (1944) Kar. F. C. 189 : 1944 F. C. R. 262 : 23 Pat. 517 : 214 I. C. 199 : 45 Cr. L. J. 755 (F. C.), H. T. Huntley v. Emperor.

3. ('46) 33 A. I. R. 1946 F. C. 25 : I.L.R. (1945) Kar. F.C. 144 : 25 Pat. 46 : 1945 F.C.R. 227 : 226 I. C. 181 : 47 Cr. L. J. 838, Sarjoo Prasad v. Emperor.
4. ('44) I.L.R. (1944) Nag. 650 : 31 A. I. R. 1944 Nag. 337, T. M. Dave v. Emperor.
5. ('38) I. L. R. (1938) 1 Cal. 440 : 24 A. I. R. 1937 P. C. 306 : 31 S.L.R. 686 : 64 I.A. 363 : 170 I. C. 332 (P.C.), Calcutta Port Commissioners v. Corporation of Calcutta.

P. Lobo—for Applicant.

W. B. Pendharkar Addl. Govt. Pleader —for the Crown.

Order. — The applicant Shamrao, telegraph messenger, was convicted and sentenced to pay a fine of Rs. 51 under S. 279, Penal Code, by the Honorary Magistrate, First Class, Raipur, and in appeal the sentence was upheld but the conviction was altered to one under S. 337 ibid by the Additional Sessions Judge, Raipur. He has now come up in revision.

[2] The prosecution case was briefly stated as follows. On the afternoon of 13-11-1945 Hari (P. W. 2) saw the applicant, who was riding his bicycle quickly, knocked down a three years old girl without having sounded his bell or reduced his speed. As a result of the collision he also fell down and Hari took the bicycle to the Court of Mr. S. N. Hadole (P. W. 1), father of the child, and reported to him that it was the machine by which the child had been hurt. Mr. Hadole inspected the bicycle and found that it had no bell or front brake and that the back wheel brake was out of order. Mr. Hadole then went to his house where he found his daughter weeping and noticed that she had injuries on the left foot and a swelling on the left leg. He accordingly took her to Dr. T. M. Dabke (P. W. 4) who examined her injuries and dressed them. The matter was in due course reported to the police and the bicycle seized.

[3] The applicant in examination claimed that at the relevant time he had been cycling at an ordinary speed to the post office for returning telegrams, that he was travelling on the left side of the road and that the small girl who was playing in the middle of the road dashed against the wheel of the bicycle in spite of his shouts to her. He admitted that the machine had no bell but claimed that the hind brake was in order. This connoted that the front brake was out of order and it was shown from the evidence of Hari and Rajabali (P. W. 5), a respectable witness, that there was no front brake and that the hind brake was out of order. In spite of these defects in the machine, the applicant had not ridden it with caution but, as the evidence showed, swiftly and so rashly or negligently that he knocked down and injured the little girl who was playing on the side of the road.

[6] The applicant was on duty at the time and the only contention pressed before me was that the proceedings against him were ultra vires, as the consent of the Governor-General had not been obtained to their institution under S. 270 (1), Government of India Act, 1935. The proceedings referred to in that sub-section are those contemplated in respect of any act done or purporting to be done in the execution of a person's duty as a servant of the Crown in India or Burma, and the learned Additional Sessions Judge held that the act of the applicant did not take place in the execution of his duties. In so finding, he relied on the following observations of Sulaiman J. in A. I. R. 1939 F. C. 43.[1]

"It (i. e. the act) must have been ostensibly done by him (i. e. a public servant) in his official capacity in execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office, nor even necessarily because he was engaged in his official business at the time."

[5] In A. I. R. 1944 F. C. 66,[2] and in A. I. R. 1946 F. C. 25[3] that rule was applied. The case in A. I. R. 1946 F. C. 25[3], was one in which the facts were as follows. The complainant with his wife and others had proceeded to a steamer station and as he was unable to purchase tickets he wanted to go on the steamer in order to bring back his wife and other people who had boarded it in the interim. In this he was resisted by the accused, station master, who abused him; and when the complainant protested, the station master called out certain people and ordered them to beat him. The complainant was then attacked by them and also by the station-master. Their Lordships of the Federal Court held that the station master's act could not be regarded as one "purporting to be done" by him in the execution of his duty.

[6] The applicant's learned counsel contended however, that in A. I. R. 1939 F. C. 43,[1] Varadachariar J. had pointed out that an act is not less one done or purporting to be done in execution of a duty because the officer concerned does it negligently. In I. L. R. (1944) Nag. 650[4] Digby J. referred to that observation and also to the case in I. L. R. (1938) 1 Cal. 440,[5] in which their Lordships of the Judicial Committee of the Privy Council had made it clear that leaving a portion of a railway unrepaired was an act done or purporting or professing to be done in pursuance of the Calcutta Port Act. That finding of their Lordships of the Judicial Committee showed clearly, Digby J. observed, that negligent performance can purport to be performance of duty. He was then discussing the case of a driver of a mail train who had failed to have a proper light on the engine and to keep a proper look-out, and this he considered to fall under the heading "negligent performance." The proceedings against the driver were accordingly quashed as the consent of the Governor-

General to their institution had not been obtained.

[7] The case before me is largely on all fours with the *Gotting (driver) case*[1]. Both he and the applicant were on duty at the relevant times the one driving a mail train and the other riding a bicycle belonging to his Department. The bicycle was defective by reason of brake deficiencies and Gotting's engine was without a proper headlamp. The applicant and he were both negligent in that in spite of these factors they failed to travel at a safe speed and to be vigilant. Gotting's act has been held to be an act purporting to be done in the execution of his duty and the same conclusion must be reached regarding the applicant's act.

[8] The proceedings against the applicant are, therefore, quashed. As the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935, a certificate under S. 205 (1) of that Act shall issue to the Crown.

S. C. *Proceedings quashed.*

A. I. R. (35) 1948 Nagpur 276 *[C. N. 90.]*

HEMEON J.

Krishna Namdeo Chimurkar — Applicant v. *Suleman and Emperor—Non-Applicants.*

Criminal Revn. No. 765 of 1946, Decided on 8th July 1947, from order of Magistrate, First Class, Nagpur, D/- 31st August 1946.

Criminal P. C. (1898), S. 439—Order of acquittal —Revision against, by private complainant, when maintainable.

The High Court is competent to entertain an application for revision against an order of acquittal at the instance of a private complainant but this is subject to the limitation imposed by S. 439 (4). But the High Court will not set aside an order of acquittal unless there are exceptional circumstances that would justify a second trial. *Case law reviewed. Criminal Appeal No. 292 of 1946, Expl. and Disting.* [Paras 8, 9]

Annotation : ('46-Com.) S. 439, N. 12, Pts. 4 and 5.

Cases referred :—

1. Cri. Appeal No. 292 of 1946, D/- 31-10-1946, Jagannath v. Laxmisingh.
2. ('09) 5 N. L. R. 4 : 1 I. C. 238 : 9 Cr. L. J. 211, Bindaprasad v. Ripusudan.
3. ('19) 2 N. L. J. 153 : 6 A.I.R. 1919 Nag. 64 : 52 I.C. 788 : 20 Cr.L.J. 708, Sunderbai v. Kishore Singh.
4. ('27) 23 N.L.R. 40 : 14 A.I.R. 1927 Nag. 170 : 102 I.C. 219 : 28 Cr.L.J. 523, Sher Khan v. Anwar Khan.
5. ('33) 28 N.L.R. 298 : 20 A.I.R. 1933 Nag. 36 : 141 I. C. 273 : 34 Cr.L.J. 145, Sitaram v. Tilokchand.
6. ('35) 31 N.L.R. 261 : 23 A. I. R. 1936 Nag. 40 : 157 I. C. 781 : 36 Cr.L.J. 1336, President Municipal Committee, Bilaspur v. Bansidhar Bani.
7. ('28) 50 All. 722 : 15 A. I. R. 1928 P. C. 254 : 55 I. A. 390 : 111 I. C. 332 : 29 Cr. L. J. 828 (P. C.), Kishan Singh v. Emperor.
8. ('38) I. L. R. (1938) Nag. 157 : 24 A.I.R. 1937 Nag. 394 : 172 I. C. 177 : 39 Cr. L. J. 75, Raghunathmal Shermal v. Patiram Sadaram.
9. ('44) I. L. R. (1944) Nag. 176 : 31 A.I.R. 1944 Nag. 136 : 215 I. C. 57 : 45 Cr. L. J. 766, In re, Ganpatrao.
10. Cri. Revn. No. 333 of 1943, Decided on 17-11-1943, Shriram v. Damodar.

P. Lobo—for Applicant.

Nisarali—for Non-Applicant No. 1.

W. B. Pendharkar Addl. Govt. Pleader—for the Crown.

Order. — Suleman and Shankar were prosecuted under S. 420, Penal Code, in the Court of the First Class Magistrate, Nagpur, for having cheated Krishna Namdeo Chimurkar of Rs. 1660 on 17th February 1945, Baliram of Rs. 915 and Tukaram of Rs. 1815 on the following day in Nagpur on the misrepresentation that yarn would be supplied to them without delay at a specified rate in lieu of the advances received by Suleman and Shankar. Suleman absconded with the money on 18th February 1945 and was apprehended at Balagat where a sum of Rs. 3778-2-0 was recovered from his wife. Costly presents given by him to friends were also seized. Shankar was acquitted on all counts on the ground that he was duped by Suleman, but the latter while acquitted on the charge of cheating Krishna Namdeo Chimurkar was convicted on the other two counts and sentenced to two concurrent terms, each of one year's rigorous imprisonment, and to pay by way of fine two sums, each of Rs. 1000.

[2] Krishna Namdeo Chimurkar thereafter filed on 7th November 1946 the present application to have Suleman's acquittal set aside and to have him duly punished according to law. Suleman had meanwhile appealed against his convictions and sentences and they were set aside on 16th December 1946 by the third Additional Sessions Judge, Nagpur.

[3] As there was an impression from the order dated 31st October 1946 of Grille C. J. and Hidayatullah J., in Criminal Appeal No. 292 of 1946[1] that revision did not lie at the instance of a private complainant, special notice was issued to the Provincial Government to appear and to have the question argued prior, if necessary, to a reference to a Full Bench.

[4] In 5 N. L. R. 4[2] it was held that the High Court has power, under S. 439, Criminal P. C., to revise an order of acquittal. In 2 N. L. J. 153[3] Drake-Brockman A. J. C., held that S. 439, Criminal P. C., confers on the High Court power to set aside an order of acquittal at the instance of a private prosecutor; and he ordered a retrial. In 23 N. L. R. 40[4] Kinkhede A. J. C., was of the same view; and at p. 99 *ibid* Wadegaonkar A.J.C., entertained an application in revision by a private complainant against the acquittal of an accused.

[5] In 28 N. L. R. 298[5] Macnair J. C., followed the rule in 23 N. L. R. 40,[4] set aside the acquittals

of the two non-applicants and remanded the case. Gruer J. (then A. J. C.) in 31 N. L. R. 261[6] in dealing with a preliminary objection to the effect that this Court is not competent to interfere with an order of acquittal except when moved to do so by the Local Government, made the following observations:

"In none of these cases do I find it laid down that the High Court is precluded from interfering at the instance of a private prosecutor. In ..... it was pointed out that S. 439 (4) does not allow the High Court to convert a finding of acquittal into one of conviction. But that is not the same thing as saying that the High Court may not set aside an acquittal and remand the case. In 50 All. 722,[7] S. 439 (4) directly applied."

The orders of acquittal were set aside and the applicants were directed to be retried.

[6] In I. L. R. (1938) Nag. 157,[8] a Division Bench held that under S. 439 read with S. 423 (1), Criminal P. C., the High Court can entertain an application for revision against an order of acquittal at the instance of a private complainant subject to the limitation imposed by S. 439 (4) of the Code. That limitation was stressed in 50 ALL. 722[7] to which Gruer J., as shown referred. The appellant in that case had been tried by the Sessions Judge under S. 302 and was convicted under S. 304, Penal Code. The Local Government failed to appeal against the acquittal of an offence under S. 302 but applied in revision and the High Court accepting the application convicted the appellant of murder and sentenced him to death. Thereafter, their Lordships of the Judicial Committee of the Privy Council pointed out that the finding at the trial amounted to an acquittal in respect of the offence of murder and that the High Court had acted without jurisdiction against the rule laid down in S. 439 (4), Criminal P. C.

[7] In Cri. Appeal No. 292 of 1946[1] the respondent who was tried under S. 302, Penal Code, was convicted under S. 326 *ibid* and an appeal was filed to this Court to have the conviction altered from S. 326 to S. 302. Grille C. J. and Hidayatullah J., dismissed the appeal *in limine* as an appeal against an acquittal can only be filed by the Provincial Government under S. 417, Criminal P. C. The party concerned had, however, also requested the Division Bench to treat the appeal as an application for revision, but that Bench rejected it on the authority in 50 ALL. 722.[7] The application was clearly not one for a remand or a retrial but for the conversion of a finding of acquittal into one of conviction and it was, therefore, untenable. The Division Bench had not held that they were incompetent to interfere in revision with an order of acquittal at the instance of a private prosecutor; and in Misc. Cri. Case No. 85 of 1946, Decided on 26-11-1946, the same Bench rejected another application in which a private party had specifically sought the setting aside of an order of acquittal and the convictions of three accused by the Bench.

[8] It follows, therefore, that there is no necessity to have the matter referred to a Full Bench. There is no conflict between the rule laid by the Division Bench in I. L. R (1938) Nag. 157[8] and that laid down in Cri. Appeal No. 292 of 1946.[1] In short, the High Court is competent to entertain an application for revision against an order of acquittal at the instance of a private complainant but this is subject to the limitation imposed by S. 439 (4), Criminal P. C. The question as to the circumstances in which such an application should be entertained is another matter which will be discussed hereinafter.

[9] In I. L. R. (1944) Nag. 176,[9] Pollock J. (now C. J.) held, as he had also held in Cri. Revn. No. 333 of 1943,[10] that this Court will not set aside an order of acquittal uuless there are exceptional circumstances that would justify a second trial. He also held that even on the assumption that the acquittal is wrong, that would not in itself constitute a sufficient ground for him to interfere in revision, set aside the order of acquittal and direct a retrial. In the case before me which is also one in which the Provincial Government did not file an appeal against the acquittal, I am clear that there are no such exceptional requirements that would justify the ordering of a retrial. The trial was a very full trial and the learned Magistrate, was, as he has done fully, entitled to give the benefit of the doubt to Suleman. The latter, it is relevant to note, had been convicted on two counts but he was acquitted in appeal. The application is dismissed.

S.C. *Application dismissed.*

A. I. R. (35) 1948 Nagpur 277 *[C. N. 91.]*

HIDAYATULLAH J.

Gajadhar Lakshiram — Applicant v. *Emperor.*

Criminal Revn. No. 137 of 1947, Decided on 2nd January 1948, from order of Sessions Judge, Wardha, D/- 8th January 1947.

(a) Factories Act (1934), S. 10 (4)—District Magistrate acting under S. 10 (4) acts not in judicial capacity but in executive capacity — Sanction by him, under rules, to prosecute manager is not a judicial function.

The action of the District Magistrate who acts under S. 10 (4) of the Act as an Inspector is not a judicial function. [Para 4]

Thus, sanction by the District Magistrate to prosecute the manager of a factory for offences under the Act is not a judicial but an executive function. It is true that the rules give the manager of the factory concerned an opportunity to represent his case but that is entirely with a view to avoiding unnecessary prosecutions. Indeed there is no warrant for such a hearing in the Act itself : 27 Mad. 54, *Ref.* [Para 4]

(b) Factories Act (1934), S. 10 (4) — Rules under Act, requiring sanction of District Magistrate for prosecution of manager—Sanction once refused can again be given by him or his successor.

There is no question of any *autrefois acquit* whenever the District Magistrate refuses to sanction the prosecution of the manager of a factory for offence under the Act. Indeed the District Magistrate can and must sanction a prosecution if on a review of the case he finds that his, or his predecessor's earlier decision refusing sanction is erroneous: 13 A. I. R. 1926 Cal. 691, *Ref.* [Para 5]

Cases referred :—

1. ('04) 27 Mad. 54, In the matter of Kalagava Bapiah.
2. ('87) 10 Mad. 232 (F B), Queen-Empress v. Sheikh Beari.
3. ('26) 13 A. I. R. 1926 Cal. 691 : 95 I. C. 79 : 27 Cr. L. J. 751, Banerji v. Bepin Behary.

M. Adhikari—for Applicant.

R. Kaushalendra Rao, Govt. Pleader—for the Crown.

Order. — This is an application for revision of an order passed by Mr. R. K. Kher Sessions Judge, Wardha, in Criminal Revision No. 72 of 1946 on 8th January 1947.

[2] The facts are that the Inspector of Factories Central Provinces and Berar made a complaint in writing against the applicant of some offences under the Factories Act. Previous to this R. B. F. C. Gangrade, District Magistrate Wardha, had refused to sanction the prosecution of the applicant but on 6th August 1946 his successor R. S. R. K. Mishra sanctioned the prosecution. The case of the applicant is that the complaint is time-barred and that R. S. R. K. Mishra could not review the order of his predecessor and hence the complaint is invalid.

[3] The complaint was received by the Magistrate concerned on 6th August 1946 though the offence was registered on 16th August 1946. Since the alleged offence was committed on 12th February 1946, the complaint was duly made within six months of the alleged offence. That it was received by the clerk of the Court and not the Magistrate matters little. In my opinion the complaint is not time-barred. Indeed this part of the case was not seriously pressed by the learned counsel for the applicant.

[4] It was contended that the according of a sanction to prosecute is more a judicial act than an administrative one. Reference is made in this connection to part 1-D of the Central Provinces and Berar Factories Manual (1938) which contains the Circular Instructions and General Orders regarding the working of the Factories. Instruction No. 5 deals with prosecutions and it is there stated how prosecutions should be launched. These rules do not appear to be anything more than instructions of an executive and administrative character. Under these rules the full-time Inspectors of factories are required to take the sanction of the District Magistrate of the District for every prosecution. While forwarding his recommendations, the full-time Inspector is required to furnish a copy together with his reasons to the factory manager, so as to enable the latter to represent the matter to the District Magistrate before sanction to prosecute is given. But the action of the District Magistrate who acts under S. 10 (4) of the Act as an Inspector is not a judical function. There is a difference between administrative and judicial functions which has been pointed out by Bhashyam Ayyangar J., in 27 Mad. 54[1] in the following words :

"There is a marked distinction between the classes of offences dealt with in S. 195, Cl. 1 (b) and (c), and those dealt with in S. 197. A Court granting sanction under S. 195, Cls. (b) and (c), does so in connection with offences committed in or in relation to any proceeding in such Court and the Court therefore acts in its judicial capacity in granting the sanction upon legal evidence. But the Government in according or withholding sanction under S. 197—for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant—acts purely in its executive capacity and the sanction need not be based upon legal evidence. The Government is certainly not acting in a judicial capacity nor exercising a judicial function in authorising or sanctioning a prosecution under Ss. 196 and 197, Criminal P. C., and there is nothing in the signification of the word 'sanction' to 'import' as the Sessions Judge supposes "a judicial element into the act of the executive, ' and the ruling of the Full Bench in 10 Mad 232[2] referred to by the Sessions Judge has no application whatever to the present case."

In the present case also the sanction by the District Magistrate was not a judicial but an executive function. It is true that the instructions give the manager of the factory concerned an opportunity to represent his case but that is entirely with a view to avoiding unnecessary prosecutions and no argument can be grounded upon this practice. Indeed there is no warrant for such a hearing in the Act itself. In my opinion the action of the District Magistrate was in his executive capacity.

[5] It was argued that the District Magistrate having once refused sanction was *functus officio* and he (and more so his successor) could not reopen the case and review his earlier decision. This is an entirely fallacious argument. There is no question of any *autrefois acquit* whenever the District Magistrate refuses to sanction the prosecution. Indeed the District Magistrate can and must sanction a prosecution if on a review of the case he finds that his earlier decision is erroneous. In A. I. R. 1926 Cal. 691[3] a prosecution without any sanction had proceeded to the stage of judgment and even this did not bar a subsequent prosecution. It is true that in that case there was no refusal to sanction in the first instance but in so far as the Court is concerned want of sanction and refusal to sanction are on the same footing. All that the criminal Courts are required under S. 74 (1) of the Act is to see that

there is a legal sanction. They are not required to inquire anything further and unless the accused can plead an *autrefois acquit* or *convict* or any other bar of law, the case must go on. To hold otherwise would constitute the criminal Courts into an appellate Tribunal which may well question the propriety or correctness of the District Magistrate's opinon. That clearly is not the province of a criminal Court which cannot go behind the sanction.

[6] The learned Government pleader drew my attention to S. 14 of the General Clauses Act. I do not propose to base my decision upon that section though *prima facie* I do not see any reason why the principle involved in that section should not be applicable to the present case.

[7] I would further say that there is considerable force in the argument of the learned counsel for the Crown that the present complaint has been filed by an Inspector as required by S. 74 (1) and that the word 'or' is disjunctively used. Though under the instructions above referred to a full-time Inspector has been told to take the sanction of the District Magistrate and not to take action himself, there is nothing in the Act to prevent an Inspector from filing a complaint. Indeed S. 74 (1) specifically authorises an Inspector to start a prosecution himself without the sanction of any superior officer. In view however of what I have held in paras 4 and 5 above I do not express any final opinion on this aspect of the case. The application for revision fails and is dismissed.

R.G.D. *Revision dismissed.*

A. I. R. (35) 1948 Nagpur 279 *[C. N. 92.]*

POLLOCK AND SEN JJ.

Mahadeosingh Hirasingh and another — Defendants—Appellants v. *Balmukund Jayanarain and others—Plaintiffs—Respondents.*

First Appeal No. 35 of 1939, Decided on 16-10-1946, from decree of Addl. Dist. Judge, Nagpur, D/-13-12-1938.

(a) Contract Act (1872), Ss. 42, 44 and 45 — Joint creditors and debtors — Rights and liabilities of — Principles of English Common Law if applies.

Under the English Common Law, the rule of survivorship applies to the case of joint creditors as well as to the case of joint debtors, but under S. 42 and S. 45, Contract Act, the rule of survivorship is not recognised and the devolution of joint liabilities and rights is governed by the provisions of Ss. 42 and 45 respectively. Under the English Common Law, the release of one debtor operates to release his co-debtors, but that is not so in India, as under S. 44 a release of one of joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors. The principles underlying the English Common Law regarding the rights of creditors and debtors are, therefore, not applicable in view of the provisions of the Indian Contract Act which are different from the English rule. [Para 17]

(b) Contract Act (1872), S. 38—Scope.

Section 38 deals with consequences which flow from an offer of performance which has been refused but does not deal with the legal consequences of the offer which has been accepted. The section is therefore not helpful in deciding the question whether payment to one of joint creditors is binding on the other creditors. *Opinion of White C. J.* in 36 Mad. 544, *Foll.* [Para 18]

(c) Transfer of Property Act (1882), S. 60— Payment to one of several co-mortgagees if operates as valid discharge of debt.

In the case of co mortgagees, the presumption of equity that creditors are tenants-in-common is applicable in India in the absence of any contract to the contrary. Accordingly a payment of the mortgage debt by the mortgagor to one of several co-mortgagees who has no authority to receive payments on behalf of others will not bind the other co-mortgagees and will not affect their right to recover the amount due to them notwithstanding the discharge given by the co-mortgagor receiving payment. *Dissenting view of White C. J.*, in 36 Mad. 544, *Foll.*; *Case law discussed.* [Para 22]

Annotation : ('45-Com.) T. P. Act, S, 60, N. 14, Pt. 13, 19 and 20.

Cases referred:—

1. (1840) 56 R. R. 707 : 10 L. J. Ex. 12 : 7 M. & W. 264, Wallace v. Kelsall.
2. (1889) 22 Q. B. D. 537 : 58 L. J. Q. B. 302 : 60 L. T. 318 : 37 W. R. 378, Steeds v. Steeds.
3. (1631) 1 Eq. Ca. Abr. 290 : 21 E. R. 1052, Petty v. Styward.
4. (1751) 2 Ves. Sen. 253 : 28 E. R. 163, Rigden v. Vallier.
5. (1732) 1 White & Tudor, 5th Ed 208, Lake v. Craddock.
6. (1798) 3 Ves. 628 : 30 E. R. 1192, Morley v. Bird.
7. (1864) 12 W. R. 926 : 10 L. T. 391, Matson v. Dennis.
8. (1901) 2 Ch. 160 : 70 L. J. Cb. 587 : 84 L. T. 620 : 49 W. R. 532, Powell v. Brodhurst.
9. ('97) 20 Mad. 461, Barber Maran & Co. v. Ramana Gounden.
10. ('02) 25 Mad. 26, Ahinsa Bibi v. Abdul Kadar.
11. ('13) 36 Mad. 544 : 19 I. C. 12, Anna Purnamma v. Aukayya.
12. ('10) 20 M. L. J. 709 : 5 I. C. 343, Ramaswami v. Muniyandi.
13. ('12) 35 Mad. 685: 10 I.C. 874, Ibrahim Tharangan v. Rama Aiyar.
14. ('03) 27 Bom. 292, Sitaram v. Shridhar.
15. ('11) 38 Cal. 342 : 8 I. C. 837, Hossaindra Begam v. Rahiman Nessa Begam.
16. ('05) 1 N. L. R. 24, Sambusa v. Gopal.
17. ('09) 1 I. C. 219 (Mad.), Kari Chengamma v. J. Kristnammah.
18. ('17) 4 A. I. R. 1917 Mad. 269 : 32 I. C. 173, Ponnusami v. Thyagaraja.
19. ('15) 21 C. L. J. 570 : 2 A. I. R. 1915 Cal. 528 : 29 I. C. 956, Umes Chandra v. Dinabandhu.
20. ('21) 8 A. I. R. 1921 Pat. 27 : 5 Pat. L. J. 376 : 56 I. C. 403, Abbas v. Misri Lal.
21. ('17) 41 I. C. 921 : 4 A. I. R. 1917 Lah. 443 : 68 P. R. 1917 (F. B.), Mathura Das v. Nizam Din.
22. ('43) 30 A. I. R. 1943 Pesh. 1 : 210 I. C. 198, Md. Sharif v. Mir. Abdullah.
23. ('37) 1937 Rang. L. R. 1 : 24 A. I. R. 1937 Rang. 227 : 170 I. C. 95 (F. B.), U Po Gyi. v. Lutchmanan Chettyar.

24. ('19) 6 A. I. R. 1919 Cal. 593 : 49 I. C. 63, Abdul Hakim v. Adyata Chandra.
25. ('27) 14 A. I. R. 1927 Cal. 425 : 101 I. C. 530, Satindra Nath v. Jatindra Nath.
26. ('19) 41 All 631 : 6 A. I. R. 1919 All. 275:51 I. C. 107, Jauhari Singh v. Ganga Sahai.
27. ('90) 3 C. P. L. R. 15, Sadasheo Tamboli v. Mt. Kareeman.

D. T. Mangalmoorti and R. N. Padhye— for Appellants.

M. R. Bobde, M. D. Khandekar (for Nos. 1 and 2) and P. P. Deo (for No. 3)—for Respondents.

Judgment.—This is an appeal which arises out of a suit on a mortgage. Appellant 1, Mahadeosingh is the father of appellant 2, Mohansingh. Mahadeosingh was indebted to respondents 1 to 3 and executed a simple mortgage in their favour on 22-8-1927 for Rs. 7,999 and agreed to pay the sum with compound interest at Rs. 0-13-0 per cent per mensem with annual rests. The amount was payable in 11 instalments on Baisakh Sudi 15 of every year commencing from Fasli year 1337 (1928 A.D.). The amount and the date of payment of the several instalments are as given below:

Amount of instalment.	Date fixed for payment.
(1) Rs. 500 *plus* interest due on the entire amount ...	4-5-1928
(2) Rs. 500 *plus* interest due on the balance ...	23-5-1929
(3) Rs. 600 " " ...	12-5-1930
(4) Rs. 600 " " ...	2-5-1931
(5) Rs. 650 " " ...	2-5-1932
(6) Rs. 650 " " ...	9-5-1933
(7) Rs. 800 " " ...	29-4-1934
(8) Rs. 850 " " ...	18-5-1935
(9) Rs. 900 " " ...	6-5-1936
(10) Rs. 950 " " ...	25-5-1937
(11) Rs. 999 " " ...	14-5-1938
Total Rs. 7,999	

In default of payment of any instalment on the due date, the defaulted instalment was to carry compound interest at the rate of Rs. 1-4-0 per cent per mensem from the date of default till payment. In default in the payment of three instalments the entire amount was to carry compound interest at Rs. 1-4-0 per cent per mensem with annual rests till realisation. The property mortgaged was 16 anna malguzari share of mahal No. 2 of mauza Tandulwani with cultivating rights in sir.

[2] Govindrao Sheoram Kedar Patil, respondent No. 3, gave a notice (Ex. P.-10) on 20-11-1934 to Mahadeosingh in which he stated that the mortgagees had received Rs. 1,000 and Rs. 125 towards a part payment of the mortgage debt and that he had further received Rs. 1,500 in three instalments towards his debt and called on him to pay the balance of the debt due within 8 days of the receipt of the notice. Mahadeosingh in his reply dated 26-11-1934 (Ex. P.-12) stated that in addition to Rs. 1,000 paid to the three mortgagees on 4-1-1928 he had paid Rs. 7,730 to Govindrao who had written a letter on 19-1-1930 recording full satisfaction of the mortgage and had agreed to return the mortgage-deed to Mahadeosingh after getting it from Balmukund. Govindrao in his reply dated 25-12-1934 (Ex. P.-13) repudiated the allegations of Mahadeosingh as false and stated that he did not receive the payments as alleged by him (Mahadeosingh) and not write a letter recording full satisfaction of the mortgage and suggested that blank papers bearing his signature might have been utilised to prepare false receipts and a false letter recording full satisfaction of the mortgage.

[3] Balmukund, appellant No. 1, gave a notice to Mahadeosingh on 2-1-1935. A copy of the notice has not been filed in the case. Mahadeosingh in his reply dated 10-1-1935 (Ex. 1-D-4) stated that he had made payment to Govindrao according to the agreement and that he had informed Balmukund about these payments after they had been made to Govindrao.

[4] The respondents filed Civil Suit No. 15-A of 1936 on 8-2-1936 in the Court of the 2nd Additional District Judge, Nagpur, against the appellants to recover Rs. 14,171 on the basis of the mortgage deed dated 22-8-1927 (Ex. P-1) and in default of payment prayed for a decree for sale of the mortgaged property. The plaintiffs filed with the plaint two schedules, Sch. A showed Rs. 10,595 as the amount due to plaintiffs 1 and 2 and Sch. B Rs. 3,576 as the amount due to plaintiff 3. Plaintiffs 1 and 2 gave credit for repayments of Rs. 593-12-0 and Rs. 74-4-0 on 4-1-1928 and 12-5-1928 respectively. Plaintiff 3 gave credit for the repayment of Rs. 406 4-0 and Rs. 50-12-0 on 4-1-1928 and 12-5-1928. Thus the plaintiffs gave credit for repayment of Rs. 1,000 on 4-1-1928 and Rs. 125 on 12-5 1928. Plaintiff 3 gave credit for the repayments of Rs. 200, Rs. 1,000 and Rs. 300 made to him in his Sch. B but did not state the dates of these repayments. The plaintiffs allowed a credit for Rs. 65 on account of the interest which they had deducted in advance at the time of the execution of the mortgage, Rs. 38-9-9 in Sch. A and Rs. 26-6-6 in Sch. B. (After stating the pleadings of the parties and the evidence adduced in the trial Court their Lordships proceeded as follows:)

[5] The trial Court found that the mortgage was duly executed by Mahadeosingh and was for consideration and was also binding on his son Mohan, defendant 2, as it was for the payment of antecedent debts and for meeting expenses for agriculture and for family purposes. The Court held that the agreements set up by defendant 1 had not been proved, that the repayments alleged by

defendant 1 had not been made, and that the receipt dated 28-4-1928 (Ex. 1-D-22) and the letter dated 19-1-1930 (Ex. 1-D 41) were not executed by Govindrao in favour of Mahadeosingh. The Court allowed compound interest at the rate of 0-13-0 per cent. per mensem from the date of the mortgage till the date when the entire amount became exigible and simple interest at the rate of 1 per cent. per mensem on the defaulted instalments till 1-1-1932 and thereafter simple interest at 7 per cent. per annum from that date till the date of suit. The Court determined Rs. 7,341-5-0 as the amount due to plaintiffs 1 and 2, Rs. 2,810-9-0 as the amount due to plaintiff 3 on the date of suit. The Court thus determined Rs. 10,151-14-0 as the amount due on the date of the suit and allowed further interest at 7 per cent. per annum from the date of suit till 13-6-1939, the date fixed for payment, and costs. It accordingly passed a joint preliminary decree for sale on 13-12-1938. The date fixed for payment was 13-6-1939 and the amount payable was Rs. 13,130-6-9; Rs. 10,151-14-0 for principal, Rs. 1 446-2-9 for interest till 13-6-1939, and Rs. 1,532-6-0 for costs. The amount of Rs. 13,130-6-9 was to carry interest at 6 per cent. per annum from 13-6-1939 till realisation.

[6] It is against this decree that the defendants have filed the present appeal. (After stating the arguments and further facts in the case the judgment proceeded as follows:)

[7] The questions for decision in this appeal are :

(1) whether there was an agreement between the parties at the time of the execution of the mortgage in suit that interest at 12 per cent per mensem was payable in case the entire amount was paid by the mortgagor before 4-5-1928, the date fixed for payment of the first instalment;

(2) whether oral evidence was admissible to prove the agreement ;

(3) whether there was an agreement between the parties that Mahadeosingh, the mortgagor, was entitled to pay the instalments or the amount due under the mortgage to any of the mortgagees and the repayments made by him to one of them were to be binding on the other mortgagees;

(4) (a) whether the repayments made by Mahadeosingh to Govindrao were binding on plaintiffs 1 and 2 and whether they were entitled to recover the entire sum due to them notwithstanding the said repayments; (b) whether the discharge, if any, of the mortgage by Govindrao was binding on plaintiffs 1 and 2;

(5) whether Mahadeosingh paid to Govindrao the following items :

(i) Rs. 4105, on 28th April 1928.

(ii) Rs. 300, on 28th October 1928.

(iii) Rs. 900, on 20th December 1928.

(iv) Rs. 1300, on 13th January 1930.

(6) whether the mortgage in suit was satisfied by a repayment of Rs. 1300, on 13-1-1930;

(7) whether Govindrao executed the receipt exhibit 1-D-22 for Rs. 4105, on 28-4-1928;

(8) whether Govindrao executed the letter Ex. 1-D-41 on 19-1-1930.

(9) whether the signatures on the documents Ex. 1-D-22 and 1-D-41 are those of Govindrao;

(10) to what relief are the plaintiffs entitled,

[After discussing the evidence on questions 1 to 3 formulated above their Lordships proceeded:]

[8] On a careful consideration of the evidence in the case tested in the light of probabilites we have reached the conclusion that Mahadeosingh has failed to prove that there was an agreement to charge interest at 12 per cent per mensem in case the entire amount was paid on or before 4-5-1928, or that there was an agreement between the parties that Mahadeosingh was entitled to pay the instalments or the amount due under the mortgage to any one of the mortgagees and the repayments made by him were to be binding on the other mortgagees. In our opinion oral evidence was not admissible under S. 92, Evidence Act, to contradict or vary the terms of the mortgage.

[9] The next question for decision is whether the repayments made by Mahadeosingh to Govindrao were binding on plaintiffs 1 and 2 and whether they were entitled to recover the sum due to them notwithstanding the repayments made to Govindrao, and whether the discharge, if any, of the mortgage by Govindrao was binding on plaintiffs 1 and 2.

[10] Whether a payment made to one of several persons jointly entitled according to the terms of the deed to the money secured by a mortgage, would be a good discharge, is a question which is not perhaps entirely free from doubt. In England, payment to one of several joint creditors will discharge the debtor at law, but a different rule has always been followed in equity, as the money is presumed to have been advanced by the lenders as tenants in common and not as joint tenants: (Ghose, Law of Mortgage, 5th Edition, p. 479.)

[11] The mortgage in suit was for a consideration of Rs. 7999. Out of this consideration plaintiffs 1 and 2 advanced Rs. 4750, and Govindrao, plaintiff 3 advanced Rs. 3249. Plaintiffs 1 and 2 and plaintiff 3 were respectively entitled to an interest in the mortgaged property in proportion to the shares of the consideration which they respectively advanced: (*see* S. 45, Transfer of Pro-

perty Act. In a series of cases it has been held that in the absence of a contract to the contrary a presumption of equity arises and that the mortgagees are tenants-in-common both of the debt as well as of the mortgage security.

(12) Balmukund and Bhikulal (plaintiffs 1 and 2) are members of the same family with Balmukund as the manager. Govindrao is of a different caste and does not belong to the family of plaintiffs 1 and 2. We have found that there was no agreement authorising Mahadeosingh to pay instalments or the amount due under the mortgage to Govindrao and that Govindrao had no authority to receive payments on behalf of the plaintiffs. The question for decision therefore is whether in the absence of any authority payments made by Mahadeosingh to Govindrao, one of the creditors, were binding on plaintiffs 1 and 2 and whether the discharge, if any, of the mortgage given by Govindrao to Mahadeosingh was binding on plaintiffs 1 and 2.

[13] In (1840) 56 R. R. 707[1] in an action by three plaintiffs for a joint demand, the defendant's plea of accord and satisfaction with one of the plaintiffs, by a part payment in cash and set-off of a debt due from that one to the defendant, was held good even without any authority from the other two plaintiffs to make the settlement.

[14] In (1889) 22 Q B. D. 537[2] it was held that according to equity joint creditors must, *prima facie*, be taken to be interested as tenants in common and not as joint tenants and that the plea of the defendant of accord and satisfaction was good only as concerned the claim of the plaintiff who was party to the accord and satisfaction but was defective as regards the plaintiffs who were not parties to it. At p. 541 Wills J., stated the distinction between the rule which obtained at law and in equity in these terms:

"The reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt, with its incident of survivorship, and the satisfaction to one of the parties of a joint demand due to himself and others puts an end to the joint demand, and he cannot afterwards, by joining the other parties with him as plaintiffs, recover the debt; nor can a right of action be supposed to exist which, if it existed, might survive to the very person who had already received full value: (1840) 7 M. & W. 264.[1]

In equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was that they will *prima facie* be regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it: (1631) 1 Eq. Ca. Abr. 290,[3] (1751) 2 Ves. Sen. 253[4] cited in (1732) 1 White & Tudor, Edn. 5, 208.[5] 'Though they take a joint security,' says Lord Alvanley, M. R., 'each means to lend his own money and to take back his own': (1798) 3 Ves. 628.[6] Where a mortgage debt has been paid to one of the mortgagees accordingly it was held that the loan was not discharged, and that the concurrence of the other mortgagees was necessary to make a good title: (1864) 12 W R 926.[7] This is on the ground that the debt is held by the two in common and not jointly, and the principle seems to us equally applicable whether the debt is secured by a mortgage or is merely the subject of a personal contract."

[15] In (1901) 2 Ch. 160[8] it was held that payment to one of the mortgagees during the lifetime of the other mortgagees, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest (if any), even though the payee ultimately becomes the survivor in the joint account. At p. 167 Farwell J., observed:

"If a mortgagor chooses to pay otherwise than in strict accordance with the terms of his contract he does so at his own risk. The proviso for redemption in a mortgage to several is never expressed to take effect on payment to the mortgagees or either of them, but to the mortgagees or the survivor of them, and if a mortgagor pays to one, although such payment may be a good discharge at law, yet the matter is at large when he comes into equity, and the Court takes into consideration all the facts of the case, and ascertains whether the payee was beneficially entitled to the whole or to a part only, or whether he was a trustee with the other mortgagee, and treats the payment as good in whole, or in part, or altogether bad accordingly."

[16] In 20 Mad. 461[9] it was held that a discharge of a mortgage by one of joint mortgagees is valid and binding on the other co-mortgagees in the absence of any proof that it was fraudulent. The learned Judges of the Madras High Court followed the decision in (1840) 7 M. & W. 264[1] and doubted the correctness of the decision in (1889) 22 Q. B. D. 537.[2] As pointed out by Sir Bhashyam Ayyangar in 25 Mad. 26[10] at pp. 28, 39 the authority of (1840) 7 M. & W. 264[1] is considerably shaken by the decision of the Court of Chancery in (1901) 2 Ch. 160.[8]

[17] Under the English Common Law the rule of survivorship applies to the case of joint creditors as well as to the case of joint debtors, but under S. 42 and S 45, Contract Act, the rule of survivorship is not recognised and the devolution of joint liabilities and rights is governed by the provisions of Ss. 42 and 45, Contract Act, respectively. Under the English Common Law the release of one debtor operates to release his co-debtors, but that is not so in India, as under S. 44 a release of one of joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors. The principles underlying the English Common Law regarding the rights of creditors and debtors are, therefore, not applicable in view of the provisions of the Indian Contract Act which are different from the English rule.

[18] Section 38, Contract Act, provides that where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible

for non-performance, nor does he thereby lose his rights under the contract, and an offer to one of several joint promisees has the same legal consequences as an offer to all of them. As pointed out by White C. J. in 36 Mad. 544[11] at p. 545 the section deals with the consequences which flow from an offer of performance which has been refused but does not deal with the legal consequences of the offer which has been accepted. Section 38, Contract Act, on which the decision in 20 Mad. 461[9] was based, is therefore not helpful in deciding the question whether payment to one creditor is binding on the other creditors. The solution turns on the determination of the question whether the creditors who advanced money on security or otherwise are joint tenants or tenants in common. The conflict is whether the rule of law as laid down in (1840) 7 M. & W. 264[1] applies or whether the presumption of equity on which (1889) 22 Q. B. D. 537[2] was decided should prevail.

[19] The case in 20 Mad. 461[9] was doubted in 25 Mad. 26,[10] 20 M. L. J. 109[12] at p. 712, 35 Mad. 685[13] at p. 687, 27 Bom. 292,[14] at p. 294 : 38 Cal. 342[15] at p. 349 and 1 N.L R. 24[16] at p. 27; but was followed in 1 I C. 219[17] and approved by majority in 36 Mad. 544[11] which held that one of several payees of a negotiable instrument could give a valid discharge of the entire debt, but White C. J., in a dissenting judgment was of opinion that the equitable presumption of tenancy in common should prevail. The decision in 36 Mad. 544,[11] was followed in A. I. R. 1917 Mad. 269,[18] but Coutts-Trotter J., stated that it was desirable that the whole matter should be reconsidered by the Privy Council in view of the very careful judgment of the High Court of Calcutta in 38 Cal. 342,[15] which was contrary to the decision of the Madras Full Bench.

[20] The opinion taken by White C. J., has been followed in numerous cases: 21 C. L. J. 570,[19] A. I. R. 1921 Pat. 27,[20] 41 I. C. 921,[21] A. I. R. 1943 Pat. 1,[22] 1937 Rang. L. R. 1.[23] In A. I. R. 1919 Cal. 593[24] and A. I. R. 1927 Cal. 425,[25] it was held that a payment by a mortgagor to one of the mortgagees was valid to the extent of his share but did not affect the rights of the other mortgagees to sue for recovery of the sums due to them. In 41 ALL. 631[26] it was held that, notwithstanding a discharge by one co-mortgagee, a suit was maintainable by the other mortgagee to recover his share of the debt.

[21] In 3 C. P. L. R. 15[27] at p. 16 and 1 N. L. R. 24[16] at p. 27, it was held that a payment of a mortgage debt to one of the mortgagees will not discharge the security in equity which treats the interest of the creditors as-tenants-in common.

[22] The dissenting judgment of White C. J., in 36 Mad. 544,[11] has received the approval of eminent jurists: (Pollock and Mulla, Indian Contract Act, Edn. 7, p. 260; Mulla, Transfer of Property Act, Edn. 2, p. 379).

[23] In our opinion, the correct rule has been enunciated by White C. J., in his dissenting judgment in 36 Mad. 544,[11] and the presumption of equity that creditors are tenants-in-common is applicable in the absence of any contract to the contrary. Accordingly we hold that the repayments made by Mahadeo Singh to Govind Rao were not binding on plaintiffs 1 and 2 and they were entitled to recover the entire sum due to them notwithstanding the said repayments, and that the discharge of the mortgage by Govindrao, even if proved, does not affect the right of plaintiffs 1 and 2 to recover the amount due to them under the mortgage.

* * * * *

(After discussing the evidence on questions 5 to 9 formulated above, their Lordships proceeded.):

[24] After a careful and anxious consideration of the case we have reached the conclusions which may be summarised thus: Mahadeo Singh has failed to prove that he repaid Rs. 4,105 on 28-4-1928, Rs. 300 on 23-10-1928, Rs. 900 on 20-12-1928 and Rs. 1,300 on 19-1-1930. He has also failed to prove that the document Ex. 1-D-22, receipt for Rs. 4,105 dated 28-4-1928, and the letter dated 19-1-1930 Ex. 1 D-41 were executed and signed by Govindrao and that the signatures on those documents were his.

[25] The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 283 *[C. N. 93.]*

POLLOK J.

Jairam and another —*Plaintiffs*—*Appellants* v. *Maifujali and others* — *Defendants* —*Respondents.*

Second Appeal No. 587 of 1943, Decided on 17-9-1947, from Appellate decree of First Addl. Dist. Judge, Nagpur, D/- 7-9-1943.

(a) Transfer of Property Act (1882), S. 52—Scope —'Court' includes revenue Court—Proceedings for recovery of arrears of rent pending in revenue Court — Lease of land by tenant — S. 52 held applied.

Section 52, of the Act is not confined in terms to civil Courts. The procedings before a revenue Court may also operate as *lis pendens*. A revenue officer when dealing with an application under S. 58-B, C. P. Tenancy Act, for realising arrears of rent is a revenue Court as defined in S. 5, Civil P. C., and when during the pendency of such proceedings the tenant leases out his field, the proceedings operate as lis pendens. Since the arrears of rent are the first charge on the holding under S. 58A, C. P. Tenancy Act, the question before the revenue officer is whether the holding should be sold to recover the money and therefore a right to immovable property is

directly and specifically in question : 14 A. I. R. 1927 All. 679, *Ref.* [Paras 2, 3]

Even if S. 52, does not apply *proprio vigore* the principle underlying it must apply. [Para 4]

Annotation : ('45-Com) T. P. Act, S. 52, Ns. 9, 14.

Cases referred :—

1. ('28) 50 All. 22 : 14 A. I. R. 1927 All. 679 : 103 I. C. 322, Munni Lal v. Mt. Phula.
2. (1857) 1 De. G. & J. 566 : 26 L. J. Ch. 797 : 6 W. R. 1, Bellamy v. Sabine.

V. V. Kelkar — for Appellants.

D. T. Mangalmurti — for Respondents.

Judgment.—Defendants 1 to 3 were the occupancy tenants of field No. 21/1 in Umrer. As they had omitted to pay the rent due, the landlord applied to a revenue officer under S. 58-B, C. P. Tenancy Act, to realize the arrears. This application was made on 17-7-1941. While it was pending defendants 1 to 3 leased out this field and another field to the plaintiffs for the year 1942-43. On 15-6-1942 the field was sold by the revenue officer under S. 58-B (1) (b), and it was purchased by defendant 4. The sale was confirmed on 23-7-1942, and defendant 1 was placed in possession on 7-8-1942, disturbing the possession of the plaintiffs. The present suit was filed by the plaintiffs on 19-8-1942 to recover the damages which they suffered by being dispossessed.

[2] The lower appellate Court held that the plaintiffs took the lease with the full knowledge of the proceedings pending before the revenue officer and that the principle of *lis pendens* applied. It is contended that S. 52, T. P. Act, in which the doctrine of *lis pendens* is embodied, does not apply to the present case because no proceedings were pending in any Court and no right to immovable property was directly and specifically in question. The revenue officer when dealing with this application under S. 58-B, was, I think, clearly a revenue Court, as defined in S. 5, Civil P. C. Section 52, T. P. Act, is not confined in terms to civil Courts, and I see no reason why it should be so confined. In 50 ALL. 22[1] it was held that partition proceedings before a revenue Court operated as *lis pendens*, and it seems to me that proceedings before a revenue Court under S. 58-B, should also operate as *lis pendens*.

[3] As regards the objection that no right to immovable property was directly and specifically in question, the answer is that the arrears of rent were a first charge on the holding under S. 58-A, C. P. Tenancy Act, and the question before the revenue officer was whether the holding should be sold in order to recover the money that constituted this charge. Therefore, I would say that a right to immovable property was directly and specifically in question.

[4] Even if S. 52, T. P. Act, does not apply *proprio vigore*, then I would say that the principle underlying it must apply. The principle on which it rests was explained by Turner L. J. in (1857) 1 De. G. & J. 566[2] :

"It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail."

The principle was applied in several cases before the Transfer of Property Act was enacted : *see* Mulla's Transfer of Property Act, Edn. 2, pp. 218 and 219, and the cases there cited. I consider therefore that the lower appellate Court was correct in holding that the purchaser was not bound by a transfer *pendente lite*.

[5] In this Court the counsel for the respondents has relied on S. 138, C. P. Land Revenue Act, which he contends applies by virtue of S. 58-D (2), C. P. Tenancy Act. Section 138 (1), however, does not apply to tenant rights recognized by or arising out of the Central Provinces Tenancy Act, 1898, and by virtue of S. 110, C. P. Tenancy Act of 1920, this would include tenant rights recognized by or arising under the Central Provinces Tenancy Act of 1920. The appeal is dismissed with costs.

S.C. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 284 *[C. N. 94.]*

PADHYE J.

Pandurang Dewaji and others—Judgment-debtors — Appellants v. *Rameshwar Motiram —Decree-holder—Respondent.*

Misc. Second Appeal No. 151 of 1946, Decided on, 7-8-1947, from order of Dist Judge, Wardha 26-4-1946.

Limitation Act (1908), Art. 181—Application for execution—Execution stayed pending decision of certain suit—On decision of suit obstruction to execution removed and decree-holder applying to executing Court to proceed with his previous application—This later application is not governed by Art. 181.

Where an application is for the time being and for no fault of the decree-holder filed it should be deemed to be pending before the Court, and it is, in fact, the duty of the Court to have a vigilant eye and to find out if the obstruction which resulted in the filing of that application for execution had been removed. It is not the duty of the decree-holder to find out if such obstruction was removed and to remind the executing Court of its duty to proceed with the execution application pending before it. [Para 7]

A decree-holder obtained a final decree for sale of the mortgaged property and applied on 4-7-1938 for execution. The sons of the judgment-debtor filed a suit for a declaration that their interest in the mortgaged property was not liable to be sold in execution. This suit was dismissed and an appeal against it was also dismissed. They preferred a second appeal to the High Court and in that appeal the High Court passed an order directing the stay of execution. This was intimated to the trial Court which on 15-4-1939 passed an order 'execution filed.' The second appeal was dismissed by the High Court on 29-2-1940 and the stay order passed by it came to an end on that date. On 31-7-1945 the decree-holder applied to the executing Court to proceed

with his application dated 4-7-1938 as the obstacle in the way of execution by the stay order of the High Court was removed :

Held that the application dated 31-7-1945 was not one which the decree-holder was bound to file and was not required under the procedure prescribed. That application could not even be said to be a revival application because its object was merely to remind the Court that it had to proceed with and dispose of the execution application pending before it. Such application was not governed by Article 181 or by any other Article. [Para 9]

Annotation:—('42-Com.) Lim. Act, Art. 182 N. 143.

Cases referred:—

1. ('46) I. L. R. (1946) Nag. 741 : 34 A. I. R. 1947 Nag. 69 : 226 I. C. 298, Ganpati v. Rameshwar.
2. ('44) 31 A. I. R. 1944 Pesh. 17 : 212 I. C. 628, Jawahar Singh v. Mahomed Rafiz.
3. ('05) 27 All. 334 : 32 I. A. 102 : 8 Sar. 810 (P. C.), Qumaruddin Ahmed v. Jawahirlal.
4. ('35) 22 A. I. R. 1935 Lah. 911 : 157 I. C. 679, Hiralal v. Punjab National Bank.
5. ('27) 14 A. I. R. 1927 All. 16 : 49 All. 276 : 100 I. C. 692 (F. B.), Chattar Singh v. Kamal Singh.
6. ('40) I. L. R. (1940) All. 246 : 27 A. I. R. 1940 All. 151 : 187 I. C. 313 (F. B.), Bhan Datta v. Mt. Tulsa Kuar.
7. ('36) 63 Cal 57 : 23 A. I. R. 1936 Cal. 239 : 162 I. C. 654, Krishtokaminee Debi v. Girish Chandra.
8. ('21) 43 All. 383 : 8 A. I. R. 1921 All. 99 : 61 I. C. 417, Madho Prasad v. Draupadi Bibi.

N. V. Gadgil—for Appellants.
R. V. Khare—for Respondent.

Judgment. — This is a miscellaneous second appeal by the judgment-debtors and the only question involved in this appeal is whether the execution application dated 4-7-1938 for sale of mortgaged property was within time.

[2] A few relevant facts are these. The decree-holder respondent obtained a final decree for sale of the mortgaged property and applied on 4-7-1938 for execution of that decree. The sons of the judgment-debtor, Pandurang, filed a suit for a declaration that their interest in the mortgaged property was not liable to be sold in execution of the mortgage decree. The suit was dismissed on 14-3-1938 and the appeal preferred against that decree in the lower appellate Court was also dismissed on 28-6-1938. They preferred a second appeal to the High Court and in that appeal the High Court passed an order on 19-10-1938 ordering the sale of the mortgaged property in execution of the decree pending in the trial Court to be stayed. This was intimated to the trial Court and it passed an order 'execution filed'. This was on 15-4-1939.

[3] This second appeal No. 565 of 1938 was dismissed by this Court on 29-2-1940. There was then a Letters Patent Appeal and a remand to the second appellate Court and the final decision by the Letters Patent Appeal which is reported in I. L. R. (1946) Nag. 741.[1] For the decision of the present appeal it is however not necessary for me to examine the effect of the Letters Patent Appeal as to my mind it is obvious that the stay order passed by this Court in second appeal No. 565 of 1938 came to an end on 29-2-1940, the date on which that appeal was dismissed.

[4] It is however not disputed before me that the second appellate Court did not intimate to the trial Court the fact that the stay order was vacated by the dismissal of the second appeal on 29-2-1940. This may perhaps be due to the fact that Letters Patent Appeal was filed. On 31-7-1945, the decree-holder applied to the executing Court to proceed with his application dated 4-7-1938 as the obstacle in the way of execution by the stay order of the High Court was removed, that order having come to an end on 29-2-1940.

[5] It was contended by the judgment-debtors that the execution application dated 4-7-1938 was no longer pending as it was disposed of on 15-4-1939 and the same could not be proceeded with again. It was also argued before me that an application such as the one dated 31-7-1945, assuming it to be a revival application, was governed by Art. 181, Limitation Act, and that application not being filed within three years of 29-2-1940 was barred by limitation. The learned counsel for the appellants relied on A. I. R. 1944 Pesh 17.[2]

[6] I have read and examined carefully the decision relied on by the appellants' learned counsel. I do not find my way, I say this with respect, to agree with that decision in so far as it decides that the application filed in that case was an application for revival of the execution and that such a revival application was governed by Art. 181, Limitation Act. Mir Ahmad J. has based his decision on certain authorities one of which is 27 ALL. 334.[3] Whilst relying on this case the learned Judge himself observed thus :

"The judgment of their Lordships of the Privy Council reported in A.I.R. 1935 Lah. 911[4] also indirectly indicates that this is a correct proposition of law."

In 27 ALL. 334[3] their Lordships of the Privy Council have not at all considered the applicability of Art. 181, Limitation Act, to what is loosely described as a revival application. The point is not similarly considered by the Lahore High Court in A. I. R. 1935 Lah 911.[4] The other case relied on namely A. I. R. 1927 ALL. 16[5] has been considered and not approved by the Full Bench in I. L. R. (1940) ALL. 246.[6]

[7] There is, on the other hand, a string of cases in which the point has been carefully and exhaustively discussed. It has been pointed out that where an application is for the time being and for no fault of the decree-holder filed it should be deemed to be pending before the Court, and it is, in fact the duty of the Court to have a vigilant eye and to find out if the obstruction

which resulted in the filing of that application for execution had been removed. It is not the duty of the decree-holder to find out if such obstruction was removed and to remind the executing Court of its duty to proceed with the execution application pending before it. It has further been pointed out that every application whether it is according to the Civil Procedure Code or not is not governed by Art. 181, Limitation Act, and surely the application of the decree-holder dated 31-7-1945 was one of such applications.

[8] It is needless for me to refer to various decisions of the different High Courts on the point. It would be sufficient to refer to I. L. R. (1940) ALL. 246[6] in which a number of decisions, for and against, have been considered: 63 Cal. 57[7]; 43 ALL. 383[8]

[9] In my view therefore the application dated 31-7-1945 was not one which the decree-holder was bound to file and was not required under the procedure prescribed. That application cannot even be said to be a revival application because its object was merely to remind the Court that it had to proceed with and dispose of the execution application pending before it. I further hold that such application is not governed by Art. 181, Limitation Act, or by any other article of that Act.

[10] There is no question in this case of showing any sympathy to the decree-holder and there is also no question of hardship he is to be relieved from. The simple question is whether the execution application is in time or not and it is quite obvious to my mind that it is in time and has to be proceeded with.

[11] I uphold the orders of the two Courts below and dismiss this appeal with costs.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 286 *[C. N. 95.]*

POLLOCK J.

Mannibai w/o Kedarmal and others — Plaintiffs — Appellants v. *Messrs. S. C. Cambata and Co., Ltd. and others—Defendants — Respondents.*

Misc. First Appeal No. 28 of 1943, Decided on 9-9-1947, from order of Sub-Judge, First Class, Akola, D/- 25-9-1942.

Civil P. C. (1908), S. 16 (d) — Interest in immovable property — Lease of coal mines — Agreement to pay three pies per ton on all coal sold during term of lease — Suit for recovery of such amount — Obligation is one annexed to ownership of immovable property but not amounting to interest therein — S. 16 (d) does not apply — T. P. Act (1882), S. 40.

One *S* agreed to pay *P* three pies per ton on all coal sold by him during the term of the lease of coal mines in district *C*. *H* then took over the business of the working of the mines with the knowledge of the agreement between *S* and *P* and certain payments were made to *P*. *P* who resided in district *A* brought a suit ar *A* where the money was payable, for the balance that might be found due after taking accounts. The Court held that the suit fell under S. 16 (d) and should be filed in Court at *C*:

Held, that the suit was for the commission on coal sold in the past. The coal was not immovable property, and the obligation was one falling under S. 40, T. P. Act as an obligation annexed to the ownership of immovable property but not amounting to an interest therein. Section 16 (d), Civil P. C., therefore did not apply to this case, and the suit could be brought in the Court at *A*, where the money was payable. [Para 3]

Annotation: ('44-Com.) C. P. C., S. 16, N. 8: ('45-Com.) T. P. Act., S. 40, N. 7.

Judgment. — This is an appeal against an order of the Subordinate Judge, Akola, holding that he has no jurisdiction to try this suit. The allegations in the plaint are as follows: One Shahabuddin had obtained from the Provincial Government a lease of three coal mines in the Chhindwara district. He got into debt and agreed to transfer these mines to the plaintiffs and others. Subsequently he agreed to transfer his rights to S. C. Cambata and Co Ltd. (defendant 1). As a result of these conflicting agreements there was a civil suit which was compromised, and under the compromise S. C. Cambata (defendant 3) on behalf of S. C. Cambata and Co. Ltd., (defendant 1) agreed on 28-1-1930 to pay to the plaintiff three pies per ton on all coal sold by his company during the term of these three leases. Subsequently the Hirdagarh Collieries Ltd. (defendant 2) was formed and took over the business of the working of these mines with notice of the above agreement. Certain payments were made in accordance with that agreement, and the plaintiffs, who are residents of Akola, brought the present suit at Akola for the balance that might be found due to them on this agreement after taking accounts. The defendants contended, and the lower Court held, that it was a suit for the determination of an interest in immovable property under S. 16 (d), Civil P. C., and should therefore have been instituted in the Court within the local limits of whose jurisdiction the property was situate, i. e. at Chhindwara.

[2] Most of the argument has been based on the statement in para. 6 of the plaint:

"The agreement with the plaintiffs ..... being in respect of the enjoyment of the mines, will go with them to whosoever may take them over from defendant 1 or from defendant 3."

It was apparently contended and held by the lower Court that this amounted to a plea that there was a covenant running with the land and that the suit was therefore one for the determination of an interest in immovable property. The plaintiffs apparently had in view S. 40, T. P. Act, which provides that where a third

person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof. It will be observed that this refers to the benefit of an obligation not amounting to an interest in immovable property.

[3] Various cases have been cited in which it was held that an obligation amounted to an interest in immovable property, but none of those cases is precisely in point. There was no obligation on the defendants to work the mines at all. It was only after they had extracted coal and sold it that the plaintiff became entitled to three pies per ton of such coal. The plaintiffs are suing for their commission on coal sold in the past. The coal is not immovable property, and it seems to me that the obligation is one falling under S. 40, T. P. Act as an obligation annexed to the ownership of immovable property but not amounting to an interest therein. Section 16 (d), Civil P. C., therefore does not apply to this case, and it is admitted that, if it does not apply, the suit may be brought in the Court at Akola, where the money is admittedly payable.

[4] The appeal is allowed with costs here and below, and the lower Court is directed to proceed with the trial of the suit. Counsel's fee in this Court Rs. 75.

S.C. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 287 *[C. N. 96.]*

MANGALMURTI J.

Mahadeo Dewanna—Plaintiff—Appellant v. *Vyankammabai—Defendant—Respondent.*

Second Appeal No. 385 of 1942, Decided on 10-2-1947, from appellate decree of Addl. Dist. Judge, Yeotmal, D/-4-7-1942.

(a) Evidence Act (1872), S. 45—Science or art — Meaning of — Test to determine if particular question is of scientific nature.

The words "Science or art" are to be broadly construed, the term "science" not being limited to the higher sciences and the term "art" not being limited to the fine arts but having its original sense of handicraft, trade profession and skill in work, which, with the advance of culture, has been carried beyond the sphere of the common pursuits of life into that of "artistic" and "scientific action". To determine whether a particular question is of a scientific nature or not, and, consequently, whether skilled witnesses may or may not pass their opinions upon it the test to be applied is, "is the subject-matter of inquiry such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts? Does it so far partake of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature, or is it one which does not require such habit or study?" [Para 5]

(b) Hindu law — Migration —Personal law not ascertainable — Law of domicile — Applicability — Yelmis in Berar are governed by Hindu Law of Madras Presidency.

Where families have migrated from one part of the country to another, they are governed by their personal law, and it is only when it is not possible to ascertain that that the law of the domicile is applied and then only as a last resort and even then only because it is assumed that it is the personal law : 25 A. I. R. 1938 Nag. 163, *Ref.*

Held that the Yelmis living in Berar have migrated to that area from the Madras Presidency and are governed by the Hindu law which prevails in that Presidency. [Para 14]

Cases referred:—

1. ('43) I. L. R. (1943) Nag. 779:30 A. I. R. 1943 Nag. 253 : 208 I. C. 211, Prabhakar v. Sarubai.
2. ('38) I. L. R. (1938) Nag. 469 : 25 A. I. R. 1938 Nag. 163 : 177 I. C. 860, Keshco Rao v. Sadasheo Rao.

S. P. Kotval — for Appellant.

V. V. Kelkar — for Respondent.

Judgment. — This is a second appeal by the plaintiff whose suit for partition and first appeal have been dismissed. He claims to have been adopted by Ratnamma to her deceased husband Devanna, the brother of the respondent, with whom he was joint in estate. The parties are Yelmis by caste residing in Kelapur Taluq of District Yeotmal in Berar. Both the lower Courts have found that the parties are governed by the law of adoption prevailing in the Madras Presidency as the Yelmis migrated to Berar from that Presidency, and there is nothing to show that they have renounced their personal law in favour of the law of the place to which they have migrated, viz., Berar.

[2] The learned counsel for the appellant contends that this Court can go into the question of the fact of migration as there is no evidence to support the finding on the point as the Court of first appeal has remarked in para. 4 of its judgment that the oral evidence on the point is of no value and the authorities referred to do not prove migration but only show that some Yelmis are residing in Berar, some in the Nizam's Dominions and some in the Madras Presidency.

[3] What the Additional District Judge meant was that the witnesses had no personal knowledge about the actual migration. He has actually believed those witnesses when they say that the mother-tongue of the community is Telugu, that it lives to the South of the Painganga and the Godavari, that the deity of the community is Venkateshwar of Tirupati in the Madras Presidency, that the customs of this community which is residing in Berar are the same as those of the community residing in the Madras Presidency, and that they are different

from the customs of the Kunbi and other communities residing in Berar. So it cannot be said that the finding that the community and the family of the parties migrated from the Madras Presidency to Berar is based merely on what is stated in Sherring's Hindu Tribes and Castes, Russell's Tribes and Castes, and Castes and Tribes of the Nizam's Dominions by Syed Siraj-Ul-Hassan. As the learned Additional District Judge, however, is not very clear in his expression, I will deal with the matter as if he had discarded the evidence of the plaintiff's witnesses on those points.

[4] This gives rise to the question about the evidentiary value of the books mentioned above. They are written by persons who have made a special and systematic study of the customs and manners of the different castes and tribes, the areas occupied by them and other connected matters. They are therefore experts which term is defined in S. 45, Evidence Act, as persons, who are specially skilled in science, art, etc. That section makes the opinion of an expert on a point of foreign law or science, or art or identity of hand-writing or finger impressions relevant when the Court has to form an opinion upon that point. The question then is whether the study of customs and manners of tribes and castes, the areas occupied by them and other connected matters comes within the meaning of 'science or art.'

[5] The words 'science or art' are to be broadly construed, the term 'science' not being limited to the higher sciences and the term 'art' not being limited to the fine arts but having its original sense of handicraft, trade, profession and skill in work, which, with the advance of culture, has been carried beyond the sphere of the common pursuits of life into that of 'artistic' and 'scientific action.' In some cases it may be difficult to determine whether the particular question be one of a scientific nature or not, and consequently, whether skilled witnesses may or may not pass their opinions upon it. The following tests may be applied: Is the subject-matter of inquiry such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts? Does it so far partake of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature, or is it one which does not require such habit or study? (Woodroffe and Ameer Ali's Law of Evidence, 9 Edn. (1941), p. 447.) Stephen in his Digest of the Law of Evidence says that "the words 'science or art' include all subjects on which a course of special study or experience is necessary to the formation of an opinion."

[6] As stated in Sarkar's Law of Evidence 7 Edn., p. 496:

"It is not necessary 'that a speciality to enable one of its practitioners to be examined as an expert, should involve abstruse scientific conditions.' 'Art, in its legal significance, embraces every operation of human intelligence, whereby something is produced outside of nature; and the term 'science' includes all human knowledge which has been generalized and systematized, and has obtained method, relations and the forms of law.' So that while it may be laid down that the opinions of experts are limited to matters of science, art or skill, yet this limitation is not to be applied in any rigid or narrow sense. As Pigot C. B. said 'the subjects to which this kind of evidence is applicable, are not confined to classified and specified professions. It is applicable wherever peculiar skill and judgment applied to a particular subject, are required to explain results or trace them to their causes'."

[7] The same view has been expressed in Taylor on Evidence, 1931, edition, vol. 2, para. 1418 in the following words:

"In short, it may be laid down as a general rule that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. In other words, this is so when it so far partakes of the character of a science or art as to require a course of previous habit or study to obtain a competent knowledge of its nature."

[8] So the opinions of these experts, Sherring, Russell, and Syed Siraj-ul-Hassan, on the points connected with migration are relevant facts under S. 45, Evidence Act. These relevant facts can be proved in the manner given in proviso 1, to S. 60, Evidence Act, which says:

"Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable."

[9] The evidentiary value to be attached to these opinions which are relevant facts would depend on several factors as in the case of other relevant facts.

[10] The caste of the parties in the present case namely Yelmi is shown as an agricultural tribe in the Central Provinces in Chap. 2 of Part 2, Vol. 2 of Sherring's Hindu Tribes and Castes (1879-81). It is described there as a tribe in the Upper Godavari district speaking Telugu. In Vol. 3 of the same book in Part 2 Chap. 2, Velama is shown as an agricultural tribe in the Madras Presidency. Russell in his Tribes and Castes of the Central Provinces of India, Vol. 4, at p. 593 says about Velama, Elassa, Yelama that it is a Telugu cultivating caste found in large numbers in Vizagapatam and Ganjam, while in 1911 about 700 persons were returned from Chanda and other districts in the Central Provinces. The other books were not

produced in this Court, but the information available from them, which the lower Courts have mentioned in their judgments, is of the same type. Even this information suggests migration in view of the very small number of persons of that community found in this Province, and the finding of the Court of First Appeal based on it cannot be interfered with.

[11] The evidence provided by those books, however, is not the only evidence in this case. There is oral evidence to the following effect: (1) This community is called Yelmi in Berar, Velma in the Nizam's Dominions, and Velmavaru in the Madras Presidency (Narsimraja D. W. 1 on commission). (2) Yelmis live only in 9 (nine) villages in Berar. The rest of the caste is living to the South of Painganga (Devanna, P. W. 4). (3) The language of Yelmis in Berar is also Telugu (Devanna P. W. 1, Krishnayya D. W. 1). (4) Dharmagurus (priests) and bhats (bards) of the Yelmis in Berar are from the Madras Presidency (Krishnayya D. W. 1, Ranganna D. W. 2. and Narsimraja D. W. 1, on commission). (5) The Yelmis in Berar worship as their family deity Venkateshwar of Tirupati, which is in the Madras Presidency (Narsimraja D. W. 1 on commission, Krishnayya D. W. 1, and Ranganna D. W. 2). (6) The custom regarding marriage of the Yelmis of Berar resemble those of the same caste in the Madras Presidency. A horse and dagger must be present at the time of the marriage of Yelmis in Berar as well as in the Madras Presidency. (Pulayya D. W. 2 on commission, Devanna P. W. 4). Tambula vidhi takes place at the house of the husband after marriage in this community in Berar as well as in the Madras Presidency (Devanna, P. W. 4, Krishnayya D. W. 1). (7) Both in Berar and in the Madras Presidency the Yelmis mention their family name before their personal name (Pulayya D. W. 2 on commission). (8) The father of Devanna (P. W. 4) used to say that they were not original residents of Berar but that they had come from beyond the river, that is, from the Madras Presidency (Pulayya D. W. 2 on commission). Such evidence is held to be admissible in I. L. R. (1943) Nag. 779[1] (9) There is no temple or guru of Yelmis in Berar (Narsimraja D. W. 1 on commission).

[12] I have carefully gone through the evidence of the witnesses on the points mentioned above and see no reason to disbelieve their testimony on those points. All this evidence goes to show that they have migrated to Berar from the Madras Presidency. The circumstances that they have no temples or gurus in Berar and that they are living only in 9 villages in Berar are decisive, and the Court of First Appeal was right in coming to that conclusion.

[13] The evidence mentioned above not only proves migration but also establishes that they are still following their ancient traditions, customs, and usages, and have not given them up in favour of those prevailing in the area to which they migrated, that is Berar. So their personal law will be the law prevailing in the Madras Presidency according to which a widow is not competent to adopt without the authority to do so from her husband or the consent of her husband's sapindas. The concurrent finding of the two lower Courts is that there was no such authority from Devanna, and that finding could not be and has not been, challenged in this Court. There was no pleading regarding consent of sapindas.

[14] The learned counsel for the appellant then contended that as there was a greater likelihood that the Yelmis migrated to Berar from the Nizam's Dominions the law prevailing in the Nizam's dominions would be applicable to this case and not that prevailing in the Madras Presidency. It appears that some of the families migrated from the Madras Presidency to the Nizam's Dominions and others to other parts and some of those who migrated to the Nizam's Dominions subsequently migrated to other parts. There is, however, nothing to show that those Yelmis who migrated to the Nizam's Dominions abandoned their personal law and adopted the law of the locality; on the other hand they retained their customs and manners as will appear from the evidence of the defendant's witnesses examined on commission. So it is immaterial whether the Yelmi families migrated to Berar from the Madras Presidency or from the Nizam's Dominions to which territory they first migrated from the Madras Presidency. What governs such a case is the personal law of the parties, and it is only when it is not possible to ascertain that that the law of the domicile is applied and then only as a last resort and even then only because it is assumed that it is the personal law: I. L. R. (1938) Nag. 469.[2] The personal law of the parties is known in this case and that is the law which prevails in the Madras Presidency because the Yelmis migrated from that Presidency. It continued to be their personal law when they migrated to the Nizam's Dominions and afterwards when they migrated from those Dominions to Berar.

[15] The learned counsel for the appellant also contended that there was no evidence regarding the migration of the particular family of the parties. There is, however, no force in this contention as it is shown that all the families belonging to this community and living in Berar had migrated to this area from the

Madras Presidency. The result is that the appeal fails and is dismissed with costs.

V. R. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 290 *[C. N. 97.]*

PADHYE J.

Ramnath Balibhadra—Defendant No. 2 — Appellant v. *Sundarabai w/o Sitaram, Plaintiff and another, Defendant No. 1 — Respondents.*

Second Appeal No. 748 of 1943. Decided on 19-8-1947, from appellate decree of Addl. Dist Judge, Buldana, D/- 20-9-1943.

Hindu law—Alienation—Mortgage of joint family property by father—In execution of simple money decree against father his share as well as that of his sons sold—Subsequent suit by mortgagee to enforce mortgage—Auction-purchaser can impeach mortgage on ground that it was not for legal necessity.

One *G* executed a mortgage of the joint family property belonging to himself and his two sons. Part of the consideration of the mortgage was the antecedent debt of *G* and the rest was advanced as cash. In execution of a simple money decree obtained by certain person against *G* the entire joint family property. i. e., of *G* himself and his two sons was sold. Subsequently the mortgagee brought a suit to enforce the mortgage:

Held that the auction purchaser represented not only the interest of *G* but also of his sons and the objection which was open to *G's* sons was also open to him. Hence, though to the extent of *G's* share in the mortgaged property the auction-purchaser would not be able to impeach the mortgage, there was nothing to prevent him from impeaching the mortgage for want of legal necessity to the extent of 2/3rd share of the two sons of *G* except to the extent of the antecedent debt of *G* included in the mortgage consideration: *Case law referred.* [Paras 4 and 5]

Cases Referred:—

1. ('15) 11 N. L. R. 1 : 2 A. I. R. 1915 Nag. 19 : 27 I. C. 859, Dalchand v. Chandkhan.
2. ('11) 33 All. 783 : 11 I. C. 220 (F. B.) Muhammad Muzamil-ullah Khan v. Mithu Lal.
3. ('33) 20 A. I. R. 1933 All. 180 : 143 I. C. 706, Jagannath Prasad v. Chunni Lal.
4. ('93) 15 All. 339 : 20 I. A. 116 : 6 Sar 313 (P. C.), Balgobind Das v. Narain Lal.
5. ('23) 45 All. 692 : 11 A. I. R. 1924 All. 29 : 74 I. C. 325, Inayat Ilahi v. Hardeo Sahai.
6. ('32) 53 All. 21 : 17 A. I. R. 1930 All. 852 : 128 I. C. 829, Madan Lal v. Chiddu.
7. ('28) 3 Luck. 598 : 15 A. I. R. 1928 Oudh. 287 : 113 I. C. 410, Ram Kishore v. Baij Nath.
8. ('41) 20 Pat. 904 : 29 A. I. R. 1942 Pat 213 : 198 I. C. 208, Shyam Behari Singh v. Rameshwar Prasad.
9. ('39) I. L. R. (1939) Nag. 665. : 26 A. I. R. 1939 Nag. 305 : 185 I. C. 727, Mishrilal v. Barik Tursi.

N. G. Udhoji and M. D. Khandekar—for Appellant.
M. N. Gadgil—for Respondent. No. 1.

Judgment.—This second appeal arises out of a suit to enforce the mortgage dated 19-3-1923 executed by Gopal, father of the defendants 1 and 2, now deceased, in favour of Bandulal, the deceased son of the plaintiff Sunderabai. One of the sons of Gopal who was defendant 1 in the first Court died during the pendency of this second appeal.

[2] The appellant Ramnath was defendant 3 in the trial Court and he was impleaded on the ground that in an auction sale held on 31-1-1935 in execution of a simple money decree against Gopal this appellant purchased a half share of one of the items mortgaged under the mortgage deed in question, viz., Field No. 65. The mortgage claim has been decreed against this item of property by both the Courts below and Ramnath has therefore filed this appeal.

[3] The consideration of the mortgage deed in suit was Rs. 900/- of which Rs. 335/- was the antecedent debt of Gopal and Rs. 565/- was advanced as cash. The plaintiff alleged that this cash consideration was advanced for legal necessity. This fact was denied by the defendant (appellant) and the plaintiff's claim was denied on the ground that the mortgage was not for legal necessity and as such it was not binding against him, at least to the extent of the cash consideration. He further pleaded that though the mortgage would be binding so far as the antecedent debt of Rs. 335/-, that part of the debt and in fact more than double that amount has already been repaid by the mortgagor Gopal. His plea therefore was that the suit should be dismissed against him and against the property he purchased in execution of the money decree. Both the Courts held that the appellant who was the auction-purchaser in execution of the simple money decree against the mortgagor Gopal stands in the shoes of Gopal himself, and as Gopal the mortgagor could not impeach the mortgage for want of legal necessity, the auction-purchaser also could not do the same. The first Court held that legal necessity was not proved but the lower appellate Court has not given any finding on that point. I have myself gone through the evidence of Sunderabai (P. W. 1), and this is the only evidence on the point of legal necessity, and I have no hesitation in confirming the finding of the first Court that legal necessity for the amount of Rs. 565 advanced in cash was not established. In view of this finding the only question that remains to be examined is whether the present appellant can in law impeach the mortgage on the ground that it was not for legal necessity and whether the decision of the Court below on this point is according to law. In my view the decision of the Court below is not justified in law.

[4] The position undoubtedly is that though the decree in execution of which the property was purchased by the present appellant was against Gopal alone, what was sold in execution was not only Gopal's share in the property but the entire interest of the joint family was put to auction and purchased by the auction-purchaser. The auction-purchaser thus represents not only

the interest of Gopal but also of Gopal's sons defendants 1 and 2. As, purchaser of the interests of Gopal as well as Gopal's sons, the auction-purchaser could not be said to be only in shoes of Gopal but also of Gopal's sons and the objection which was open to Gopal's sons was also open to him.

[5] It is true that Gopal himself could not have impeached this mortgage on the ground of want of legal necessity as a mortgagor could not deny his own right to mortgage the property included in that mortgage and so to the extent of Gopal's share in that mortgaged property the present appellant would not also be able to impeach that mortgage. There is nothing however to prevent him from impeaching the mortgage for want of legal necessity to the extent of 2/3rd share of the two sons of Gopal except to the extent of the antecedent debt of Gopal included in the mortgage consideration.

[6] The learned counsel for the appellant in supporting his point that the appellant could impeach the mortgage for want of legal necessity relied upon certain decisions some of which were already brought to the notice of the lower appellate Court. That Court however distinguished those authorities on the grounds which appear to me not correct. Leaving aside the decision in 11 N. L. R. 1[1] which may be distinguished, other authorities viz. 33 ALL. 783,[2] A. I. R. 1933 ALL. 180,[3] relying on 15 ALL. 339[4] and 45 ALL 692[5] clearly support the point of view pressed by the appellant. Besides these authorities, there are many others which clearly expose the erroneous view of law taken by the Courts below.

[7] 53 ALL. 21[6] is clearly a case which is on all fours with the present case. Similarly, in 3 Luck. 598[7] and 20 Pat. 904,[8] it is held that an auction-purchaser who purchases the entire joint family interest in any item of the property mortgaged can impeach the mortgage for want of legal necessity.

[8] The learned counsel for the respondents tried to distinguish 53 ALL. 21[6] and other decisions cited from the Allahabad High Court on the ground that according to the Mitakshara law as administered in the United Provinces no coparcener can alienate even for value his undivided interest without the consent of the other coparceners, and such alienation is wholly void; while according to the Mitakshara law as administered in the Central Provinces a coparcener can mortgage or otherwise alienate for value his undivided interest in coparcenary property without the consent of the other coparceners; therefore the alienation is in no case void. It will be valid at least to the extent of his own share and it may be valid wholly if the mortgagor was the father or a manager of the family and the mortgage debt was either for legal necessity or for the benefit of the estate. It was therefore contended that the decisions from the Allahabad High Court would not apply on this point in the Central Provinces. I do not agree with this contention. Though it is true that no coparcener can alienate even his own share under the Hindu law as administered in the United Provinces still the rigour of that rule has been relaxed in favour of the auction-purchaser throughout British India including the United Provinces and Bengal. Thus so far as the question that has to be examined in this appeal is concerned there is no distinction between the United Provinces and the Central Provinces and the decisions from the Allahabad High Court relied on are authorities which cannot be distinguished on the grounds on which the learned counsel for the respondents sought to distinguish them. It is thus clear to me that the appellant-auction-purchaser is entitled to impeach the mortgage on the ground of legal necessity and he can do so successfully in the present case as it has been found that legal necessity to the extent of the cash consideration of Rs. 565 was not established.

[9] The lower appellate Court has also further held that the mortgage cannot be impeached by the auction-purchaser as the property purchased by him was subject to the mortgage of respondent 1 and not free from encumbrance. The respondents' learned counsel conceded that in the circumstances of this case that view of the lower appellate Court is not substainable. There is nothing to show that what was sold was subject to mortgage. It could at best be said that the auction purchaser may have been aware of the existence of the mortgage but the position of the purchaser with knowledge of mortgage is not the same as the position of a purchaser subject to mortgage. A distinction between these two positions is pointed out in I. L. R. (1939) Nag. 655[9] and in the light of that authority it could not be contended that the present case was a case of sale subject to mortgage and that the auction purchaser could not therefore impeach the mortgage on that account.

[10] What is said above brings us to the position that the mortgage is not binding so far as the cash consideration is concerned. It cannot be impeached so far as Rs. 335 which is the antecedent debt of Gopal, father of defendants 1 and 2, and an equal amount by way of interest thereon. Similarly it cannot be impeached to the extent of the share of the mortgagor Gopal which on the date of the mortgage was 1/3rd in the property mortgaged.

[11] The learned counsel for the appellant contended that this debt of Rs. 335 has already been paid off. There is no reason why the repayments which were not expressly made towards any particular part of the consideration could be

taken towards satisfaction of the antecedent debt. The appellant cannot while impeaching the mortgage of Gopal take advantage of the repayments made by him. It is thus clear to me that this mortgage is binding against the present appellant to the extent of Rs. 670, that is, Rs. 335 principal with damduppat thereon, and the decree for that amount should be passed in place of Rs. 739-15-0 claimed by the plaintiff in the present case. For satisfaction of this amount the share of Gopal in the mortgaged property that means 1/3rd share would be liable to be sold if the mortgage is not redeemed within the time allowed by the decree.

[12] In conclusion I hold that the decrees passed by the two Courts below should be modified to this extent that a decree will be passed for Rs. 670 with future interest at 6 per cent. per annum and on failure to satisfy this decree within the time allowed, 1/3rd share in survery No. 65 and the trees mortgaged will be sold for the satisfaction of the debt.

[13] As to costs in view of a partial success of the appeallant, the parties to bear their costs throughout.

D.S. *Decrees modified.*

A. I. R. (35) 1948 Nagpur 292 *[C. N. 98.]*

PADHYE J.

Mt. Jankibai w/o Zangoji Dhangar and another — Defendants—Applicants v. *Rama Manaji Dhangar — Plaintiff — Non-Applicant.*

Civil Revn. No. 94 of 1945, Decided on 20-1-1947, against decree of Sub-Judge, 2nd Class, Akot, D/-1-11-1944.

C. P. and Berar Relief of Indebtedness Act (14 (XIV) of 1939), S. 8—Co-judgment-debtors—Relief proceedings by some judgment-debtors—Discharge of decretal debt — Effect—Right of contribution — Contract Act (1872), S. 43.

The discharge of a debt in the proceedings before a Debt Relief Court cannot affect the mutual rights and liabilities between the co-debtors or co-promisors, or the persons who were not parties, or could not be proper or necessary parties thereto, or a liability which was not even in existence on the date on which the order of discharge was passed : 33 A. I. R. 1946 Nag. 135, *Foll.*

[Paras 6 and 8]

A joint decree having been passed against *A*, *B* and *C*, *B* and *C* applied to the Debt Relief Court for scaling down their debts, joining *A* as non-applicant. The decree-holders having failed to comply with the requirement of S. 8, Relief Act, their decretal debt, as against *B* and *C*, was discharged. Thereafter, in execution of the decree, the decree-holders realized the entire decretal amount from *A*. In a suit by *A* against *B* and *C* for contribution :

Held, that *A*, not being either a necessary or a proper party to the relief proceedings and the cause of action for the suit having arisen long after the termination of the proceedings, was entitled to call upon *B* and *C* to contribute to the performance of the promise unaffected by the discharge in the Relief Court.

[Para 9 and 10]

Case referred.—

1. ('46) 1946 N. L. J. 74 : 33 A. I. R. 1946 Nag. 135 : I.L.R. (1946) Nag. 353 : 225 I. C. 355, Birdichand v. Mt. Kachri Bai.

A. L. Halve — for Applicants.

T. B. Pendharkar — for Non-Applicant.

Order. — This is a revision by the defendants-applicants against the decree passed in Civil Suit No 79 of 1944 by the Judge, Small Cause Court, Akot on 1-11-1944.

[2] Shortly stated, the facts are these. In Civil Suit No. 182-B of 1941, decided on 12-9-1942, Tikaram and others obtained a decree against three persons, namely Rama, Zangoji and Punjaji. Of these Zangoji and Punjaji applied to the Relief Court for scaling down their debts. In these proceedings they had joined Rama as non-applicant 6. This was, however, of no consequence as Rama was neither a necessary nor a proper party to the relief proceedings, he being not then a creditor of the applicants, or a person to whom they owed any liability.

[3] The decree-holders in Civil Suit No. 182-B of 1941 who were parties to the relief proceedings failed to comply with the requirement of S. 8, Relief Act, and in consequence their decretal debt so far as against the applicants before Relief Court, was discharged on 29-9-1942.

[4] The aforesaid decree-holders sued out execution against Rama who was not the applicant before the relief Court and realized from him the entire decretal amount on 12-4-1944. The amount actually recovered was Rs. 179-5-6.

[5] Rama thereafter sued his co-judgment-debtors, Zangoji and Punjaji for contribution to the extent of Rs. 60-0-0 from each one of them. His claim was opposed on the ground that their liability to the decree-holders was already discharged in the relief proceedings and in consequence they were not liable to contribute anything to Rama even though he was required to satisfy the entire decretal amount. This defence was negatived by the lower Court and the claim was decreed. The present application attacks the decree of the lower Court on the ground that it is contrary to law.

[6] It is not disputed that as between the decree-holders and the defendants who were proper parties to the relief proceedings, the decretal debt was discharged. The question is how far this discharge affects the claim of Rama (present plaintiff) to claim contribution from them i. e. his two co-judgment-debtors which right arose in his favour on his satisfying the decree on 12-4-1944 long after the termination of the relief proceedings. The discharge of the decretal debt in the relief proceedings disentitled the decree-holders from executing their decree against Zangoji and Punjaji. The legal effect of the

discharge was in no way different from the discharge if given by the creditor or the decree-holder to some of his debtors or judgment-debtors who along with others were jointly and severally liable to him. Neither such an agreement between the creditor and some of his debtors nor the discharge in the relief proceedings can affect the mutual rights and liabilities between the co-debtors or co-promisors. Under S. 43, Contract Act, each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract. The liability of the defendants as joint promisors—which is a liability between them *inter se*—is different from the joint and several liability of each of the joint promisors to the creditor. While the latter would be affected by the discharge of the joint promisor whether the discharge is obtained by that promisor from the creditor, either voluntarily or involuntarily, the former, which is a liability *inter se* between the joint promisors would not thereby be affected. The discharge in relief proceedings is merely an involuntary discharge obtained by a debtor from the debts due to the creditor as a result of a statute.

[7] As soon as a decree was passed the co-judgment-debtors were in the position of joint promisors, each of them being liable jointly and severally to the decree holders and mutually liable to one another to contribute towards the performance of the promise. The applicants before the Relief Court in which the debt was discharged are not absolved from their liability to their joint promisors. This liability between the joint promisors is no doubt latent until one of them satisfies the decretal amount, but on satisfaction of the decree, as was done in the present case on 12-4-1944, that liability becomes patent and can be enforced against other joint promisors and it is in no way affected by the discharge obtained by that joint promisor from the creditor either under an agreement or under the Relief Act.

[8] The discharge in the proceedings before the Debt Relief Court could in no way affect the persons who were not parties thereto or who could not be proper or necessary parties thereto. It could not similarly affect a liability or a debt which came into existence after the termination of the relief proceedings as was the case here. It is held in several decisions of this Court—and quite recently in 1946 N. L. J. 74[1] that the debt contemplated in the Relief Act is the debt due by the applicant and not by one who is not a party to the proceedings. Similarly, the discharge of a debt would affect the rights of persons impleaded as creditors in those proceedings and not the persons who are not parties to the proceedings. It cannot also affect a liability which was not even in existence on the date on which the order of discharge was passed.

[9] The cause of action in the present case arose on 12-4-1944, long after the termination of the relief proceedings. This cause of action was based mainly on the rights and liabilities *inter se* created between the plaintiff and the present defendants on the date on which the joint decree was passed against them and this cause of action could not possibly be affected by anything that may have happened between some of the debtors and creditors subsequent to the date of the decree and to which other debtors were not parties.

[10] In my opinion, therefore, the decree of the lower Court is perfectly correct. The plaintiff who paid off the entire decretal amount was entitled to call upon his other judgment-debtors to contribute to the performance of the promise unaffected by the discharge in the Relief Court. It is only the creditor who is affected by the discharge passed in the Relief Court and not the co-promisor or the co-judgment-debtor. The revision is dismissed with costs. Counsel's fee Rs. 20-0-0.

V.R. *Revision dismissed.*

A. I. R (35) 1948 Nagpur 293 *[C. N. 99.]*

BOSE AND MANGALMURTI JJ.

Tukaram Ramji Shendre and others — Plaintiffs—Appellants v. *Madhorao Manaji Bhange and others — Defendants — Respondents.*

Second Appeal No. 496 of 1942, Decided on 6-12-1946, from appellate decree of Dist. Judge, Wardha, D/- 27-6-1942.

(a) Limitation Act (1908), S. 19 — Acknowledgment by *de facto* guardian.

Only a lawful guardian or manager can sign an acknowledgment for purposes of S. 19, or in their absence an agent duly authorised either by the lawful guardian or by the manager. Accordingly, a *de facto* guardian will not do. Acknowledgment by him will not extend limitation : 27 A. I. R. 1940 Mad. 33 (FB), *Rel. on.* [Para 7]

Annotation:—('42-Com.) Lim. Act, S. 21, N. 3, Pt. 9.

(b) Contract Act (1872), S. 196 — Minor, if can ratify acknowledgment given by *de facto* guardian, on attaining majority.

As a general rule a person or a body of persons not competent to authorize an act cannot give it validity by ratifying it. [Para 8]

Where the minor was not in a position to give authority at the date when the acts were performed for the reason that a minor cannot contract or perform other legal acts based on a contract, he cannot subsequently ratify these acts because the whole question of ratification is based on the assumption that authority could have been conferred at the date when the acts were performed. Subsequent acknowledgments by minor on attaining majority do not amount to ratification of acknowledgment given by his *de facto* guardian during

his minority : 3 Cal. 280 (P.C.), *Foll.*; 22 A.I.R. 1935 Nag. 127, *Expl. and Disting.*; 11 A.I.R. 1924 All. 730 and 15 A. I. R. 1928 All. 440 (F.B.), *Disting.* [Paras 8 & 14]

(c) Contract Act (1872), S. 198—Minor executing acknowledgment on attaining majority — Knowledge that person executing prior acknowledgment had no authority, if can be imported.

There can be no valid ratification when the knowledge of the person making it regarding the facts of the case is materially defective. The mere fact that a minor executed an acknowledgment on attaining majority did not import knowledge of the minor that the person who executed prior acknowledgment during his minority was not his guardian and had no authority to execute it on his behalf. [Para 15]

(d) Evidence Act (1872), S. 115 — Acknowledgment beyond limitation.

Acknowledgments of debt made beyond limitation do not act as estoppel against the person making the acknowledgment. [Para 17]

(e) Evidence Act (1872), S. 115 — Opposite party not misled—No estoppel.

Where the opposite party was not misled to change their position by the representations, there can be no estoppel against the person making the representation. [Para 17]

(f) Civil P. C. (1908), S. 100 — New plea — Plea based on stated account cannot be raised.

A stated or settled account is nothing but a contract. It is binding unless it is avoided for one or more of the reasons which the law permits in the case of avoiding a contract. Contracts must be specifically pleaded. It cannot be pleaded in second appeal for the first time, when the opposite party had no opportunity of meeting the case : 33A. I. R. 1946 Nag. 112, *Expl.* [Para 19]

Annotation.—('44-Com.) Civil P. C., S. 100, Note 55, Pt. 16

(g) Civil P. C. (1908), S. 100—New plea—Discretion of Court to allow.

The question of amendment or deciding cases on matters not pleaded is largly one of discretion, and it is impossible for one Court to say whether discretion should or should not be exercised on the facts before it because of discretion exercised in some other case on some other facts. [Para 22]

Where the plaintiffs had already several opportunities to amend their pleadings, even in appellate Court but they did not include the new plea sought to be raised for the first time in second appeal, and the new plea involved not only questions of law but also of facts, the plea was not allowed to be taken in the second appeal. [Paras 20 & 21]

Annotation. — ('44-Com.) Civil P. C., S. 100, Notes 55 and 57.

Cases referred :—

1. ('40) I. L. R. (1940) Mad. 358 : 27 A. I. R. 1940 Mad. 33 : 186 I. C. 749 (FB), Chennappa v. Onkarappa.
2. ('77) 3 Cal. 280 : 4 I. A. 86 : 3 Sar. 692 (PC), Irvine v. Union Bank of Australia.
3. ('35) 31 N. L. R. 243 : 22 A. I. R. 1935 Nag. 127 : 155 I. C. 607, Shriram v, Mohanlal.
4. ('24) 46 All. 568: 11 A. I. R. 1924 All. 730: 79 I. C. 945, Narain Singh v. Chiranji Lal.
5. ('28) 51 All. 164 : 15 A. I. R. 1928 All. 440 : 112 I. C. 159 (FB), Suraj Narain v. Sukhu Ahir.
6. ('46) I. L. R. (1946) Nag. 21 : 33 A. I. R. 1946 Nag. 112, Bulakhidas v. Ganpatrao.

P. R. Padhye — for Appellants.

V. V. Kelkar and M. R. Bobde—for Respondents.

Judgment. — This is a suit for Rs. 2,500 based on an *akada* dated 21-4-1913 executed by the defendants' father Manaji in favour of the plaintiffs' father Ramji. The document is Ex. P-8. The claim was dismissed, and the plaintiff appeals.

[2] The history of the subsequent transactions is this. On 28-3-1916 accounts were made up and the defendants' father Manaji executed an acknowledgment Ex. P-9. Rupees 1350 were then found due. Manaji died some time after this on 3-3-1919 and left defendants 1 to 4 (his sons) as his heirs. He also left two widows, Mt. Gangu and Mt. Saru, who were the lawful guardians of the sons who were then minors.

[3] On 21-3-1919 accounts were again made up and Rs. 1526-4-0 were found due. The two guardians, Mt. Gangu and Mt. Saru, thereupon executed an acknowledgment Ex. P-10 on behalf of the minors. On 7-3-1922 accounts were again made up and Rs. 1866 are said to have been found due. In this case a document Ex. P-11 was executed by one Pandurang, the paternal uncle of the defendants. The main question in this case is whether Pandurang had authority to execute this document on behalf of the minors. On 26-2-1925 accounts were again made up and this time, Rs. 2271-10-9 were found due. Pandurang again executed an acknowledgment. This acknowledgment is Ex. P-12. When the next settling of accounts took place, viz., on 9-2-1928, defendant 1 had attained majority. According to the plaintiffs, Rs. 2829-2-3 were found due and this time the acknowledgment Ex. P-13 was executed by defendant 1. He signed on his own behalf and on behalf of his three minor brothers. Three years later, on 26-1-1931, accounts were again made up and this time Rs. 2722-1-3 are said to have been due. By then defendant 2 had also attained majority and accordingly the acknowledgment Ex. P-14 was signed by defendants 1 and 2 for themselves and by defendant 1 on behalf of his two minor brothers. The sum of Rs. 2722-1-3 was reached after giving credit for a repayment of Rs. 750 which was made at the same time. It is a matter of dispute whether this payment preceded the settlement of accounts or succeeded. So far as the document Ex. P-14 is concerned, it shows the total due, next a deduction of Rs. 750 and then the balance which we have set out above. Then follow the signatures.

[4] On 17-1-1934 there was a further settlement of accounts and this time Rs. 3458-10-6 are said to have been due. By this time all four defendants had attained majority and so they all signed the acknowledgment Ex. P-15.

[5] Three years later, on 6-1-1937, the defendants applied to the Debt Conciliation Board and this debt was included in their application Ex. P-16. The plaintiffs refused to conciliate, and accordingly a certificate under S. 15, Debt Con-

ciliation Act, was issued against them. On 6-1-1940 the present suit was filed.

[6] A number of defences were taken to the action. As this is a second appeal we do not intend to deal with all the points raised because it is possible to decide the matter on the points with which we intend to deal. The first point is whether Pandurang had authority to execute the acknowledgments in the years 1922 and 1925.

[7] Under S. 19, Limitation Act, an acknowledgment for purposes of that section means one signed either personally or "by an agent duly authorised in this behalf." Section 21 (1) of the Act indicates who these agents are. The section runs,

"The expression "agent duly authorised in this behalf", in S. 19 . . . shall in the case of a person under disability, include his lawful guardian, . . . or manager, or an agent duly authorised by such guardian, . . . or manager to sign the acknowledgment."

It is evident from this that only a lawful guardian or manager can sign an acknowledgment for purposes of S. 19, or in their absence an agent duly authorised either by the lawful guardian or by the manager. Accordingly, a *de facto* guardian will not do. This point was considered by a Full Bench of the Madras High Court in I.L.R. (1940) Mad. 358,[1] and the learned Judges held that an acknowledgment signed by a *de facto* guardian does not fulfil the requirements of S. 19 read with S. 21 (1) of the Act. We are in respectful agreement with that conclusion. It follows, then that Pandurang had no authority to sign for purposes of extending limitation under S. 19. If he had no authority then the subsequent acknowledgments by the various defendants will not serve to extend limitation.

[8] That leads us to the next question, viz., whether there was ratification of Pandurang's acts by the defendants and whether there can be such ratification in law. It is urged on the basis of S. 196, Contract Act, that Pandurang purported to act on behalf of the minor defendants, and accordingly when the defendants after reaching age signed their subsequent acknowledgments they thereby ratified Pandurang's actions. As regards this, the law as enunciated by their Lordships of the Privy Council in 3 Cal. 280[2] at p. 285 is this. Their Lordships say,

"A ratification in law is treated as equivalent to a previous authority, and it follows that, as a general rule, a person, or body of persons, not competent to authorize an act, cannot give it validity by ratifying it."

This is also the view of the learned authors of Pollock and Mulla's Indian Contract Act, Edn. 7, p. 553. The minors were not in a position to give authority at the date when the acts were performed for the reason that a minor cannot contract or perform other legal acts based on a contract. Accordingly, under the law enunciated above, they cannot subsequently ratify these acts because the whole question of ratification is based on the assumption that authority could have been conferred at the date when the acts were performed.

[9] We are referred to 31 N.L.R. 243[3] at p. 245 where Pollock J. states:

"It was of course open to the defendant to ratify the acts of his guardian, and the acts of the guardian's agent may be taken to be the acts of the guardian."

It is sought to be inferred from this that there can be ratification of acts performed during a person's minority in certain cases. We are, however, of opinion that that is not true ratification. In the case of an act of a minor's guardian the act is good until avoided. The minor has the right, when he reaches age, either to elect to ratify the act or to avoid it, assuming it falls within the clause of avoidable actions. Accordingly, when he makes his election he is not ratifying it in the sense in which ratification is spoken of in S. 196. He is electing not to avoid an act which he is entitled to avoid. The point is that in such a case the act is good until avoided.

[10] In cases falling under S. 196 the position is the reverse. The act is not good. The person acting without authority has no power to do anything on behalf of another, and unless his action is ratified it does not hold good. That is true ratification. In the other case it is an election not to avoid an avoidable act. In a case under S. 196 it it a matter of ratifying and making good that which otherwise would not be good.

[11] We must not be understood in saying this to imply that there can be ratification of void act, e. g., the contracts of a minor. The Privy Council hold there can be no such ratification. The position contemplated by S. 196 is different, because there it is assumed that if the act had been done with authority it would have been good. Accordingly, it is assumed that the person who subsequently ratifies would have been in a position to confer the requisite authority at the time of ratification.

[12] Reliance was next placed upon 46 ALL. 568[4] and 51 ALL. 164.[5] The former is not a case of ratification. It is a case in which a minor when he reached age elected to pay for articles which had been supplied to him during his minority. This, as the learned authors of Pollock and Mulla's Indian Contract Act point out at p. 70, amounts not to ratification but to a gift. If a minor is not bound under the law to pay for goods supplied to him and chooses to do so then he is doing something which he is not compelled by law to do, that is to say, he is making a free gift. That is not ratification. If, however, they

are necessaries then of course he is compelled to pay in any event and no question of ratification arises. 46 ALL. 568[4] is accordingly not in point.

[13] As regards the other ruling, that also is not a case of ratification. That is a case in which a minor borrowed a sum of money and executed a simple bond for it when he was still minor. After attaining majority he executed a second bond in respect of the original loan together with interest. It was held that the second bond was good. That is not a case of ratifying a void act but of entering into a fresh contract based on good consideration. It is to be observed that a minor's contracts are not illegal; they are merely void, that is to say, they cannot be enforced in law, but the fact that considerations are received under them remains, and therefore, if basing upon that consideration, a minor subsequently elects to enter into a fresh contract when of age his consideration is good and the contract is a fresh contract. The position is also adumbrated by the learned authors of Pollock and Mulla's Indian Contract Act, Edn. 7, at pp. 69 and 70.

[14] We hold, therefore, that the actions of the defendants in executing acknowledgments subsequent to the acknowledgments executed by Pandurang do not in law amount to ratification.

[15] Then follows another question of law, *viz.*, whether knowledge of the circumstances can be deduced from the facts found. Under S. 198, Contract Act there can be no valid ratification when the knowledge of the person making it regarding the facts of the case is materially defective. It was held by Pollock J. in 31 N. L. R. 243[3] at p. 245 that the mere fact that a minor executed a promissory note on attaining majority did not import that he intended to acknowledge liability for an old debt. The facts here are similar except that here the minors did not execute a promissory note but executed acknowledgments. Agreeing with Pollock J. we are of opinion that that fact in itself cannot import knowledge of the minors that Pandurang was not their guardian and had no authority to execute prior acknowledgments on their behalf. It is not necessary to go into this question further.

[16] Next question of estoppel was raised. It was said that the action of the defendants in executing these subsequent acknowledgments, and particularly in making the statement which they did to the Debt Conciliation Board, estops them from questioning the plaintiffs' right of suit. In our opinion, there is no estoppel.

[17] The question here is whether Pandurang had authority to make acknowledgments in 1922 and 1925. Nothing has been shown to indicate that the plaintiffs were in any way misled by any statement or action of the defendants in receiving these acknowledgments. The subsequent statements or acts of the defendants long after 1922 and 1925 could clearly not have misled the plaintiffs in 1922 and in 1925. Accordingly their subsequent statements do not estop them from questioning Pandurang's authority. So far as their own acknowledgments are concerned, there is no question of estoppel. They do not deny these acknowledgments. They admit they made them. But they were made beyond time if Pandurang's acknowledgments fall to the ground, and therefore do not serve to extend limitation. Accordingly, as the plaintiffs were not misled and as they are not shown to have changed their position for the worse in any way by reason of the subsequent statements, there can be no estoppel.

[18] The plaintiffs next claim to base their case on an account stated or settled. According to them, the various acknowledgments executed by the defendants themselves amount not only to acknowledgments but are also accounts stated.

[19] This question was not pleaded. A stated or settled account is nothing but a contract. It is binding unless it is avoided for one or more of the reasons which the law permits in the case of avoiding a contract. Contracts must be specifically pleaded; also the plaint must set out the facts which constitute the cause of action and the date on which the cause of action accrued. The acknowledgments here have not been used as contracts. Accordingly, the defendants have had no opportunity of meeting that case and of contesting the acknowledgments on any of the grounds on which a contract can be contested. As the matter has not been fought out and has been raised first time in second appeal, we are unable to allow the plea to be taken.

[20] The cause of action for a suit based on an account stated is entirely different from one based on the original loan with acknowledgments used to extend limitation. Accordingly, the present claim could not be entertained without an amendment of the plaint. The plaintiffs have already had several opportunities to amend. At one stage they were allowed to amend in the appellate Court, and after amendment the matter was remanded to the first Court for fresh trial. We are unable to grant them further opportunity. Accordingly, we do not allow this plea to be taken.

[21] We pause to observe that the matter is not only one of law but it involves facts also. It involves a difficult consideration of a question of law regarding EX. P-15 which is said to be the account stated. A question arises whether that is a one-sided account and whether in law an account stated can be based on accounts which are only one sided. However, we need not go into all that because, as we have said, the matter

was not pleaded. The claim was not based on an account stated. The suit has not been tried along those lines and it is impossible for us to guess at what would be the result if the matter had been properly fought out.

[22] Reliance was placed in this connection on a decision of Puranik J. in I. L. R. (1946) Nag.21[6] at p. 25 where the learned Judge stated that even though the matter had not been pleaded the suit before him could be decided on the basis of an account stated. It is not necessary for us to dissent from that view because the question of amendment or deciding cases on matters not pleaded is largely one of discretion, and it is impossible for one Court to say whether discretion should or should not be exercised on the facts before it because of a discretion exercised in some other case on some other facts. It is to be observed that in I. L. R. (1946) Nag. 21[6] the learned Judge decided the matter on two other grounds, and at the end he said that it could also be decided on the ground of an account stated even though it had not been pleaded. We are unable to accept that as authority for the view that in every case in which the matter is not pleaded it would be right and proper to permit a claim to be decreed on that basis. In our opinion, this is a case in which it would not be right. As we have said, the plaintiffs were given ample opportunity to amend. They availed themselves of it in one particular but not in this. Accordingly they cannot succeed on this ground. In view of this, we need not consider the other points raised. The appeal fails and is dismissed with costs.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 297 *[C.N. 100.]*

PADHYE J.

The Laxmi Bank Ltd., Akola and others — Applicants v. *Harikisan and others — Non-Applicants.*

Civil Revn. No. 87 of 1947, Decided on 7-10-1947, from order of Addl. District Judge, Khamgaon, D/- 15-1-1947.

(a) Civil P. C. (1908), S. 10 — Applicability—Subject-matter of previous suit need not be covered by later suit—It is enough if subject-matter of later suit is covered by prior suit.

Where the issue involved in a subsequently instituted suit is covered by one of the issues in the previously instituted suit, appeal in which is pending, the subsequently instituted suit should be stayed, until the decision of the appeal in the previously instituted suit. It is not necessary that the subject-matter of the previous suit should be covered by the subsequent suit. It is enough if the subject-matter of the subsequent suit is covered by the previous suit : 22 A. I. R. 1935 Mad. 112 ; 28 A. I. R. 1941 Cal. 434 ; 34 A. I. R. 1947 Bom. 84 and 33 A.I.R. 1946 Nag. 5, *Rel. on.* [Para 6]

Annotation : ('44-Com.) Civil P. C., S. 10 N 4.

(b) Civil P. C. (1908), S. 151—Stay of suit—Civil P. C. (1908), S. 10.

In proper cases a subsequently instituted suit can be stayed under S. 151 even though S. 10 may not strictly apply. *Case law Referred.* [Para 6]

Annotation : ('44-Com.) Civil P. C. S. 151 N. 2.

(c) Civil P. C. (1908), S. 10—Substantial identity of parties in suit is enough.

It is doubtful if for the application of S. 10 there should be a complete identity of parties or a complete identity of the subject-matter. It is enough that there should be substantial identity of parties in the two suits : 22 A. I. R. 1935 Cal. 1 and 29 A. I. R. 1942 Bom. 314, *Rel. on.* [Para 8]

Annotation : ('44-Com.) Civil P. C., S. 10 N. 9.

Cases referred : —

1. ('35) 22 A.I.R. 1935 Mad. 112 : 155 I. C. 1002, Mahaganpathi v. Natesa Iyer.
2. ('41) I.L.R. (1941) 1 Cal. 373 : 28 A. I. R. 1941 Cal. 434 : 196 I. C. 415, Naskarpatha Jute Mills Co. Ltd. v. Nirmal Kumar.
3. ('29) 16 A.I.R. 1929 Lah. 12 : 113 I. C. 783, Kader Mal Jethanand v. Tilak Ram.
4. ('47) 34 A.I.R, 1947 Lah. 28 : 224 I. C. 532, Dwarka Das v. Governor General in Council.
5. ('95) 17 All. 29, Durga Dihal Das v. Anoraji.
6. ('06) 33 Cal. 927, Hukum Chand Baid v. Kamalanand Singh.
7. ('41) I.L.R. (1941) 1 Cal. 490 : 28 A. I. R. 1941 Cal. 670 : 199 I. C. 32, Bhagat Singh Bugga v. Dewan Jagbir Sawhney.
8. ('40) I.L.R. (1940) All. 201 : 27 A. I. R. 1940 All. 185 : 187 I. C. 813, Dhaneshwar Nath v. Ghanshyam Dhar.
9. ('34) 61 Cal. 670 : 22 A.I.R. 1935 Cal. 1 : 154 I. C. 645, Durga Prasad v. Kantichandra Mukherji.
10. ('42) 29 A. I. R. 1942 Bom. 314 : 203 I. C. 359, Trikamdas Jethabhai v. Jivraj Kalianji.
11. ('46) 48 Bom. L. R. 633 : 34 A. I. R. 1947 Bom. 84 : 229 I. C. 346, Sankalchand Shah & Co. v. J. Prakash & Co.
12. ('45) I.L.R. (1945) Nag. 634 : 33 A.I R. 1946 Nag. 5, Liladhar Daultram v. Firm Radhakishan Ramsahaya.

M. R. Bobde, A. S. Athaley, K. V. Tambe and G. R. Mudholkar—for Applicants.

N. B. Chandurkar—for Non-Applicant No. 1.

Order. — This is a revision by defendants 1 and 3 in Civil suit No. 2-B of 1946 pending in the Court of the Additional District Judge, Khamgaon, against the order of that Court refusing to stay the suit pending the decision of First Appeal No. 18 of 1945 pending in the High Court.

[2] In order to appreciate correctly the subject-matter of this revision it is necessary to state facts in detail. 'Sitaram Bindraban' a partnership firm at Khamgaon (hereafter called a firm) dealt in cotton, cotton-seed etc. and it also carried on business as *adtiya* and commission agents for purchases and sales of these articles for its constituents and it also financed its constituents in their transactions. Harikisan was one of the constituents of the firm and he did cotton business in the *adat* of the firm between 14-8-1942 and 21-3-1943. The business consisted *inter alia* of purchase of 496 bales of

cotton through the *pakki adat* of the firm which also financed Harikisan. Harikisan agreed to pay interest, *adat*, brokerage and loss, if any, to the firm. It is alleged that the bales were in the custody of the firm by way of security for money advanced for purchasing the bales until these bales were sold by Harikisan to the firm from time to time until 6-3-1943. As he suffered loss in this and other businesses carried on through the *adat* of the firm he was unable to repay the amount due from him to the firm. As Harikisan failed to satisfy his liability to the firm, the latter instituted against Harikisan and others Civil Suit No. 6-B of 1943 and claimed Rs. 12,868-2-9 as a result of all the dealings between Harikisan and the firm or through the *adat* of the firm. Subsequently, the firm also instituted another suit—Civil Suit No. 7-B of 1943 against Harikisan for recovery of Rs. 15,202-4-0 which was realised from the firm on a hundi dated 12th February 1943 drawn in favour of Laxmi Bank by Harikisan and in which the firm was the drawee. These two suits were consolidated and the claim of the firm was decreed on 22nd September 1944 for Rs. 17,216-3-0. The firm has filed an appeal against the dismissal of a part of its claim and it is pending as First Appeal No. 18 of 1945 in the High Court.

[3] On 6th March 1946, Harikisan instituted Civil Suit No. 2-B of 1946 against Laxmi Bank, Kisanlal, the Sub agent of Laxmi Bank and the firm Sitaram Bindraban at Khamgaon for recovery of Rs. 57,094-7-0, made up of Rs. 45,358 as the price of 250 bales of cotton on 22nd April 1943 or by way of damages and Rs. 11,736 7-0 as interest thereon at 9 per cent. per annum. In this suit Harikisan alleged that as on 17th September 1942 the firm 'Sitaram Bindraban' pressed Harikisan for a substantial repayment he applied for a loan of Rs. 14,000 from the Laxmi Bank on the security of his bales of cotton and it was granted to him under the hypothecation bond dated 17 September 1942. According to the bond 250 out of 496 bales were pawned with the Bank and delivered in its custody and the Bank paid Rs. 14,000 to the firm by a cheque for Rs. 14,000. The price of cotton began to go up and Harikisan wanted the Bank to allow him to redeem the 250 bales pawned by him with the Bank. It was after much delay on 22nd April 1943 that the reply was received from the Bank that these bales were pawned not by Harikisan but by the firm through its managing partner and that the pawn was already redeemed in March 1943. Harikisan, therefore, filed on 6th March 1946 Civil Suit No. 2 B of 1946 as already stated above.

[4] Defendants 1 and 3 contended in Civil Suit No. 2-B of 1946 that the trial of the suit should be stayed till the decision of First Appeal No. 18 of 1945 and this was the subject-matter of issue 16 framed by the lower Court. The lower Court treated this as a preliminary issue and rejected the prayer for stay by its order dated 15th January 1947. Defendants 1 and 3 seek to have this order revised.

[5] The prayer for stay was mainly based on the ground that in Civil Suit No. 6-B of 1943 between the firm as plaintiff and Harikisan as one of the defendants the question about the ownership of the 250 bales pledged with the Laxmi Bank was agitated and it formed the subject-matter of issue 13 in that suit. The trial Court answered this issue against the plaintiff, e. g., the firm. It held that 250 bales belonged not to the firm but to Harikisan and they were pledged by Harikisan. The claim of the firm to that extent was disallowed, and the firm is now agitating that question in First Appeal No. 18 of 1945 before the High Court. In the present suit, i. e., Civil Suit No. 2-B of 1946, the sole question in dispute is that which was covered by issue 13 in the previously instituted suit, Civil Suit No. 6-B of 1943 and which is now the subject matter of First Appeal No. 18 of 1945.

[6] It is clear from the order of the lower Court that it has misdirected itself on very vital points resulting in the refusal to exercise jurisdiction or acting in the exercise of jurisdiction with material irregularity. Evidently, the learned Judge has misunderstood and misapplied the decision in A. I. R. 1935 Mad. 112.[1] According to that decision the subject-matter of the subsequent suit must be covered by the previously instituted suit and not the *vice versa*. It is obvious that the subject-matter of civil suit No. 2-B of 1946 is covered completely by civil suit No. 6-B of 1943 but the lower Court somehow misapprehended the correct position under a wrong belief that according to the ruling the subject-matter of the two suits should be in every respect identical. The lower Court thus acted in the exercise of its jurisdiction under S. 10, Civil P. C., with material irregularity. Further the lower Court denied to itself the jurisdiction to stay the suit under S. 151, Civil P. C., by misunderstanding the decision in I. L. R. (1941) 1 Cal. 373.[2] The lower Court failed to see that in that case the learned Judges of the Calcutta High Court have discussed the scope and the application of the inherent powers of the Court now recognized in S. 151, Civil P. C., and these powers are open to the High Court and to the subordinate Court alike. This resulted in the non-exercise of jurisdiction which the lower Court had under S. 151 of the Code i. e., apart from S. 10, Civil P. C., in suitable cases. In the unreported judgment passed by this Court in

second appeal No. 395 of 1946 it is held that a subsequently instituted suit could be stayed under S. 151, Civil P. C., even though S. 10 of the Code may not strictly apply. The same view is taken in A. I. R. 1929 Lah. 12[3] and A. I. R. 1947 Lah. 28.[4] Even before the Code of 1908 which gave a statutory recognition to the inherent powers of a Court such a power was recognized as appears from 17 ALL. 29,[5] 33 Cal. 927[6] and other cases. In 33 Cal. 927[6] Woodroffe J. observed:

"Law cannot make express provisions against all inconveniences, and that the Court had, therefore, in many cases where the circumstances warranted it, and the necessities of the case required it, acted upon the assumption of the possession of an inherent power to act *ex debito justitiae* and to do that real and substantial justice for the administration of which it alone exists".

These observations are cited with approval in I. L. R. (1941) 1 Cal. 490[7] and I. L. R. (1940) ALL. 201.[8]

[7] According to S. 10, Civil P. C., the Court is forbidden from proceeding with the trial of a suit when the matter in issue in the subsequent suit is directly in issue in the previously instituted suit between the same parties or between the parties under whom they or any of them claimed under the same title where the suit is pending in British India having jurisdiction to grant the relief. It is not disputed that all the requirements of S. 10, are satisfied so far as the firm and Harikisan are concerned and as against Harikisan the suit is liable to be stayed. It is however contended that the suit cannot be stayed so far as defendants 1 and 2 are concerned as they were not parties to the previously instituted suit. It is true that so far as defendants 1 and 2 are concerned the subsequently instituted suit cannot be said to be a parallel suit as the findings in First Appeal No. 18 of 1945 would not operate as *res judicata* as held in 61 Cal. 670[9] and A. I. R. 1942 Bom. 314,[10] but a finding regarding the ownership of the firm and its right of redemption of 250 bales which would be binding between the firm and Harikisan would have a material bearing so far as the suit between Harikisan and defendants 1 and 2 is concerned. Thus even if S. 10, Civil P. C., does not as such apply, the circumstances of this case, the interest of justice and the balance of convenience justify the staying of the entire suit as against all the defendants. On the other hand, serious complications may arise if the suit is allowed to proceed.

[8] It is doubtful if for the application of S. 10, Civil P. C., there should be a complete identity of parties or a complete identity of the subject-matter. Such a view would furnish a handle to the unscrupulous litigants to escape from the operation of S. 10 by adding some formal party who was not a party in the previously instituted suit or add some nominal relief not covered by the previous suit. It is enough as pointed out in the exhaustive commentary on S. 10, Civil P. C., by Chitaley and Annaji Rao that there should be a substantial identity of parties in the two suits. The same applies to the subject-matter.

[9] The learned counsel for the non-applicant relied on 48 Bom. L. R. 633[11] which lays down the undisputed proposition that all the issues in the subsequent suit should be covered by the previously instituted suit. The decision in I. L. R. (1945) Nag. 634[12] is also to the same effect.

[10] Finally I hold that the lower Court should have stayed the trial of civil suit No. 2-B of 1946 under S. 10 read with S. 151, Civil P. C., and I order accordingly. The revision is allowed with costs. Counsel's fee Rs. 30.

R.G.D. *Revision allowed.*

A. I. R. (35) 1948 Nagpur 299 *[C. N. 101.]*

MANGALMURTI J.

Mt. Deokibai w/o Surtasao—Defendant—Appellant v. *Punjabrao s/o Bhola — Plaintiff—Respondent.*

Second Appeal No. 306 of 1943, Decided on 14-3-1947, from appellate decree of 1st Addl. Dist. Judge, Nagpur, D/-16-2-1943.

(a) C. P. Tenancy Act (1 [I] of 1920), S. 105 (a) —Applicability — Transfer of interest in absolute occupancy holding void — S. 105 (a) does not bar jurisdiction of civil Court.

Section 105 (a) does not bar the jurisdiction of a civil Court where there is no legal transfer of the interest of an absolute occupancy tenant. [Para 3]

Where a minor is living under the guardianship of his father a sale of the minor's interest in an absolute occupancy holding by his brother who is not his guardian is void: 14 A. I. R. 1927 Bom. 611, *Rel. on.* [Para 2]

Hence where such sale was pre-empted by the lambardar under S. 6 of the Act as it stood before the Amending Act (11 [XI] of 1940) the jurisdiction of the civil Court to entertain a suit by the minor for possession would not be barred by S. 105 (a): 15 A. I. R. 1928 Nag. 249, *Disting.* [Para 3]

(b) C. P. Tenancy Act (1 [I] of 1920), S. 105— Interpretation of — Interpretation of statutes.

A statute like the C. P. Tenancy Act creating a special jurisdiction must be very strictly construed especially when it seems to have the effect of depriving the subject of a common law right of suit in the ordinary civil Court: 8 N.L.R. 107, *Rel. on.* [Para 3]

Annotation: ('44-Com.) C. P. C., Preamble N. 7 Pts. 64, 65.

(c) Civil P. C. (1908), S. 9 — Court of special jurisdiction does not carry with it power to act beyond that jurisdiction—Action *ultra vires* of such jurisdiction gives cause of action in civil Court: 8 N. L. R. 107 and 27 A. I. R. 1940 P. C. 105, *Rel. on.* [Para 4]

Annotation: ('44-Com.) C. P. C. Preamble N. 7, Pts. 66; S. 9, N. 53, Pt. 6

(d) Hindu law — Minor — De facto guardian — Alienation of minors' property by, neither for necessity nor for benefit of estate of minor — Alienation is voidable and not void: 13 A. I. R. 1926 Mad. 457, *Rel. on.* [Para 5]

Cases referred:—

1. ('27) 51 Bom. 1040 : 14 A. I. R. 1927 Bom. 611 : 105 I. C. 722, Harilal v. Gordhan.
2. ('12) 8 N. L. R. 107 : 16 I. C. 449, G. I. P. Rly. Co. v. Amraoti Municipality
3. ('40) I. L. R. (1940) Mad. 599 : 27 A. I. R. 1940 P. C. 105 : I. L. R. (1940) Kar. P. C. 194 : 67 I. A. 222 : 188 I. C. 231 (P. C.), Secy of State v. Mask & Co.
4. ('28) 15 A. I. R. 1928 Nag. 249 : 109 I. C. 615, Balaji Koshti v. Rambilas.
5. ('26) 49 Mad. 768 : 13 A. I. R. 1926 Mad. 457 : 92 I. C. 827, Seetharamamma v. Appiah.
6. ('28) 15 A. I. R. 1928 Nag. 151 : 107 I. C. 516, Waman v. Vishnu.

M. N. Gadgil and M. R. Rajkarne— for Appellant.

D. B. Padhye—for Respondent.

Judgment.—The respondent Punjabrao, who is a minor, and his elder brother Shripat inherited from their mother's father his interest in the absolute occupancy field Khasra No. 91, area 4.56 acres. Shripat for himself and also purporting to act as the guardian of the minor Punjabrao sold 2.65 acres out of this field to one Banudeo. The appellant Mt. Deokibai, who is the lambardar of the village thereupon pre-empted the sale under S. 6, C. P. Tenancy Act. Punjabrao therefore brought the suit out of which this second appeal has arisen claiming to be put in joint possession. It was decreed, and the appeal therefrom was dismissed by the Additional District Judge, Nagpur. Hence this second appeal by the defendant Mt. Deokibai.

[2] The learned District Judge has found that Punjabrao is living under the guardianship of his father Bhola and that Shripat is not the guardian of Punjabrao. The learned counsel for the appellant has not shown any reason for interfering with this finding of fact. So the sale by Shripat of Punjabrao's share is void: 51 Bom. 1040.[1]

[3] The learned counsel for the appellant, however, contended that the jurisdiction of civil Courts was barred in this case under S. 105 (a), C. P. Tenancy Act, which says :

". . . . no Civil Court shall exercise jurisdiction over . . . . (a) any matter provided for in S. 6 as to the enforcement by the landlord of his right to purchase the right of an absolute occupancy tenant. . . . . "

This case is governed by S. 6, C. P. Tenancy Act as it stood before the amendment made by the C. P. Tenancy (Amendment) Act, 1939 (Act 11 [XI] of 1940). That section dealt with the right of transfer by an absolute occupancy tenant and permitted pre-emption when there was a transfer. In this case, however, there is no legal transfer at all, Shripat having had absolutely no right to transfer the share of Punjabrao who was then a minor. Section 105 (a) does not bar the jurisdiction of the civil Court in such a case where there is no transfer. It is a well-established rule that a statute purporting to create a special jurisdiction must be very strictly construed, especially when it seems to have the effect of depriving the subject of a common law right: 8 N. L. R. 107.[2]

[4] Concerning this question of jurisdiction we get in I. L. R. (1940) Mad. 599[3] at p. 614, the following very instructive remarks of their Lordships of the Privy Council :

"It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

It is clear from the last part of these remarks that the Court of special jurisdiction does not carry with it a power to act beyond and outside that jurisdiction. Therefore action which is ultra vires of such jurisdiction gives a cause of action in the civil Court: 8 N. L. R. 107.[2]

[5] The learned counsel for the appellant relied on A. I. R. 1928 Nag. 249.[4] But it is not applicable to the present case as in that case it was the guardian of the minor who had given the notice to the defendant of her intention to sell. Such an alienation, i. e. an alienation by a *de facto* guardian, is not void but only voidable if it is neither for necessity nor for the benefit of the estate of the minor: 49 Mad. 768.[5] It is therefore not necessary in this case to go into the question of conflict between the decisions in A. I. R. 1928 Nag. 249[4] and A. I. R. 1928 Nag. 151.[6] There is therefore no force in the appeal, and it is hereby dismissed with costs.

G.N. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 300 *[C. N. 102.]*

BOSE J.

Marotrao Shama — Appellant v. *Narayan Jasrup and others —Respondents.*

Second Appeal No. 656 of 1943, Decided on 12-12-1947, from Appellate Decree of Dist. Judge, Wardha, D/- 18-8-1943.

(a) C. P. Land Revenue Act (2 [II] of 1917), S. 157 (4)—S. 157 (4) is not governed by S. 149.

Section 157 (4) is not governed by S. 149. The section provides the lambardar with a speedy and summary remedy when he pays the land revenue on behalf of a Malik-Makbuza, but it does not take away any of his ordinary rights of suit. In the same way, though immediate effect is given to the Deputy Commissioner's order of sale the rights of those affected to agitate the matter in the regular Courts is not taken away. [Para 21]

(b) Civil P. C. (1908), O. 21. R. 22 — Omission to give notice renders sale void.

An execution sale which is held without notice to the parties concerned is a nullity : 32 Cal. 296 (P. C.), *Foll.* [Para 26]

Annotation: ('44-Com.) Civil P. C. O. 21, R. 22 N. 5.

(c) Civil P. C. (1908), O. 21, R. 22—Death of judgment-debtor after attachment—Sale without notice to legal representatives is nullity.

When a judgment-debtor dies, even after attachment, any sale of his property held after his death is a nullity against his legal representatives unless they are noticed: 1940 N. L. J. 148, *Foll.* [Para 27]

Annotation: ('44-Com.) Civil P. C., O. 21, R. 22 N. 5.

Cases referred :—

1. ('05) 32 Cal. 296 : 32 I. A. 23 : 8 Sar. 734 (P. C.), Khiarajmal v. Diam.
2. ('40) 1940 N. L. J. 148, Akola Central Bank v. Pandoo.
3. ('15) 42 Cal. 72 : 1 A.I.R. 1914 P. C. 129 : 41 I. A. 251 : 24 I. C. 304 (P. C.), Raghunath Das v. Sundar Das.
4. ('93) 20 Cal. 370, Gopal Chunder Chatterjee v. Gunamoni Dassi.

M. Adhikari — for Appellant.

D. B. Nazbile and T. M. Chande— for Respondents.

Judgment. — This is a suit to set aside the sale of a Malik-Makbuza Plot No. 26/2 made under S. 157, Central Provinces Land Revenue Act of 1917.

[2] The field was sold at the instance of defendant 2 who was the lambardar of the village in which the field is situated. The appellant, who was defendant 1, is the auction-purchaser. The history of the plot is as follows. The original owner of this Malik-Makbuza plot and two other fields, which were khudkasht, was one Bhagwantrao. He mortgaged all three to four sets of persons, namely (1) Narayan, the present plaintiff 1, (2) the firm of Mansukhdas Pannalal whose owners were (a) Tejmal, (b) Harakchand, (c) Narayandas and (d) Khushalchand (the Narayandas No. (c) is not the same as the Narayan just mentioned.) (3) Jitmal and (4) Punamchand Agyaram.

[3] In due course the mortgagees sued on their mortgage and obtained a foreclosure decree on 14th June 1932. They obtained possession on 1st November 1933 : *see* Ex. P-2 (when I say they obtained possession, the one who took actual possession was Narayandas.)

[4] From 1st November 1933 down to 16th December 1940 no land revenue was paid and so the lambardar had to pay what was due to Government. Having done this he initiated proceedings under S. 157, Land Revenue Act.

[5] Though the fields were transferred to the mortgagees under their foreclosure decree no steps were taken to obtain mutation in the case of the Malik-Makbuza plot and Bhagwantrao continued to be recorded as the Malik-Makbuza down to the date of the auction sale in 1940. Exhibits D-10 to D-15 are the relevant Jamabandis from 1933 to 1940.

[6] The history of the Khudkasht plots in the revenue records is different. In the year 1934-35 they were recorded as the Khudkasht of one Ramrao (Ex. D 3). Then in the years 1935 36 to 1939-40 one of the mortgagees, Punamchand and one Khioraj were entered as the occupancy tenants of these fields (*see* Exs. D-4 to D-8). I have referred to Punamchand as one of the mortgagees. Actually of course he was now one of the owners because of the foreclosure decree in 1932, but it will be convenient to refer to these owners as the mortgagees throughout this judgment.

[7] In 1940-41, the year in which the auction sale took place, three of the mortgagees, Jitmal, Narayan and Punamchand, along with two others, Harakchand and another Narayan, were recorded as the occupancy tenants (*see* Ex. D 9).

[8] The revenue was not paid and the Lambardar had to pay it over to Government. In consequence the Lambardar instituted two separate cases under S. 157. The first was filed on 30-7-1937 (Ex. P-12) for the land revenue of the year 1936-37 in connection with all three fields. Rupees 63-12-0 was claimed for the Malik-Makbuza field now in suit and Rs. 47 for the other two. The proceedings were against Jitmal alone.

[9] Exhibit P-5 contains the order sheets relating to that case. It shows that various attempts were made to serve Jitmal, but he was not served till the hearing of 23-2-1937 and on that date the Lambardar asked that the R. R. C. be issued through the Deputy Commissioner. After that nothing further was done for some months.

[10] In the meanwhile a second application, Ex. P-16, was filed on 26-7-1938. This related to to the Malik Makbuza field alone. The Lambardar sought to recover Rs. 63-12-0 for the year 1937-38. This also was against Jitmal alone.

[11] The order sheets relating to this case will be found in Ex. P-7. Jitmal appeared on 8-9-1938 and said that he should only be made liable for one-third of the claim because there were two other co-sharers, Punamchand and Narayandas. The Lambardar was then told to amend his application and serve the other two. The application was amended (Ex. P-15), but the other two co-sharers could not be served and so an R. R. C. was ordered to be issued against Jitmal on 30-11-1938, and against the other two in their absence on 30-1-1939.

[12] Nothing was done till 20-2-1940 and then the first case, Ex. P-5, was linked up with the second and the proceedings continued in the second.

[13] On 23-4-1940 the Lambardar asked for attachment of the Malik-Makbuza field alone. On 30-7-1940 the Naib-Tahsildar was shown the sale-deed under which the four mortgagees obtained the three fields. He was informed that the fields had been mutated in the names of these four persons. He therefore directed that enquiries should be made.

[14] On 15-8-1940, the Lambardar said he wanted to attach only half the Malik-Makbuza field and asked that it be sold in satisfaction of the arrears in both cases. This was sanctioned and the Naib-Tahsildar directed that the prohibitory order forms be put up. This was done and the Deputy Commissioner sanctioned the sale on 23-9-1940 (Ex. P 6) and the sale was eventually held on 16-12-1940. The field was then purchased by defendant 1-appellant and the sale was confirmed on 1-2-1941 (Ex. P-6).

[15] Jitmal died on 2-10-1940 after the Deputy Commissioner's order sanctioning the sale but before the sale. Thereupon on 31-3-1941, after the sale had been held and after the confirmation, the legal representatives of Jitmal applied for review (Ex. D-20) and at the same time made an application for substitution (Ex. D-19). These applications were dismissed on 31-3-1941 (Ex.P-7).

[16] Having failed in the revenue Courts, the mortgagees and their representatives, who by that time were the owners of the property, brought the present suit seeking to set aside the revenue proceedings and asking for possession.

[17] The case was contested on grounds of fraud and the like, but those points have been dropped here because of the finding of fact that there was no fraud. The two points which I have to see are, (1) whether the sale could proceed in the absence of Jitmal's legal representatives, and (2) whether the interests of the other mortgagees who were not noticed are affected.

[18] As the sale here was held under the Land Revenue Act it is necessary first to look to the provisions of that Act. Section 157 is the material section. It authorises a Lambardar who has paid any land revenue due by any Malik Makbuza or proprietor to apply to the Deputy Commissioner and ask the Deputy Commissioner to recover the same on his behalf.

[19] The Deputy Commissioner is then authorised to proceed to recover the sum "as if it were an arrear of land revenue." Sub-section (4) then proceeds:

"No appeal shall lie from an order under this section; but any person affected by such order may institute a suit in a civil Court to establish the right which he claims."

[20] If that were all the matter would be plain sailing. The Lambardar applied, the Deputy Commissioner acted, and this is the suit which is contemplated. But it was argued that this section is governed by S. 149 which limits such suits to two grounds, namely (1) fraud and (2) that no arrears were due. It was said that sub-s. (5) of S. 157 makes it clear because it says "If the civil Court decides that no arrear was due, and the property has been sold for the recovery of arrears, the sale shall become void."

[21] I am of opinion that S. 157 (4) is not governed by S. 149. The section provides the Lambardar with a speedy and summary remedy when he pays the land revenue on behalf of a Malik-Makbuza, but it does not take away any of his ordinary rights of suit. In the same way, though immediate effect is given to the Deputy Commissioner's order of sale the rights of those affected to agitate the matter in the regular Courts is not taken away.

[22] In my opinion S. 157, so far as it goes, is complete in itself, and the direction that the Deputy Commissioner shall recover the money "as if it were an arrear of land revenue" merely indicates the mode of recovery and does not clothe the Lambardar with any of the attributes or privileges of Government conferred by the earlier sections. The only right given to him is to make the application. Once that is done the Deputy Commissioner does everything else for him and recovers the money. The rest of the section tells the Deputy Commissioner how to proceed, and sub-s. (4), says that any person affected by his action can fight the matter out in the civil Courts in the ordinary way if he is aggrieved.

[23] Sub-section (5) of S. 157 is there for a special reason. It is not intended to limit the scope of the suits which sub-s. (4) permits. The reason is this. Sub-s. (3) empowers the Deputy Commissioner to decide how much was due, and if sub-s. (5) had not been there the jurisdiction of the civil Courts to enquire into this particular matter would have been barred under S. 220 because this is one of the matters which a Revenue Officer, namely the Deputy Commissioner, is empowered by the Act to determine. But that has the effect of extending the scope of the suit contemplated by sub-s. (4) and not of curtailing it.

[24] Turning next to the Deputy Commissioner's powers, as he is directed to recover the amount "as if it were an arrear of land revenue" he has to proceed in the manner set out in the earlier sections. These sections draw a distinction between attachments and sales under Chap. 10 of the Act other than S. 128 and those made specially under S. 128. Section 128 is limited to recoveries of arrears *due to Government*. For that there are special provisions and powers in addition to the ordinary ones. But in all other

cases under Chap. 10, S. 131 directs that the attachment and sale shall be as nearly as may be "according to the law for the time being in force for the attachment and sale of such property under the decree of a civil Court."

[25] Section 149 is an empowering section and does not impose limitations. As I have said, S. 220 excludes the jurisdiction of the civil Courts in all matters with which the Revenue Officers are empowered to deal under the Act. The attachment and sale of properties for arrears of land revenue and for sums directed to be recovered as if they were arrears is one of these matters. Therefore without S. 149 (2) no civil suit would have lain. Sub-s. (2) modifies this and permits suits in two classes of cases. Sub-section (4) of S. 157 does the same thing in yet another class of case, only there the scope of the permitted suit is wider.

[26] As S. 131 directs that all sales under Chap. 10 which are not separately provided for under S. 128 shall be as nearly as may be in accordance with the law relating to the attachment and sale of such property under the decree of a civil Court it follows that the law which prevails there must obtain here as well. Under that law a sale which is held without notice to the parties concerned is a nullity : *see* 32 Cal. 296[1] at p. 312. That being the case, the interests of all the mortgagees except Jitmal are not affected.

[27] As regards Jitmal 1940 N. L. J. 148[2] holds that when a judgment-debtor dies, even after attachment any sale of his property held after his death is a nullity against his legal representatives unless they are noticed. This is based on a Privy Council decision in 42 Cal. 72[3] at. p. 83. and on 20 Cal. 370.[4] As Jitmal's legal representatives were not noticed the sale is void against them as well.

[28] The decisions of the Courts below are upheld, and the appeal is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 303 *[C. N. 103.]*

PADHYE J.

Vithoba Chimanji Bangde, Auction-purchaser and another, Decree-holder—Applicants v. *Mahadeo Kesheorao Meghe and others — Judgment-debtors — Non-Applicants.*

Civil Revn. No. 367 of 1946, Decided on 30-9-1947, from order of Addl. Dist. Judge, Wardha, D/- 21-8-1946.

(a) Civil P. C. (1908), O. 21, R. 89 — Notice of application under, to auction-purchaser is sufficient—He need not be made party.

The law nowhere requires that an auction-purchaser should be impleaded as a party to an application under O. 21, R. 89. It is sufficient if he has notice of this application before it is disposed of. Where the auction-purchaser took part in the proceedings in the executing Court and he raised all possible objections and in fact succeeded in the executing Court and was impleaded as a party in appeal, there is no substance in the objection by auction-purchaser, that he was not impleaded in the application under O. 21, R. 89. [Para 4]

Annotation : — ('44-Com.) Civil P. C., O. 21, R. 92 N. 4.

(b) Civil P. C. (1908), O. 21, R. 89 (as amended in Central Provinces) — Person having interest at time of petition can apply.

It is no longer necessary under R. 89, as amended in the Central Provinces, to prove that the applicant either owned the property or held an interest in the property before the sale. It is sufficient for the applicant to claim an interest in the property at the time of making the application under O. 21, R. 89. [Para 6]

Where an occupancy field is sold in execution of a rent decree in respect of the field against a certain person *A*, *B* and *C* who are the recorded tenants of the field at the time of the petition, and who have been in continuous possession of the field, for a long time have an interest to safeguard and to maintain their possession over the field from which they may be dispossessed as a result of the auction sale and are, therefore, entitled to apply under O. 21, R. 89 : 22 A. I. R. 1935 Lah. 51 and 23 A. I. R. 1936 Lah. 561, *Rel. on*; 11 A. I. R. 1924 Mad. 723, *Ref.* [Paras 5 & 6]

Annotation : ('44-Com.) Civil P. C., O. 21 R. 89 N. 12 Pt. 12.

Cases referred :—

1. ('35) 22 A. I. R. 1935 Lab. 51, Ram Chandra v. Narain Parshad.
2. ('36) 23 A. I. R. 1936 Lah. 561 : 168 I. C. 819, Jamna Das v. Jalal-ud-Din.
3. ('24) 11 A. I. R. 1924 Mad. 723 : 79 I. C. 874, Patti Nayaker v. Suppammal.

T. B. Pendharkar — for Applicants.

R. V. Khare — for Non-applicants 1 and 2.

Order.—Between 1938-1941, Ganpati, the landlord, obtained against Mt. Savitri three rent decrees amounting to a total of Rs. 304-0-6 in respect of an occupancy field No. 380/2 of patti E of mauza Paunar. In execution of these decrees the aforesaid field was put to auction on 28th May 1945 for Rs. 650 and it was purchased by Vithoba auction-purchaser, (applicant 1). On 20th June 1945 the present non-applicants 1 and 2 deposited the decretal amount, 5 per cent. of the sale proceeds as compensation to the purchaser, and applied that the auction sale held on 28th May 1945 should be set aside. In that application they pointed out that they are the recorded tenants of the field sold and were also in its possession for several years and that they, therefore, had sufficient interest to entitle them to apply under O. 21, R. 89, Civil P. C.

[2] This application was opposed both by the decree-holder and also by the auction-purchaser Vithoba. They contended that the applicants had no *locus standi* to apply under O. 21, R. 89, Civil P. C., and that they are also barred by the principle of *res judicata* from agitating that they had such interest as in the previous execution case their application to set aside the sale under O. 21, R. 89 of the Code was rejected on the ground that they had no *locus standi* to apply

under that provision of law. These contentions prevailed in the executing Court and the application under O. 21, R. 89 was dismissed.

[3] The non-applicants 1 and 2, then appealed to the Court of the Additional District Judge, Wardha, and the learned appellate Judge in his order under revision held that the appellants were in possession of this field for several years in the past and this in itself is sufficient interest, within the meaning of O. 21, R. 89, Civil P. C., as now amended, to entitle the applicants to deposit the amount and to apply for setting aside the sale. The appeal was consequently allowed. The auction-purchaser and the decree-holder have jointly filed this revision against the aforesaid order of the appellate Court.

[4] One of the contentions raised on behalf of the auction-purchaser in the executing Court was that an application under O. 21, R. 89, Civil P. C. was not competent because the auction-purchaser was not impleaded in the application and no notice was issued to him. The appellate Court has correctly overruled this objection on the ground that there was sufficient compliance with the law as the auction-purchaser had an opportunity of opposing the application and he, in fact, did oppose it before it was disposed of under O. 21, R. 92 of the Code. The law nowhere requires that an auction-purchaser should be impleaded as a party to an application under O. 21, R. 89. It is sufficient if he has notice of this application before it is disposed of. In the present case, the auction-purchaser took part in the proceedings in the executing Court and he raised all possible objections and in fact succeeded in the executing Court. He was impleaded as a party in appeal. There is thus no substance in the objection by the auction-purchaser.

[5] It appears from the documents on record that in 1931 the name of Savitri as a tenant of the field No. 380/2 was removed and the names of the present non-applicants 1 and 2 were recorded and the revenue record shows that this field is continuously recorded and is also in continuous possession of non-applicants 1 and 2. They have certainly an interest to safeguard and to maintain their possession over this field from which they may be dispossessed as a result of the auction sale in favour of applicant 1. Order 21, R. 89 of the Code is recently amended and its scope is now very much enlarged. According to the amended provision "any person claiming any interest in the property sold at the time of the sale or at the time of the petition, may apply to have the sale set aside on his depositing in Court, etc....." It is no longer necessary now that the person applying must be either owning such property or holding an interest therein by virtue of a title acquired before such sale.

[6] An amendment similar to the Central Provinces amendment was made to the original O. 21, R. 89, Civil P. C. by the Lahore High Court in 1932. In A. I. R. 1935 Lah. 51[1] it was held that it was no longer necessary under the new rule to prove that the applicant either owned the property or held an interest in the property before the sale. It is sufficient now for the applicant to claim an interest in the property at the time of making the application under O. 21, R. 89, Civil P. C. If he does so and deposits in Court 5 per cent. of the purchase price for payment to the auction-purchaser and the amount due to the decree-holder he is entitled to have the sale set aside. This decision was followed in A. I. R. 1936 Lah. 561.[2] In my view the learned Judge of the appellate Court was, therefore, right in holding that the present non-applicants 1 and 2 had sufficient interest in the property within the meaning of O. 21, R. 89 of the Code as amended to enable them to deposit the amount and to claim that the sale of the property of which they were in possession peacefully and for a very long time should be set aside.

[7] In fact, in A. I. R. 1924 Mad. 723[3] Venkatasubba Rao J. went further and held that even a trespasser who is in possession of property sold in a court auction prior to the execution sale, is a person holding an interest in the property sold by virtue of a title acquired before such a sale within O. 21, R. 89, Civil P. C.

[8] Even apart from what is stated above, to indicate that the order passed by the appellate Court was correct and legal I see no reason to interfere with the decision of the appellate Court in revision. The learned Judge has properly exercised his jurisdiction in a perfectly legal and regular manner and his decision, whether right or wrong, cannot therefore, be interfered with under S. 115, Civil P. C. The revision application is dismissed with costs. Counsel's fee Rs. 20.

R.G.D. *Revision dismissed.*

A. I. R. (35) 1948 Nagpur 304 *[C. N. 104.]*

BOSE AND PADHYE JJ.

Ramrao Shamrao and others — *Appellants* v. *Dattadayal Bishandayal and others*—*Respondents.*

First Appeal No. 82 of 1940, Decided on 22-10-1946, from decree of 1st Addl. Dist. Judge, Wardha, D/- 30-3-1940.

(a) Civil P. C. (1908), S. 11 — Consent decree against minor—Res judicata.

A consent decree once obtained whether by consent or otherwise, stands and must be obeyed until it is set aside. It must be obeyed not only in execution but in subsequent proceedings and it binds the parties as effectively as any other decree so long as it is there. In

this respect there is no difference between a consent decree to which all parties are adults and one where a minor is concerned, though a minor is entitled to impeach a decree passed against him if the next friend or guardian for the suit is guilty of fraud or gross negligence. It has to be set aside by proper proceedings instituted for that purpose but cannot to called in question by way of objection in a subsequent suit, where it operates as *res judicata* : 16 A. I. R. 1929 P. C. 289, *Rel. on.* [Paras 13, 14, 15]

Annotation : ('44-Com.), Civil P. C., S. 11, N. 114.

(b) Hindu law — Father — Antecedent debt — Relation between father's immorality and debt must be established.

Under Hindu law the sons cannot challange the antecedent debt of their father unless they can first establish their father's immorality and next establish some reasonable connection between the debt and the immorality; that is to say, unless they can show that the debt was borrowed for immoral purposes : *Case law referred.* [Para 21]

Cases referred :—

1. ('29) 16 A. I. R. 1929 P. C. 289: 118 I. C. 7 (P. C.), C. H. Kinch v. E. K. Walcott.
2. (1877) 6 Ch. D. 297 : 46 L. J. Ch. 838 : 37 L. T. 419 : 25 W. R. 793, Flower v. Lloyd.
3. ('91) 15 Bom. 594, Mirali v. Rehmoobboy.
4. ('41) I. L. R. (1941) Nag. 513 : 27 A. I. R. 1940 Nag. 163 : 194 I. C. 861, Ghasiram v. Mt. Kundanbai.
5. ('40) I. L. R. (1940) Nag. 573 & 618 : 27 A. I. R. 1940 Nag. 305 : 191 I. C. 241 (F. B.), Kashinath v. Bapurao.
6. ('88) 15 Cal. 717 : 15 I. A. 99 : 5 Sar. 186 (P. C.), Bhagbut Pershad Singh v. Girja Koer.
7. ('33) 64 M. L. J. 148 : 20 A. I. R. 1933 P. C. 38 : 141 I. C. 509 (P. C.), Shyam Narayan v. Suraj Narain.
8. ('13) 17 C. W. N. 124 : 17 I. C. 729, Sri Narain v. Lala Raghubans.
9. (1854-57) 6 M. I. A. 393 : 1 Sar. 552 : 2 Suther. 29 (P. C.), Hanoomanpersaud Pandey v. Mt. Babooee Munraj Kunweree.
10. ('38) I. L. R. (1938) Nag. 91 : 25 A. I. R. 1938 Nag. 112 : 179 I.C. 129, Bhagwant Rao v. Anandrao.

D. T. Mangalmurti and P. S. Pultamkar — for Appellants.

M. R. Bobde and V. V. Kelkar — for Respondents 1 and 2.

Judgment.—This is an appeal by defendants 5 to 9 in a suit on a mortgage dated 11 1-1921 (Ex. P.3) for Rs. 30,000 executed by three brothers Shamrao, Govindrao and Shankar. Of these Shankar was a minor and was represented by his eldest brother Shamrao who acted as his guardian. The mortgage was in favour of defendant 1. On 24 4 1934 he and his sons assigned it to the plaintiffs and the plaintiffs sue on it.

[2] The following genealogical tree will show the relationship between the defendants, or rather those with whom we are concerned in this appeal.

JHANABAPU = Parbatibai

- Shamrao = Saraswati (Defendant 4)
  - Ramrao (Deft. 6)
  - Ganeshrao (Deft. 7)
- Govindrao (Defendant 5)
  - Vyankatrao (Deft. 8)
  - Manekrao (Deft. 9.)
- Shankar (Defendant 6 W. Nanibai.)

Defendants 4 and 5, Shamrao and Govindrao are dead and are represented by their respective sons who were already on the record. Defendant 6 Shankar is also dead and is represented by his widow Mt. Nanibai.

[3] The defence to the action is considered in stages. We will deal first with Shankar's position. He was a minor at the date of the mortgage. The lower appellate Court finds that none of the debts were incurred by the father of the mortgagors Jhanabapu. It also finds that the debts were not for legal necessity. Accordingly, the defendants state that Shankar's share is not liable.

[4] The answer to this contention is that the matter is now *res judicata*. In the year 1923 Shankar and his mother Parbatibai (Shankar was then still a minor) sued Shamrao and Govindrao for partition; the suit is Civil Suit No. 9 of 1923. The mortgagee Narsappa was joined as a defendant to the case. Shanker raised the questions of legal necessity and the like. The plaint is Ex. P-18. The mortgagee did not oppose the partition but pleaded that the mortgage was binding on the whole body of coparceners. This plea was taken in Ex. P-14. In another statement (Ex. P-13) the mortgagee also pleaded in the alternative that if the mortgage were found not to be binding on the minor Shankar's interest then the items of the joint family property should as far as possible be allotted to the shares of Shamrao and Govindrao.

[5] The brothers of Shankar also contested the suit. One of the pleas taken by the two brothers was to the effect that the plaintiff Shankar was not the son of Jhanabapu. That implied that Shankar's mother Parbatibai had been immoral and that Shankar was her illegitimate son. That is not stated in so many words in the statement (Ex. P-19), but it is the necessary effect of what they say. We refer to this because of the plea of coercion which we will have to consider at a later stage.

[6] The parties to this litigation compromised their dispute. The compromise petition (Ex. P-15) was signed by all the parties including the mortgagee who was represented by a pleader Mr. D. V. Gharpure. The portion of the compromise which relates to the mortgagee is as follows: The petition first of all sets out that three of the instalments due on the mortgage have been fully paid together with interest and that only seven remained. Then it continues :

"The liability of the plaintiffs and the defendants 1 to 4 will be 1/3rd and 2/3rd respectively. With regard to defendant 5 it be decided in this compromise that the plaintiffs and defendants 1 to 4 are all liable for the remaining mortgage debt and all the conditions in the mortgage-deed."

[7] The plaintiff Shankar who was then a minor was represented in the litigation by his mother Parbatibai who acted as his next friend,

He was represented by a senior pleader Mr. Lule. The Court considered whether it should accord sanction to the compromise and reached the conclusion that the compromise was for the benefit of the minor and after stating out its reasons sanctioned the compromise. This will be found in EX. P-3.

[8] Following this a compromise decree was drawn up. The part of the decree which relates to the mortgagee is in these terms. It sets out that the first three kists have been paid with interest, and it then states that :

"all the parties agree the remaining seven kists with whatever interest would be chargeable are still to be paid to defendant 5 and that plaintiffs 1 and 2 and defendants 1 to 4 would be liable jointly and severally for the above balance of the mortgage money .... A declaration be granted in favour of defendant 5 that his mortgage stands effective for the remaining seven kists and the interest due thereupon and subject to all other conditions specified in the mortgage-deed as against plaintiffs 1 and 2 and defendants 1 to 4."

[9] It is clear from this decree that the mortgagee was entitled to enforce his mortgage for the balance due against the whole family. There is implicit in that the conclusion that the mortgage was good and binding. That is not stated in so many words but it is impossible to hold in a decree that a mortgagee can enforce his mortgage against the parties mentioned in the decree without at the same time importing into the decree the conclusion that the mortgage is binding against all the parties.

[10] The defendants seek to challenge this decree on the ground that a compromise decree does not act as *res judicata*, and also on the ground that it is open to a minor to challenge a compromise decree on any ground which he can take in a suit brought against him on the mortgage.

[11] We will deal first with the position of compromise decrees and their effect on the parties as regards *res judicata*. This matter is concluded by their Lordships of the Privy Council in A.I.R. 1929 P. C. 289[1] at p. 294. Their Lordships point out there that

"an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal .... In other words the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal."

Their Lordships were dealing there with the question of *res judicata* and that, in our opinion, concludes the matter. A consent decree so long as it stands binds the parties as effectively and in the same way as any other decree; although, so far as getting that decree set aside is concerned, the matter stands on a different footing from other decrees.

[12] That brings us to the question as to how a consent decree can be set aside. Their Lordships indicate one method, namely, mutual agreement. That does not apply here. The other is, to quote the quotation of their Lordships of the Privy Council, to get it "set aside in proceedings duly constituted for the purpose." These words have been construed in English cases—in fact their Lordships quoted an English case—and also in India, to mean, to set aside in a suit properly instituted for that purpose. Apart from the English decision quoted in their Lordships decision, there is another in (1877) 6 Ch. D. 297.[2] There are also several other cases which will be found collected by Sir Dinshah Mulla in Edn. 11 of his Civil Procedure Code at p. 358. The learned author also states there that this can only be done by a suit. A similar conclusion was reached in 15 Bom. 594[3] at p. 598 and by a Division Bench of this Court in I. L. R. (1941) Nag. 513.[4]

[13] These cases were not cases of minors, and the question arises whether there is any difference between a consent decree to which all the parties are adults and one where a minor is concerned. In our opinion, there is none so far as this point is concerned, though the manner and the grounds on which a consent decree can be set aside by a minor are different and somewhat wider than the grounds on which an adult can do so. The general principle is that a decree is an order of a Court, and to quote the Privy Council quotation the judgment-debtor

"must when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose."

That, in our opinion, is the general principle which runs through the doctrine of estoppel by record. A consent decree once obtained, whether by consent or otherwise, stands and must be obeyed until it is set aside. It must be obeyed not only in execution but in subsequent proceedings and it binds the parties as effectively as any other decree so long as it is there.

[14] So far as minors are concerned, their position is dealt with by Sir Dinshah Mulla at p. 70 of Edn. 11 of his Civil Procedure Code. The learned author points out there that a decree passed against a minor properly represented is binding upon him to the same extent as a decree passed against an adult, though a minor is entitled to impeach a decree passed against him if the next friend or guardian for the suit is guilty of fraud or gross negligence. Also, of course, if there was fraud. At page 1029 Sir Dinshah states that:

"A compromise decree may be set aside either in a regular suit or upon an application for review to the Court that passed the decree. But it cannot be called

in question by way of objection to any proceeding taken in execution of it."

In our opinion, the same principle applies when a decree is being considered in a subsequent suit instead of in execution. The position is also dealt with in Mayne's Hindu Law (Edn. 10) at p. 915. The learned author states that:

"A decree in a suit in which a minor is properly represented may be liable to be set aside for fraud or other reasons, but till set aside it binds him, and proceedings to get rid of it must be commenced within three years from the date of the discovery of the fraud or from the termination of the minority."

[15] As this decree has never been set aside, and as this is not a suit constituted for that purpose, it stands good and we have next to consider the effect of it. As we have already said it is plain from the decree that the mortgagee is entitled to enforce his mortgage against all the mortgagors including the minor Shankar. It does not matter why it was so agreed. The fact remains that under the decree he is entitled. Accordingly it is not open to the minor or any one on his behalf now to challenge that decree.

[16] The learned counsel for the appellants contends that the decree says nothing about legal necessity and immorality of the father and so forth. He contends that these points were not in issue and there was no decision on them, and that, in any event, a decree by consent can only operate to create an estoppel under S. 115, Evidence Act, and that the principle of *res judicata* does not extend beyond, in any event, what is actually stated in the decree. We have already dealt with this and are of opinion that the matter is *res judicata* and that it is not open to the defendants to raise any plea which will have the effect of rendering the mortgagee's right to enforce his decree against the whole of the family property ineffective.

[17] The next point raised is that, in any event, Shankar's liability is restricted to Rs. 7000 under the compromise decree. He relies on cl. (2) of the decree which states that

"out of the lists of Rs. 32,148-0-0 admitted as joint debt by both sides as per details below the plaintiffs will be liable for one-third debt, i. e., Rs. 7000 0-0 only due on the mortgage of Narsappa Komti while the defendants will bear the other two-thirds of Narsappa and all the debts of all other creditors."

In our opinion, this relates to the liability of the members of the family *inter se* and not to the rights of the mortgagee. Those rights are to be found in cl. (7) of the decree the relevant portions of which we have already reproduced.

[18] Next we consider the position of the sons of Govindrao. The lower Court finds that these sons were not in existence at the date of the mortgage. This finding was accepted on behalf of the appellants in this Court. That being so, the sons cannot, in any event, challenge the mortgage because of the Full Bench decision in I. L. R. (1940) Nag. 573.[5] This is quite apart from the question of *res judicata*.

[19] Next, regarding the position of the sons of Shamrao. The finding is that only Rs. 19,378 of the mortgage debt is antecedent debt, and the rest is found by the lower Court not to be for legal necessity. Accordingly, the appellants say that the sons of Shamrao can challenge the mortgage to the extent of the balance, namely Rs. 10,622-0-0. In our opinion, the matter is concluded against the sons because of the previous suit. They are bound to the same extent as their father Shamrao. The decision there reached by consent was that the entire family property was to be liable for the mortgage. That concludes the matter.

[20] We may state that the mortgagee contests the findings of the lower Court which are against him on the point of legal necessity. But as, in our judgment, the mortgagee is bound to succeed on other grounds it is not necessary for us to enter into this.

[21] It was next urged that the sons of the mortgagors Shamrao and Govindrao have challenged the mortgage on the ground of immorality. This can only arise if the consent decree does not operate as *res judicata* and bind them. We have already held that it does. Therefore, we need only say very briefly that, in our opinion, it is beyond controversy that the sons cannot challange the antecedent debt of their father unless they can first establish their father's immorality and next establish some reasonable connection between the debt and the immorality that is to say, unless they can show that the debt was borrowed for immoral purposes. In our opinion, this is to be gathered from the Privy Council rulings. We need only quote 15 Cal. 717,[6] 64 M. L. J. 148[7]; 17 C. W. N. 124.[8] Also Mulla's Hindu Law, Edn. 9. p. 357 and Mayne's Hindu Law, Edn. 10, p. 442.

[22] The learned counsel for the appellants contends that the Privy Council decisions have been much misunderstood and relies on 15 Cal. 717[6] and an earlier Privy Council case in 6 M. I. A. 393[9] at p. 418. As we have said we do not intend to enter into this at length because of our finding on the question of *res judicata*. We merely content ourselves with stating that in our opinion the law is well settled and that it is necessary for the sons to show that the debt was borrowed for an immoral purpose. The finding here is that though the father was immoral there is no connexion shown between his immorality and the debt and that it is not proved that the debt was borrowed for any of those purposes. That finding regarding the facts

was not challenged, and we were not shown how there was any connexion. All that was argued was that the sons need do no more than establish generally that the father was immoral and that he was unlikely to be in need of money for other purposes. That in our judgment is not sufficient.

[23] It was then argued that the consent decree can be set aside because it was obtained by coercion. The plea regarding this is to be found in paras. 3 and 4 of Shankar's written statement. He there says that the decree was obtained by

"the exercise of undue influence, fraud and misrepresentation."

Later he says that it was obtained

"with the sole object of coercing her into submitting to the terms of compromise as dictated by them and defendant 1."

[24] The only detail regarding coercion, upon which reliance was placed in the appeal before us, was that Shamrao denied the legitimacy of Shankar and thus implied that his guardian and mother in that litigation, had been immoral. It is said that she was thus prevailed upon to enter into the compromise.

[25] As we have already said, this is not a proceeding in which we can entertain such a plea. It might be relevant in a proper suit for setting aside the compromise decree, but it cannot be taken by way of defence in the present suit. Apart from that, we have not been shown any other evidence. We do not know whether the lady was strong-willed, or otherwise. We do not know what advice she had beyond the fact that she was represented by a very senior pleader. Accordingly, we are unable to hold on that single allegation that there was coercion.

[26] We may add that the eldest brother Shamrao admitted in the mortgage deed by implication that his minor brother Shankar was a legitimate son of his father because he described him as his brother and joined him in the mortgage deed and acted as his guardian in that deed. This, however, is seized on by the appellant as one of the facts showing coercion. He says that the same person who admitted in the mortgage deed that Shankar was legitimate contended later in the partition suit that he was not. This, however, is not sufficient to constitute coercion.

[27] That leaves the question whether we should pass in this suit a decree for sale instead of one for foreclosure. It is said that the mortgage is an anomalous mortgage and, therefore, on the principle laid down in I. L. R. (1938) Nag. 91[10] we should exercise our discretion in passing a sale decree.

[28] We need not enquire here whether the mortgage is anomalous or not because even if it is, we are of opinion that the lower Court exercised a proper discretion in refusing to pass a decree for sale.

[29] The value of the property given by the appellants in their statement in the first Court is Rs. 40,000-0-0 at the time of the mortgage. According to them the value at the date on which they made the statements, namely 6-2-1943 was Rs. 31,980. The lower Court remarks that the property has fallen in value and it is clear from the statement of the appellants themselves that the property is worth about half of the amount due to the defendants on the decree. The decree is for Rs. 79,458-13-9. In addition to this we have the fact that the preliminary decree was passed on 30-3 1940 while a final decree was not made till 22-12-1943, that is to say, $3\frac{3}{4}$ years later. If the property really had any value disproportionate to the amount of the decree, it is evident that the mortgagors could and would have raised money on the strength of it to pay off this decree. Taking all these matters into consideration we are of opinion that the lower Court exercised a proper discretion in not allowing a sale. The appeal fails and is dismissed with costs.

D.R.R. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 308 *[C. N. 105.]*

HIDAYATULLAH J.

Bajya Hari — Appellant v. *Tarachand Hukumchand and others—Respondents.*

Misc. Appeal No. 43 of 1945, Decided on 31-1-1947, from order of Dist. Judge, Chhindwara, D/-6-11-1944.

(a) Limitation Act (1908), Art. 182 (5)—Step-in-aid of execution — Criterion — Compromise decree passed on award—Subsequent application for final decree is not step-in-aid of execution—Question of *bona fides* is irrelevant.

The words "step-in-aid of execution of a decree" postulate very clearly that there must be at least a decree in existence. The passing of a decree creates a dividing line between the suit and its execution. An application for the passing of a final decree would, therefore, be an application in the suit and it cannot by any stretch of imagination be placed beyond the dividing line marked by the decree in the case so as to be called a step-in-aid of execution of a decree. In cases where a decree is already in existence the application must necessarily be to aid the execution of that decree. Infructuous applications made in the suit are not steps-in-aid of execution.

Hence where a compromise decree passed on an award which allowed the judgment-debtor to pay the amount by instalments and on failure to pay three instalments the whole of the amount was to become due, an application by the decree-holder, on default of three instalments, for a final decree, whether bona fide or not, must inevitably be regarded as a proceeding in the suit itself though entirely superfluous because the relief claimed had already been got and is not therefore a step-in-aid of execution to enlarge the period of limitation. The question of bona fides is irrelevant : 25 A. I. R. 1938 Lah. 117; 29 A. I. R. 1942 Nag. 63; 31

A. I. R. 1944 Nag. 145 and 26 A. I. R. 1939 Cal. 488, *Rel. on*; 15 A. I. R. 1928 Mad. 38 and 26 A. I. R. 1939 Oudh 155, *Dissent.* [Para 4]

Annotation: ('42 Com). Lim. Act, Art. 182, N 100.

(b) Limitation Act (1908), S. 19 — Compromise decree passed on award — Decree providing for instalments with default clause—On default decree-holder applying for final decree—Judgment-debtor in answer applying for instalments admitting liability under decree—It was held an acknowledgment of liability under S. 19 and as it was consciously made, a fresh period would start from date of acknowledgment for execution of decree : 26 A.I.R. 1939 All. 483, *Ref.* [Para 5]

Annotation : ('42-Com) Lim. Act, S 19, N 18.

(c) Civil P. C. (1908), S. 100 — Limitation—Plea of acknowledgment to save limitation can be raised in second appeal.

The decree-holder respondent is entitled to plead an acknowledgment to save limitation even in second appeal although he had not raised such a plea in the lower Courts especially when the orders of the lower Courts are in his favour and no question of surprise arises where he is relying upon a document of which the judgment-debtor appellant is himself the author. [Para 5]

Cases referred.—

1. ('28) 15 A. I. R. 1928 Mad. 38 : 106 I. C. 395, Kunhammad Hajee v. Kozhunammal.
2. ('39) 14 Luck. 453 : 26 A. I. R. 1939 Oudh 155: 180 I. C. 113, Raghunath Singh v. Subedar Singh.
3. ('42) I. L. R. (1942) Nag. 539 : 29 A. I. R. 1942 Nag. 63 : 200 I. C. 56, Maruti v. Nanjappa Chetty.
4. ('37) I. L. R. (1937) 18 Lah. 671 : 25 A. I. R. 1938 Lah. 117 : 175 I. C. 846, Jodh Singh v. Bhagwan Das Nanak Chand.
5. ('39) 26 A. I. R. 1939 Cal. 488 : 183 I. C. 473, Calcutta Corporation v. Monjoor Ahmed.
6. ('44) I. L. R. (1944) Nag. 419 : 31 A. I. R. 1944 Nag. 145 : 217 I. C. 295, Gulabsingh v. Nathu.
7. ('37) 24 A. I. R. 1937 Lah. 404 : 173 I. C. 185, Jodh Singh v. Bhagwan Das Nanak Chand.
8. ('39) I. L. R. 1939 All. 728 : 26 A. I. R. 1939 All. 483 : 183 I.C. 685, Risal Singh v. Lal Singh.

D. B. Najbile—for Appellant.

B. L. Gupta and V. K. Sanghi (for No. 5) — for Respondents.

Judgment.—This is a miscellaneous (second) appeal against the order dated 6 11.1944 passed by Mr. K. Radhakrishnan, I. C. S., District Judge, Chhindwara, in Civil Appeal No. 12A of 1944 arising out of execution proceedings in Civil Suit No. 81A of 1937 decided by the Subordinate Judge, 2nd Class, Chhindwara.

[2] The suit was originally brought on a mortgage, but the matter was referred to an arbitrator and on his award a compromise decree was passed on 10-11-1937. By this decree the judgment-debtors were allowed to pay by annual instalments commencing from 1-6 1938. The agreement was that on default of three instalments the whole of the amount would become due. Admittedly three instalments were defaulted, and thereafter the decree-holder (respondent 1 in this matter) applied to the Court for a final decree on 7-9-1942. This application was rejected on 31-8-1943 because the compromise decree in effect operated as a final decree between the parties and after the rejection of this application the present application for execution was filed on 19-10-1943. This was patently beyond the period of limitation and unless the application dated 7-9-1942 can be regarded as a step-in-aid of execution of the decree the application for execution (unless otherwise saved) must be rejected.

[3] The two Courts below have held that the application for making the decree final was a step-in-aid of execution and they have relied on A. I. R. 1928 Mad. 38[1] and 14 Luck. 453.[2] For the appellant reliance is placed on I. L. R. (1942) Nag. 539,[3] 18 Lah. 671[4] and A. I. R. 1939 Cal. 488[5] and Mr. V. K. Sanghi who appeared for the minor respondent 5 has further relied upon I.L.R. (1944) Nag. 419.[6] The argument on behalf of the appellant is that the application for a final decree was a totally infructuous proceeding, and, therefore, it did not serve to save limitation. In I. L. R. (1942) Nag. 539[3] the decree-holder had applied to the Court which passed the decree to recall the decree sent to another Court for execution and to send it back to the same Court for execution. It was held that this was not an application in aid of execution under Art. 182 (5), Limitation Act, as being a thoroughly unnecessary and infructuous step. In 18 Lah. 671[4] which overruled A. I. R. 1937 Lah. 404[7] a Divisional Bench of the Lahore High Court doubted the correctness of the decision in A. I. R. 1928 Mad. 38.[1] The reasons given by their Lordships are as follows:

"In A. I. R. 1928 Mad. 38[1] it was held that strictly speaking O. 34, R. 5 has no application to a compromise decree, but that where the decree-holder, by applying for a final decree, was endeavouring to get an order which he thought at the time was necessary before executing his decree, but afterwards due to better advice he gave up that attempt and applied for the execution of the decree without obtaining a final decree, such an application was a step-in-aid of execution; for he was asking the Court to make an order which was thought necessary before taking out actual execution of the decree. With all respect, this amounts to a decision that the decree-holder can take any step, whether necessary or not, and, whatever that step may be, it will be counted as a step-in-aid of execution though unnecessary. This appears to us to go very far, and in any case this decision has no application to the facts before us where there was already a final decree in existence passed in the presence of the decree-holder."

In A.I.R. 1939 Cal. 488[5] a final decree had already been passed and the decree-holder made a second application for a final decree, and it was held that the application was not a step-in-aid of execution because it was not taken in aid of the decree which was already in existence but was something else quite independent of it. In I.L.R. (1944) Nag. 419[6] where the execution application was filed against a deceased judgment-debtor,

Bobde J. held that the application did not save limitation. The gist of all these cases is that an application which is entirely infructuous and made merely to save limitation does not count as a step-in-aid of execution. The contrary view is expressed in the two cases referred to on behalf of the respondents, namely A.I.R. 1928 Mad. 38[1] and 14 Luck. 453.[2] In those cases there was a compromise decree and the decree-holder genuinely thought that he had to apply for a final decree before he could proceed with his execution, and the Court took into account the conduct of the decree-holder and in one case also the conduct of the judgment-debtor.

[4] In my opinion, the words "step-in-aid of execution of a decree" postulate very clearly that there must be at least a decree in existence. The passing of a decree creates a dividing line between the suit and its execution. An application for the passing of a final decree would, therefore, be an application in the suit and it cannot by any stretch of imagination be placed beyond the dividing line marked by the decree in the case so as to be called a step-in-aid of execution of a decree. In cases where a decree is already in existence the application must necessarily be to aid the execution of that decree, and I respectfully agree with the observations contained in 18 Lah. 671[4] and I. L. R. (1942) Nag. 539[3] that infructuous applications made in the suit are not steps-in-aid of execution and the present application whether *bona fide* or not must inevitably be regarded as a proceeding in the suit itself though entirely superfluous because the relief claimed had already been got. To hold otherwise would enable all manner of applications whether profitable or not to be used as steps-in-aid of execution to enlarge the period of limitation. In my opinion (and I say with all due respect) the question of *bona fides* is irrelevant. The matter has to be judged objectively as to whether the application in question was or was not a step-in-aid of execution. The learned counsel appearing on behalf of the respondent (decree-holder) attempted to distinguish the Lahore and the Calcutta cases on the ground that in those cases a final decree had already been passed. In principle I do not see any difference between those cases and the case before me. Either there is an executable decree or there is not one. If there is an executable decree that decree has to be executed by a proper application and the application must be in aid of that execution; if there is no decree in existence, then the application is not one for execution of the decree and must, therefore, be regarded as an application in the suit. From whichever point of view the matter is looked at, the present application falls within the rules indicated in I.L.R. (1942) Nag. 539[3] and the Lahore and the Calcutta cases cited by me above. I hold, therefore, that the application by itself did not serve as a step-in-aid of execution in the case.

[5] There is, however, another point which has been urged by respondent 1 (decree-holder) which serves to save limitation. It is that in answer to the application for making a final decree, the judgment-debtors applied for instalments admitting their liability under the decree. This is an acknowledgment of liability under S. 19, Limitation Act, and as it was consciously made of a subsisting liability a fresh period will start from 11th November 1942 when that acknowledgment was made : *see* I.L.R. (1939) ALL. 728.[8] The learned counsel appearing on behalf of the appellant says that this is a plea which was not taken in the lower Court. The decree-holder's application for execution is being challenged on the ground of limitation and he can in support of his case, prove any circumstance by which limitation is saved. He has in his favour orders of the learned Judges in the Courts below and he can also support these orders on any ground not noticed by the learned Judges who passed these orders. There is no question of surprise because the decree-holder is relying upon a document of which the judgment-debtor is himself the author and it is, therefore, well-known to him (the judgment-debtor). In the circumstances I hold, therefore, that the decree-holder (respondent 1 here) is entitled to plead an acknowledgment to save limitation. The result is that the decision of the two Courts below is confirmed and the appeal is dismissed with costs.

S.C. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 310 *[C. N. 106.]*

PADHYE J.

Sitalprasad Kalka Prasad — Plaintiff—Appellant v. *Sukya and another—Defendants—Non-applicants.*

Civil Revn. No. 195 of 1946, Decided on 14-10-1947, from order of Civil Judge, First Class, Balaghat, D/- 26-2-1946.

Civil P. C. (1908), O. 17, R. 3—Plaintiff absent but counsel present on adjourned date — Counsel applying for adjournment on ground of no instructions—Application rejected—Court proceeding with case by examining defendant—Suit dismissed and decree passed—O. 17, R. 3 applies and not O. 17, R. 2—Application for restoration does not lie — Proper remedy is by way of appeal — Civil P. C. (1908), O. 17, R. 2.

Where on the adjourned date of hearing the counsel for the plaintiff appears and applies for an adjournment on the ground of the absence of the plaintiff and the absence of any instructions, but the Court rejects the application and proceeds with the case by examining the defendant and dismisses the suit and passes a decree, the decision is on merits and the case is covered

by O. 17, R. 3 and not O. 17, R. 2. It is immaterial whether this decree is right or wrong because if it is wrong it can be set aside in appeal preferred therefrom and not in any other way. The Court passing such a decree has no jurisdiction to set aside the decree passed by it in a proceeding started on an application for restoration of the suit to file and the High Court cannot also do it in revision against an order refusing to restore the suit to file : 22 A. I. R. 1935 All. 398, *Rel. on.* [Para 5]

Annotation : ('44-Com.) Civil P. C., O. 17 R. 2 N. 9 ; O. 17 R. 3 N. 3 & 7.

Case referred : —

1. ('35) 22 A.I.R. 1935 All. 398 : 157 I. C. 1021, Mt. Ram Dulari v. Bhola.

M. R. Indurkar—for Applicant.

V. R. Deopujari—for Non-applicant 1.

Order.—Civil Suit No. 11-A of 1944 was fixed on 11-10-1945 for recording evidence of parties. On that date the plaintiff who had to lead evidence was not present and his pleader applied for an adjournment on the ground that the plaintiff was ill since last three days and that his witnesses were also ill and were consequently absent. The defendants opposed the adjournment and the lower Court refused to adjourn the case. Thereupon the plaintiff's counsel Mr. C. D. Gautam said that as the plaintiff could not appear and instruct him for that date he was unable to proceed with the case for want of instructions, and that the plaintiff may be treated as absent. Thereafter the Court recorded the evidence of defendant 1 as a witness and closed the case at 12.35 P. M. The learned Judge then immediately proceeded to write a judgment which was delivered the same day, and the decree in accordance with that judgment was actually signed on 12-10-1945.

[2] On 8-11-1945 the plaintiff applied for restoration of the suit to file on the ground that it was dismissed in default on 11-10-1945. This was registered as Miscellaneous Judicial Case No. 54 of 1945. This application was dismissed by the Court on 26-2-1946. It held that the dismissal of the suit on 11-10-1945 was on merits under O. 17, R. 3, Civil P. C., and the proper remedy of the plaintiff was by way of an appeal and not by way of an application for restoration of the suit to file. The plaintiff has now come up in revision to this Court. He is again met with the objection that his proper remedy against the decree passed by the lower Court was by way of an appeal and that that decree cannot be set aside by the same Court in proceedings for restoration of the suit or by this Court in revision against the order refusing to restore the suit to file.

[3] There is much substance in the contention of the non-applicant. In a case where the plaintiff at whose instance a suit is adjourned to enable him to perform some act necessary for the further progress of the suit remains absent on the adjourned date of hearing and also fails to perform the act for which the adjournment was granted to him, the Court should dispose of the case under O. 17, R. 2, Civil P. C. and not under O. 17, R. 3: *vide* cases collected by Sir D. F. Mulla in his Civil Procedure Code at p. 708.

[4] In the present case the counsel for the plaintiff did appear on the adjourned date of hearing and applied for an adjournment. It was when his request for adjournment was refused that he retired from the case on the ground that no instructions were given to him by the plaintiff for that particular date. This is not therefore a case where a party has failed to appear on the date to which the suit is adjourned. In these circumstances it cannot be said that the Court was positively wrong in proceeding under O. 17, R. 3, Civil P. C., or that it had no jurisdiction to decide the suit forthwith on merits as it did.

[5] It cannot be denied in this case that the lower Court did proceed under O. 17, R. 3 and decide the case on merits. It has also passed a decree dismissing the plaintiff's suit. It is immaterial whether this decree is right or wrong because if it was wrong it could be set aside in appeal preferred therefrom and not in any other way. At any event the Court passing such a decree has no jurisdiction to set aside the decree passed by it in a proceeding started on an application for restoration of a suit to file and this Court cannot also do it in revision against an order refusing to restore the suit to file. The decree passed by the lower Court would therefore stand apart from the fact whether it was right or wrong because the proper remedy for having it set aside was not followed by the plaintiff.

[6] In A.I.R. 1935 ALL. 398[1] a Division Bench of that Court held that where the lower Court holding that there was no ground for allowing an adjournment dismissed the suit the case was covered by O. 17, R. 3 and if it subsequently restored the same it acted without jurisdiction as it had no jurisdiction to restore the suit to file and the order for restoration was set aside by the High Court in revision. It was further observed in that case that where the plaintiff does appear either through himself or through his counsel the provisions of O. 17, R. 2 are not attracted and the case can only be disposed of under O. 17, R. 3, Civil P. C.

[7] I am aware of the fact that the Allahabad High Court has added by way of amendment a clause and an explanation to O. 17, R. 2 and it has also amended O. 17, R. 3, Civil P. C. But that does not affect the view that I am taking in this revision.

[8] This revision is dismissed mainly on the ground that when once the lower Court has proceeded under O. 17, R. 3, Civil P. C., and passed, rightly or wrongly, a decree the only remedy of the party is to appeal against that decree. This was not done in the present case and a wrong remedy in the shape of an application for restoration of the suit to file was adopted. In my view that application was rightly dismissed by the lower Court and consequently this revision is also dismissed with costs. Counsel's fee Rs. 20.

R.G.D. *Revision dismissed.*

A. I. R. (35) 1948 Nagpur 312 *[C. N. 107.]*

SHEVDE J.

Lungya Balya Dhangar — Defendant 4 —Appellant v. *Bansilal Pusaram Mahesari —Plaintiff—Respondent.*

Second Appeal No. 536 of 1943, Decided on 17-9-1947, from appellate decree of Addl. Dist. Judge, Amraoti, D/-31-8-1942.

(a) C. P. & Berar Debt Conciliation Act (2 [II] of 1933), S. 21 — Stay of pending suit — In absence of certificate, civil Court is not bound to stay suit.

The civil Court is not bound to stay the proceedings of a suit in respect of a debt in the absence of a certificate from the Board under S. 21 and the civil Court is quite competent to proceed with the suit and eventually pass a preliminary decree for foreclosure. [Para 4]

(b) C. P. & Berar Debt Conciliation Act (2 [II] of 1933), S. 21—Certificate of suspension—Duty is cast on Board to issue certificate *suo motu*—Failure of Board to issue certificate — Decree in civil suit followed by discharge of debt by Board under S. 8 (2)—Debtor is not estopped from questioning decree because he was party to civil suit — Evidence Act (1872), S. 115.

It is clear from the provisions of S. 21 that the statutory duty is cast upon the Board to issue a certificate of suspension of civil suit proceedings, pending the determination of the application filed before it. It is the business of the Board to issue such a certificate *suo motu*. The only responsibility that lies upon the debtor is to bring it to the notice of the Board that some suit or proceeding is pending in a civil Court. [Para 4]

Where due to the mistake of the Board, the suit on a mortgage is not suspended with the result that a preliminary decree for foreclosure is passed and subsequently the Board discharges the debt under S. 8 (2), the debtor is not estopped from questioning the preliminary decree because he was a party thereto. [Para 4]

Annotation:—('46 Man) Evidence Act, S. 115 N. 2a.

(c) C. P. & Berar Debt Conciliation Act (2 [II] of 1933), S. 2 (e) — Debt — A mortgage debt does not cease to be a debt within the meaning of S. 2 (e), even though it has merged into a preliminary decree: 31 A. I. R. 1944 Nag. 289 (F. B.), *Foll.* [Para 5]

(d) Evidence Act (1872), S. 115 — Estoppel is always personal. [Para 5]

Annotation :— ('46-Man) Evidence Act, S. 115 N. 1 pts. 22, 28.

(e) Evidence Act (1872), S. 115 — No estoppel against statute.

Where a preliminary decree on mortgage is wiped out by an order of discharge under S. 8 (2), C. P. & Berar Debt Conciliation Act, there can be no plea of estoppel against the debtor because he was party to the mortgage suit, for the simple reason that there can be no estoppel against a statute. [Para 5]

Annotation : — ('46-Man) Evidence Act, S. 115 N. 50.

Cases referred :—

1. (42) I. L. R. (1942) Nag. 357 : 29 A. I. R. 1942 Nag. 88 : 200 I. C. 709, Dau Balwantsingh v. Mt. Bindabai.
2. ('44) I. L. R. (1944) Nag. 568 : 31 A. I. R. 1944 Nag. 289 (F. B.), Rukhmabai v. Shamlal Surajmal.

Y. V. Jakatdar—for Appellant.

D. B. Padhye and P. R. Padhye—for Respondent.

Judgment. — This appeal arises out of final decree proceedings in Civil Suit No. 11-A of 1938 in the Court of the Second Subordinate Judge, Second Class, Amraoti. The facts of the case are somewhat as follows. The plaintiff (respondent before me) filed this suit on the basis of a mortgage dated 30-1-1924, claiming foreclosure in default of the payment of the mortgage debt. The appellant Lungya Dhangar was impleaded in this suit as defendant 4 as a subseqnent purchaser of the fields under the mortgage. The mortgage in suit comprises a house and two fields and defendant 4 Lungya is the subsequent purchaser of these two fields and is in possession thereof. Pending the suit in the trial Court, Lungya filed an application on 28-5-1938 before the Debt Conciliation Board, Murtizapur, (hereinafter called the Board) for conciliation of his debts including the mortgage debt of the plaintiff-respondent. The proceedings in the suit were not stayed, presumably because no certificate was issued by the Board to the civil Court, with the result that a preliminary decree for foreclosure was passed on 19-7-1938. Later on the Board discharged the debt of the plaintiff for his failure to submit to the Board a statement of debts in writing under S. 8 (2), Debt Conciliation Act (hereinafter referred to as the Act), on 8-9-1939. When the plaintiff filed an application for a final decree for foreclosure on 29-3-1940, defendant 4 Lungya objected to a final decree being passed against the two fields in his hands, on the ground that the debt was discharged by the Board. The plaintiff Bansilal admitted that the debt was discharged, but his contention was that as he was not served with a notice by the Board as required, the order of discharge of the Board was illegal and *ultra vires.*

[2] The trial Court found that defendant 4 Lungya could apply to the Board, that the plaintiff Bansilal was served with a proper notice and that the order of discharge being *intra vires*, the plaintiff was not entitled to a final decree for foreclosure, in respect of fields in the possession of defendant 4, namely, Lungya. It, therefore, passed a final decree for foreclosure only in respect of the house property, in the hands of the mortgagor.

[3] On appeal by the plaintiff, the lower Court of appeal set aside the order of the Court of first instance and ordered that the final decree for foreclosure be passed against the entire property comprised in the mortgage. Defendant 4 Lungya has, therefore, come up in second appeal.

[4] The substantial points for determination in the appeal before me are : (i) Whether defendant 4, Lungya is estopped from disputing the preliminary decree for foreclosure on the ground that he did not bring a certificate from the Debt Conciliation Board for stay of proceedings in the civil suit; and (ii) Whether the order of discharge dated 8.9.1938 passed by the Chairman of the Debt Conciliation Board was illegal and *ultra vires*.

[5] *Point No. (i)* : I agree with the first appellate Court that the civil Court was not bound to stay the proceedings of the suit on mortgage, in the absence of a certificate from the Board under S. 21 of the Act, and, that the civil Court was quite competent to proceed with the suit and eventually pass a preliminary decree for foreclosure and this is quite all right so far as it goes, but it appears from the reasoning of the lower Court of appeal that it was the duty of the appellant Lungya to obtain such a certificate and it was he, who was at fault for not getting it produced in the Court. It is quite clear from the provisions of S. 21 of the Act that the statutory duty is cast upon the Board to issue a certificate of suspension of civil suit proceedings, pending the determination of the application filed before it. It is the business of the Board to issue such a certificate *suo motu*. The only responsibility that lies upon the debtor is to bring it to the notice of the Board that some suit or proceeding is pending in a civil Court. It is an admitted fact that the debtor Lungya has clearly mentioned in his application to the Board dated 28.5.1938 (Ex. 4-D-2) under S. 4 of the Act that he wanted the mortgage debt due to the respondent Bansilal to be conciliated, which was the subject-matter of the suit (Civil Suit No. 11-A of 1938) in the second Subordinate Judge, 2nd Class, Amraoti. If in spite of this definite notice about the mortgage suit, the Board did not act in accordance with the requirements of law, under S. 21 of the Act, that was the mistake of the Board and not the fault of the debtor. It is a fundamental principle of jurisprudence that mistakes of Courts cannot prejudice parties and the plea of estoppel cannot, therefore, be sustained on the mistake of the Board. It is ridiculous to argue that defendant 4 Lungya is estopped from questioning the preliminary decree for foreclosure because he was a party thereto.

[6] The mortgage debt did not cease to be a "debt" within the meaning of S. 2 (e) of the Act, merely because it had merged into the preliminary decree for foreclosure. It is no doubt true that it was held in I. L. R. (1942) Nag. 357[1] that there was no debt left within the meaning of the Act after a preliminary decree for foreclosure had been passed, but that ruling was overruled by the Full Bench in I. L. R. (1944) Nag. 568[2] and it was held therein that the mortgage debt did not cease to be a debt within the meaning of S. 2 (e) of the Act, even though it had merged into a preliminary decree. It is, therefore, beyond question that the Board was quite competent to discharge the debt under S. 8 (2) of the Act and if the order was *intra vires*, the decretal amount was wiped out by operation of law. The preliminary decree for foreclosure was dead as against defendant 4, Lungya and it cannot certainly be revived on the ground of estoppel. Estoppel is always personal, and it cannot be argued that defendant 4 is guilty of any acts or representations to the plaintiff respondent, on the faith of which the latter acted to his prejudice, so as to create any estoppel against the appellant Lungya. The failure to obtain a certificate was not certainly the fault of the appellant Lungya as I have stated above. It was certainly not the result of any personal acts or representations on his part and it cannot possibly serve as the basis for the plea of estoppel. Looking at the question from another point of view I think that the plea of estoppel is devoid of any substance. The preliminary decree is wiped out, not by any personal acts of defendant 4 but by operation of law. If the statute says that the debt is discharged under certain conditions, as laid down by the statute itself, it is discharged. There is an end of the matter, for the simple reason that there is no estoppel against a statute. I, therefore, set aside the finding of the lower appellate Court and hold that defendant 4 Lungya is not estopped from disputing the preliminary decree for foreclosure.

[7] In conclusion I allow the appeal and set aside the order of the lower appellate Court and restore that of the trial Court, directing the final decree for foreclosure to be passed only in respect of the house in the possession of the mortgagors. The respondent will pay the costs of the appellant here and in the Courts below and bear his own.

V.B.B. *Appeal allowed.*

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A. I. R. (35) 1948 Nagpur 314 *[C. N. 108.]*

GRILLE C. J. AND HIDAYATULLAH J.

Shree Ramchandra Swami Deosthan Rampaili — Appellant v. *Yadorao Ramchandrao Bhogore — Respondent.*

Letters Patent Appeal No. 18 of 1943, Decided on 9-9-1947, from High Court's decree in S. A. No. 31 of 1942, D/- 23-11-1943.

C. P. Land Revenue Act (2 [II] of 1917), S. 203 (3) — Scope — Word 'transfer' does not cover simple mortgage — Simple mortgage of house in abadi with site under it does not entitle landlord to eject mortgagor.

The word 'transfer' in S. 203 (3) is not wide enough to include a simple mortgage. [Para 9]

A simple mortgage of his house in the abadi by the owner together with a mortgage of the site under it (whatever the effect of that might be) is not such a transfer as would entitle the landlord to eject the creator of the mortgage: S. A. No. 314 of 1935, *Rel. on* ; 27 A. I. R. 1940 Nag. 182, held must be taken to apply to possessory mortgages alone. Passages in that case so far as they are capable of being taken to apply to simple mortgages *overruled*. [Para 10]

The malguzar's cause of action arises when the actual transfer is made and not as in the case of a simple mortgage when a transfer of right to occupy is merely in contemplation and may never happen. [Para 8]

Cases referred :—

1. ('40) I. L. R. (1940) Nag. 167:27 A. I. R. 1940 Nag. 182 : 186 I. C. 250, Chhatarsing v. Hamersing.
2. ('08) 4 N. L. R. 149, Govind Rao v. Amrit Rao.
3. ('15) 11 N. L. R. 126 : 2 A. I. R. 1915 Nag. 119 : 31 I. C. 307, Narain v. Bebari.
4. ('25) 12 A. I. R. 1925 Nag. 396 : 86 I. C. 763, Bhagwan v. Raghubar Dayal.
5. *Reported in* ('39) 26 A.I.R. 1939 Nag. 163, Kunwarji v. Bhurelal.

A. L. Halve, K. B. Tare and C. P. Kalele— for Appellant.

M. R. Rajkarne — for Respondent.

Judgment. — The plaintiff as malguzar of mouza Mendha in the Balaghat District brought a suit to eject the defendant, a tenant, from his site in the abadi of the village on the ground that he had executed a simple mortgage of his house and the site in favour of Ganpatrao Pande a large land-owner, and thereby contravened sub-s. (3) of S. 203, Land Revenue Act. The defendant pleaded that the word 'transfer' in that section did not include a mortgage and that the plaintiff had no right of suit as long as Ganpatrao Pande did not obtain possession of the site, and that possession had not been given by the terms of the mortgage and since the defendant remained in possession S. 203 would not be applicable.

[2] The defendant's contentions prevailed in the trial Court, and the plaintiff went up in appeal. The Additional District Judge, Balaghat, applying the principles in I. L. R. (1940) Nag. 167,[1] which deal with a possessory mortgage, to the case of a simple mortgage equally, allowed the appeal and decreed the plaintiff's claim.

[3] In second appeal Bose J. reversed this decision and restored that of the trial Court. Owing to the fact, however, that he was confronted with *obiter dicta* in two cases both of which decided a similar question in respect of possessory mortgages only but which pointed to opposite conclusions in the matter of simple mortgages, he gave permission for an appeal to be filed under the Letters Patent of this High Court.

[4] The first three sub-sections of S. 203, C. P. Land Revenue Act, read as follows :

"(1) Every person holding land in a mahal for agricultural purposes, otherwise than as a sub-tenant, or ordinarily working therein as an agricultural artisan or labourer, and the village-watchman are entitled to a housesite of reasonable dimensions in the abadi free of rent.

(2) Such person, on ceasing to hold such land, or to work as an agricultural artisan or labourer, or to be the village-watchman, shall forfeit his right under sub-s. (1).

(3) A person holding a site under sub-s. (1) shall be incompetent to transfer it except to his next heir or to a person entitled to and not already in possession of such site :

Provided that the materials of any house erected thereon shall be transferable."

The case as far as simple mortgages are concerned is one of first impression, the previous cases being concerned either with sales or possessory mortgages, and it must be noted that in every case, namely, 4 N. L. R. 149,[2] 11 N. L. R. 126[3]—both these cases were cases of sale—A.I.R. 1925 Nag. 396,[4] S. A. No. 314 of 1935[5] and I. L. R. 1940 Nag. 167[1]—which were cases of possessory mortgages—the defendant was not the tenant-mortgagor or the tenant-vendor but the vendee or the mortgagee. S. A. No. 314 of 1935,[5] the *obiter dicta* to which Bose J. has preferred to that of I. L. R. (1940) Nag. 167[1] is in agreement with the conclusion reached in that case that the possessory mortgage is one coming within the mischief of sub-s. (3) of S. 203, Land Revenue Code, though the reasoning in each case is different. It is true that in I. L. R. (1940) Nag. 167[1] there are statements in dealing with arguments that a tenant is not entitled to transfer his house in an *abadi* and the right to occupy the site by a possessory mortgage, which may be taken to apply to a simple mortgage. For instance it is said that:

"the term 'transfer' cannot be limited to a conveyance of all the transferor's interest in the property and includes such limited form of conveyance as a mortgage,"

and also

"A transfer of a house in the *abadi* site without the malguzar's permission by means of a mortgage is as repugnant to the Land Revenue Act as is a transfer by means of a sale, and the plaintiff's claim must be decreed."

The lower appellate Court then could with reason believe that these dicta applied to the case of a simple mortgage as well as a possessory

one. It was also stated in I. L. R. (1940) Nag. 167:[1]

"The malguzar cannot be expected to wait until such time as the period of mortgage expires and then be alert to take action in the event of the mortgagor failing to redeem."

We do not consider that these words were intended to apply or should be taken to apply to a simple mortgage; they cover only the question of a possessory mortgage where the mortgagee was in possession of the house and it would not be easy to determine when his rights as a mortgagee expired and any adverse possession began. In the very next sentence, it is stated that the transfer of the site is no more than the transfer of a licence to occupy, and naturally there is no transfer of the licence to occupy until the mortgagor occupant has moved out and the mortgagee has moved in.

[5] In the answer to the reference made in S. A. No. 314 of 1935[5] it is stated that the words "to transfer it" in sub s. (3) of S. 203 mean "to transfer the right to possession," that such right of possession is transferred if the transferor does some act which in law has the effect of transferring within the meaning of the Transfer of Property Act the right to possession, that despite the fact that in the case of a lease or possessory mortgage the transferor reserved to himself a right of re-entry thereafter, there would be a transfer of the present right of possession, and that that is the kind of transfer which sub-s. (3) prohibits.

[6] It follows then from this that there is no transfer of a right of possession until some act is done which has the effect of transferring it, and we are in respectful agreement with this view. The point was put with more acuity in the reference made by Niyogi J. which resulted in the opinion quoted, where we find:

"The word 'transfer' used in S. 203, Central Provinces Land Revenue Act comprises all such modes of transfer *as result in the transfer of possession.*" (the italics are ours.)

And again:

"Consequently as soon as a licensee transfers the right to occupy, *and ceases to occupy the site himself*, the license which means only a permission to occupy comes to an end with the result that the transferee in occupation becomes a trespasser from the moment he takes possession." (Again the italics are ours.)

[7] Turning now to the wording of sub-s. (3) itself we are constrained to point out that the wording is somewhat loose. It lays down that "the person holding a site under sub-s. (1) shall be incompetent to transfer it . . . . ." The word 'it' cannot refer to the site as the site is not the property of the person holding it but of the malguzar, and the person holding it is only a licensee. 'It' therefore can only have reference to his right to occupy. Now, while a house on the site can be the subject of a mortgage the site itself cannot be mortgaged by the owner of the house since he has no title to the site, and the right to occupy or license is not something that is susceptible of being mortgaged at all. When therefore a person holding a site executes a mortgage of whatever character in respect of the site on which the house stands, his act in respect of that site is a nullity and of no effect, and the only way in which he can transfer the particular right to which the section refers is by allowing his mortgagee or vendee to enter into possession, either voluntarily or involuntarily, and relinquishing that possession himself. Until the tenant, that is to say, the person defined in sub-s. (1), relinquishes his possession and his transferee enters into possession there is no transfer as contemplated by sub-s. (3), and, as we have pointed out earlier in this judgment, every case unlike the present one which has been brought to our notice arises out of a suit brought against the transferee and not the transferor.

[8] *A fortiori* no suit can be brought against a licensee from the malguzar in respect of the transfer made or contemplated under sub-s. (3) since that sub-section unlike sub-s. (2) does not contemplate forfeiture of a right on the part of the licensee on account of the licensee's action if the licensee does transfer his right except to a person entitled. The malguzar's cause of action arises when the actual transfer is made and not as in the case of a simple mortgage when a transfer of a right to occupy is merely in contemplation and may never happen.

[9] The passages which we have cited from I. L. R. (1940) Nag. 167[1] in so far as they are capable of being taken to apply to mortgages of that description are too widely stated in so far as simple mortgages are concerned, and to that extent are now overruled and must be taken to apply to possessory mortgages alone. The contention raised by the appellant before us, which is really based on the wide assertion that the term 'transfer' in sub-s. (3) is wide enough to cover all mortgages including a simple mortgage, cannot therefore prevail.

[10] We have no doubt that the view taken by Bose J. is the correct one and that a simple mortgage of his house in the *abadi* together with a mortgage of the site under it (whatever the effect of that might be) is not such a transfer as would entitle the landlord to eject the creator of the mortgage.

[11] The appeal fails and is dismissed with costs. Counsel's fee Rs. 25.

S.C. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 316 *[C. N. 109.]*

BOSE AND PADHYE JJ.

Shamrav Bapuji —*Defendant*—*Appellant* v. *Kamalnayan Jamanlalji Bajaj and others* —*Plaintiffs* — *Respondents.*

First Appeal No. 75 of 1940, Decided on 12-12-1946, from decree of Sub-Judge, 1st Class, Wardha, D/- 13-2-1940.

(a) C. P. Tenancy Act (I [1] of 1920), S. 9 — Charge given to landlord, extent of —Prior encumbrancer, right of — Purchase of holding by landlord at rent sale — Right of prior charge-holder to redeem —Position of landlord in such case —Transfer of Property Act (1882), Ss. 92, 101, 60.

Under S. 9, C. P. Tenancy Act, the landlord is given a charge on the holding for his rent. The charge is not on the fee simple in the land but on the tenancy rights. That charge is made a first charge, and accordingly all prior encumbrancers are postponed to him. But they are no more than postponed. Thay are not wiped out altogether. The prior encumbrancer has therefore a subsequent right of suit: *Case law relied on.* [Para 18]

Section 9, C. P. Tenancy Act, confers no right of subrogation. Therefore, if subrogation is sought, the matter must be brought within S. 92, T. P. Act. The landlord has charge for rent upon the property and so falls within the class mentioned in cl. (a) of S. 91, T. P. Act, but when he brings the property to sale, he does not redeem the charge. Landlord when he purchases the holding in execution of rent decree does not redeem his own charge but extinguishes it by sale. Accordingly he does not come under S. 92, T. P. Act. Section 101, T. P. Act, however, comes into play in such cases and the landlord is entitled to set up his own charge as he is a chargeholder within the meaning of that section. [Paras 34, 35, 36 & 37]

Rent in respect of the absolute occupancy holdings fell in arrears and the lambardar brought suits to recover it and got a decree and in execution thereof purchased both the fields *A* and *B* and obtained possession. Some years before rent suit, one *P* had brought a suit against the tenant for money and a consent decree was passed during the pendency of the rent suit which created a charge on field *A* in respect of the decretal amount. In execution of the decree, *P* brought field *A* to sale and purchased it himself. His taking of possession was however resisted by the lambardar who was in possession. *P* then brought a suit seeking possession of *A* field against the defendant lambardar and claimed priority over him. In the alternative, he claimed the right to redeem the two fields by paying the defendant the price of his decrees etc, and on redemption he prayed that he be placed in possession of field *A* and as regards the other field, he claimed the right to bring it to sale, free of the defendant's encumbrances, in satisfaction of the unsatisfied part of his decree :

Held (i) that the plaintiff must redeem the landlord's charge before he could enforce his own charge under the decree; [Para 36]

(ii) that the defendant-landlord was not only the holder of the first charge because there had been no merger, but he was also a purchaser of the property. That resulted in splitting up of the charge. As the charge was split by reason of the defendant being the owner of the right to redeem as well as a chargeholder, the defendant should be paid so much of the total of the decree which he had obtained as was proportionately assignable to *A* field. On this payment being made the plaintiff would be entitled to enforce his mortgage against the defendant in the usual way, and if the defendant did not pay up, the field should be sold; [Para 38]

(iii) that since the plaintiff proceeded against field *A* only in the suit, he could not be permitted to proceed against field *B*. Therefore, so far as the prior charge which related to both fields was concerned, the defendant was in the position of a charge-holder who had acquired an indefeasible right as owner to a portion of the charged property, namely, the field *B*. This attracted the provisions of S. 60, T. P. Act, and resulted in a splitting up of the charge, and that resulted in piecemeal redemption; [Para 40]

(iv) that since the rights of the defendant in the litigation were not affected by the charge decree in plaintiff's favour, S. 52, T. P. Act, did not apply and question of *lis pendens* did not arise; [Para 42]

(v) that as the plaintiff's charge decree was registered before the purchase by the defendant in execution, it operated as notice; 39 Cal. 527 (P. C.) and 18 A. I. R. 1931 All. 62, *Rel. on*: [Para 43]

(vi) that since the plaintiff was not entitled to possession under the charge decree no question of accounting for profits on the part of the defendant arose; [Para 46]

(vii) that the defendant was entitled to amount spent by him on improvements of the field while in possession; [Para 46]

(viii) that the plaintiff was no more than a chargeholder, and all he could do was to enforce his charge. In doing so the defendant, as owner of the equity, had the right to redeem. [Para 49]

Annotation : — ('45 Com.) T. P. Act, S. 101, N. 6; S. 92, Ns. 6, 7.

(b) Transfer of Property Act (1882), S. 52 — Creation of charge during pendency of rent suit.

The plaintiff's charge on a field was created on 23-4-1930. This was during the pendency of the rent suit in respect of that field which was instituted on 11-2-1930. In a suit by the plaintiff to enforce the charge against the defendant-landlord who had purchased the field in execution of the rent decree, it was contended that the charge was consequently inoperative against the defendant :

Held, that the question of *lis pendens* did not arise. The defendant's only right in the litigation was to have the property brought to sale in satisfaction of a first charge which, as such, obtained priority over all other charges. The creation of a subsequent encumbrance did not affect that right. The defendant still got priority. His rights in the litigation were consequently not affected and so S. 52 was not called into play. [Para 42]

Annotation: — ('45 Com.) T. P. Act, S. 52, N. 35.

Cases referred:—

1. ('27) 14 A. I. R. 1927 Nag. 119 : 99 I. C. 445, Asaram v. Kanchedilal.
2. ('37) I. L. R. (1937) Nag. 498 : 24 A. I. R. 1937 Nag. 376 : 176 I. C. 155, Ganba v. Ganpatsao.
3. ('40) I. L. R. (1940) Nag. 522 : 27 A. I. R. 1940 Nag. 97 : 187 I. C. 785, Bhikulal v. Bhaiyalal.
4. ('41) I. L. R. (1941) Nag. 607 : 27 A. I. R. 1940 Nag. 156 : 190 I. C. 641, Sitaram v. Krishnarao.
5. S. A. No. 287 of 1937, Decided on 11-4-1939, Laxmiprasad v. Balaprasad.
6. ('36) I. L. R. (1936) Nag. 138 : 23 A. I. R. 1936 Nag. 148 : 164 I. C. 931, Shankernath v. Babulal.
7. ('40) I. L. R. (1940) Mad. 599 : 27 A. I. R. 1940 P. C. 105 : I. L. R. (1940) Kar. P. C. 194 : 67 I. A. 222 : 188 I. C. 231 (P. C.), Secretary at State v. Mask and Co.
8. ('09) 5 N. L. R. 176 : 4 I. C. 795, Jagannath v. Khuba.

9. ('38) I. L. R. (1938) Nag. 206 : 24 A. I. R. 1937 Nag. 372: 172 I. C. 142 (F. B.), Taibai v. Wasudeorao.
10. ('37) I. L. R. (1937) All. 880 : 24 A. I. R. 1937 All. 588 : 171 I. C. 153 (F. B.), Hira Singh v. Jai Singh.
11. ('42) I. L. R. (1942) All. 608 : 29 A. I. R. 1942 P. C. 50 : I. L. R. (1942) Kar. P. C. 99 : 69 I. A. 98 : 202 I. C. 265 (P. C.), Shah Ramchand v. Parbhu Dayal.
12. ('91) 18 Cal. 164 : 17 I. A. 201 : 5 Sar. 507 (P.C.), Umesh Chunder Sirkar v. Zahur Fatima.
13. ('30) 52 All. 985 : 18 A. I. R. 1931 All. 62 : 130 I. C. 489, Nathanlal v. Durga Das.
14. ('12) 39 Cal. 527 : 39 I. A. 68 ; 14 I.C. 496 (P.C.), Mahomed Ibrahim Hassain Khan v. Ambika Prasad Singh.

M. R. Bobde and R. V. Khare —for Appellant.
M. Adhikari and R. G. Shiras—for Respondents.

Judgment.—This judgment will govern First Appeal No. 75 of 1940 and First Appeal No. 76 of 1940. They turn on a construction of S. 9, C. P. Tenancy Act (Act I [1] of 1920). One is by the plaintiff and the other by the defendant.

[2] One Kautikabai was the absolute occupancy tenant of the fields in suit. They can be divided into two groups and it will be convenient to speak of them as two fields. One, comprising five K Nos., was known as the Bhonslawala field, and the other, comprising KI No. 88, was known as Bhivseni. Both are situate in mouza Digras of which the defendant is the lambardar.

[3] Kautikabai's rent fell into arrears and so the defendant instituted Civil Suit No. 2 of 1930 against her for the arrears. He obtained a decree (Ex. D-13) for Rs. 565-4-6 on 4th August 1930. He applied for execution, and the C Form was sent to the Collector. On 6th October 1934 the Collector ordered both sets of fields to be sold (Ex. D-15).

[4] In the meanwhile, there were further arrears and so a second suit (Civil Suit No. 247 of 1933) was launched on 30th March 1933. This resulted in a decree on 28th July 1933 (Ex. D-17) for Rs. 461-14-0. Here also, the C Form was sent to the Collector, and on 16th November 1934 the two executions were consolidated. The Collector ordered both sums to be included in one proclamation and directed the fields to be sold for the combined amounts (Ex. P-14).

[5] One of the fields (Bhivseni) was sold on 19th January 1935 and was purchased by the decree-holder (the defendant lambardar in this case). The sale was confirmed in due course, and the defendant was placed in possession on 21st May 1935. The other field (Bhonslawala) was sold on 12th December 1935 and was also purchased by the defendant. This sale was also confirmed and the defendant was placed in possession on 26th May 1936.

[6] Some years before the first rent suit was launched, namely in 1927, the plaintiff had filed a suit for money (Civil Suit No. 16 of 1927) against Kautikabai and certain others with whom we are not concerned. The parties compromised, and the plaintiff was given a consent decree on 23rd April 1930. This decree created a charge for Rs. 55,000 on the plaint fields and certain other property. The judgment in that suit is Ex. P-6. It will be observed that the charge was created during the pendency of the first rent suit but before the sale and before the decree.

[7] In execution the plaintiff brought the Bhonslawala field to sale and purchased it himself on 28th June 1937. When he tried to take possession he was resisted by the defendant who had already been placed in possession in execution of his own decrees.

[8] In the present suit the plaintiff seeks possession of the Bhonslawala field which he purchased and claims priority over the defendant. In the alternative, he claims the right to redeem the two fields by paying the defendant the price of his decrees etc., and on redemption he prays that he be placed in possession of Bhonslawala; and as regards the other field, he claims the right to bring it to sale, free of the defendant's encumbrances, in satisfaction of the unsatisfied part of his decree.

[9] The question at issue is who is to get priority and to what extent. It arises because of S. 9, C. P. Tenancy Act of 1920. But before going into that it will be necessary to define the respective positions of the plaintiff and the defendant qua holders of the right to redeem. Both have charges on the property. The defendant purchased the right to redeem the Bhonslawala field, which alone is in suit, on 12th December 1935. The plaintiff purchased on 28th June 1937. Therefore, so far as the ownership of the field is concerned, the defendant gets priority, and for purposes of redemption he must be treated as owner of the equity of redemption. As regards the priority of their respective charges and the results which flow from that, that is governed by S. 9 which we will now have to examine.

[10] Section 9 provides:

(1) that the rent of the holding of an absolute-occupancy tenant shall be a first charge thereon; and

(2) that "notwithstanding anything contained in S. 100, T. P. Act, 1882, and O. XXXIV of Schedule 1, Civil P. C. 1908, such holding shall be liable to sale for the satisfaction of such charge in execution of a decree for rent against the tenant whether such decree orders such sale or not."

It also permits any person claiming an interest in the holding

"to deposit in the Court executing a decree for rent on account of such holding, the amount due under such decree."

and directs that

"such deposit shall be credited in satisfaction of such decree."

[11] The provision which makes the rent a first charge on the holding gives the landlord priority over other charge-holders and mortgagees. It merely means that even though the landlord's right to recover the rent may have arisen after a prior encumbrance the landlord shall be put in the same position as if it had occurred first. Therefore, whatever the order of their respective titles to their charges, we must regard the defendant landlord as the first charge-holder in respect of the sums awarded to him under both his decrees, and look upon the plaintiff as a subsequent encumbrancer. Of course, actually the landlord's charge accrues as soon as the rent is in arrears. Therefore, so far as the arrears prior to 1930 were concerned, the landlord would be a first charge-holder anyway. But that, in our opinion, is immaterial because whether the arrears are prior or subsequent the law gives the landlord precedence. So far the matter is simple. All that is necessary is to reverse the order of their encumbrances where necessary.

[12] Next follows a matter which raises complications. In the ordinary way, when a prior charge-holder seeks to enforce his charge he has to join all subsequent encumbrancers to the action so as to give them an opportunity of redeeming, and if they are not joined their rights are not affected. But owing to the special provisions of S. 9 the landlord need not join anyone but the tenant and he can still enforce his charge. Subsequent encumbrancers, and those who are relegated to that position because of the section, are given the right to free the holding under S. 9(3) depositing the amount of the decree in Court any time before the sale. But they need not be joined to the action and they need not be noticed. That raises the question whether this is their only chance of redemption. That is a question which has been debated many times in this Court, and a series of cases hold that it is not. With one exception they are all agreed that a subsequent suit for redemption lies.

[13] We are in respectful agreement with the majority view. Section 9 enacts a special law, and though a special law overrides the general it only does so to the extent to which it expressly or by necessary implication changes the general law. This is particularly so when the special law seeks to affect vested interests. Under S. 9 (1) a prior charge holder is relegated to the position of a subsequent encumbrancer. That is bad enough from his point of view, but if the intention was to wipe away his charge altogether he has a right to have that unequivocally expressed. In our judgment, that is not done by affording him the privilege of paying off the landlord's charge under S. 9 (3) when he is not a party to the action. That merely softens the rigour of the blow inflicted by sub-s. (1). It does not take away his general right as a puisne encumbrancer.

[14] It seems futile to us to relegate him to the position of puisne encumbrancer by sub s. (1) and then hold, without express legislation to that effect, that he is not to have any of the rights of a puisne encumbrancer. Moreover, that is not the way the legislature acts. In the allied legislation (C. P. Land Revenue Act of 1917) which was enacted only three years befor the present Act, there are similar provisions except for one notable difference. Section 122, Land Revenue Act, makes the land revenue a first charge on the estate, mahal or land. But S. 138(1), unlike S. 9, C. P. Tenancy Act, provides that the purchaser at the auction will get the land free from all encumbrances. There must have been some reason for omitting this express provision in the later Act. In our opinion, the legislature would have made a similar provision in the C. P. Tenancy Act if that had been its intention. We are accordingly in respectful agreement with the following cases which hold that the prior encumbrancer, though relegated to a secondary position by the section, is not wiped out altogether, and that he has a subsequent right of suit. Exactly what he can do in the subsequent suit, whether claim a right to redeem only, or to enforce his mortgage, is a matter we have yet to consider. The decisions to which we refer are A. I. R. 1927 Nag. 119,[1] I. L. R. (1937) Nag. 498,[2] I. L. R. (1940) Nag. 522,[3] I. L. R. (1941) Nag. 607[4] and S. A. No. 287 of 1937.[5] The decision of Niyogi J. in I L.R. (1936) Nag. 138,[6] which was quoted to the contrary, we will consider later.

[15] Reliance was placed by the appellant on I. L. R. (1940) Mad. 599[7] at p. 616 where their Lordships quoted Willes J. to the effect that:

"Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it .... With respect to that class it has always been held, that the party must adopt the form of remedy given by the statute."

He also relied on 5 N. L. R. 176.[8]

[16] In our opinion that principle does not apply. The rights and liabilities of a charge-holder are not new. They are defined and dealt with under the ordinary law. All that S. 9 does is to alter the order of the charges where necessary and give the landlord a special privilege, namely the right to enforce his charge without joining either subsequent encumbrancers or those who are relegated to that position; and the effect of sub-s. (3) is to prevent these other charge-holders from questioning either the existence of the arrears of rent or their extent. As regards that, they are bound by the decree.

[17] The object of the Legislature was to provide the landlord with a simple and effective

remedy when his rent is not paid. He holds the superior right and is not concerned with mortgagees of the lesser interests, namely, the interests of the tenant. It was considered undesirable that these holders of lesser interests should be permitted to intervene and challenge his rights and complicate a simple rent suit by the introduction of extraneous matters in which the landlord was not interested. But except for this, there is here no creation of new rights and remedies under the general law. Landlords are not new, nor are tenants; nor are chargeholders unknown to the general law. On the contrary, their rights are well defined. The rule enunciated by their Lordships does not apply in such cases. On the contrary, the rule to be applied here is the one which directs Courts to respect vested rights and rights given by the general law and to permit them to be varied only to the extent expressly empowered by the special law or empowered by necessary implication.

[18] In our opinion, the position is this. The landlord is given a charge on the holding for his rent. The charge is not on the fee simple in the land but on the tenancy rights. That charge is made a first charge, and accordingly all prior encumbrancers are postponed to him. But they are no more than postponed. They are not wiped out altogether.

[19] Next, it is clear to us that what the landlord sells at the auction is the tenant's interests in the holding and not his (the landlord's) fee simple in the land. Accordingly, a stranger-auction-purchaser gets only the tenant's rights in the land. He does not acquire any of the landlord's superior rights. In the circumstances, it is not easy to see how a stranger-purchaser can be said to step into the landlord's shoes and acquire his charge. It is impossible to hold that there is, or can be, any subrogation in a case like this. It is clear to us that the stranger-purchaser steps into the tenant's shoes and not the landlord's. He becomes a tenant and has no higher rights. When the landlord purchases a complication arises, but until we are clear about the stranger-purchaser's rights it will not be easy to define the landlord-purchaser's position.

[20] Now, if there is no subrogation when a stranger purchases, and a prior encumbrancer is relegated to a secondary position, then we have a simple case of a man purchasing an encumbered estate and allocating part of the purchase price to the satisfaction of a prior encumbrance. This is considered at length by the Full Bench in I. L. R. (1938) Nag. 206.[9] The question posed there was (p. 215):

"Is a purchaser of a property with whom is left part of the consideration of the sale in his favour for paying off a mortgage but in whose favour there is no express agreement of subrogation in writing registered entitled to claim subrogation as against a later mortgagee under S. 92, T. P. Act as amended by Act 20 [XX] of 1929 ?"

The answer was no.

[21] Now, the position posed there is, in our opinion, almost exactly the position here when there is a stranger-purchaser. It is true no part of the purchase price is left in the purchaser's hands; the prior encumbrance is automatically discharged, but that makes the matter worse for the purchaser, and in any case, that position was dealt with in the argument at p. 219. The Full Bench point out that in such a case the only way in which the purchaser can get subrogation is (1) by first acquiring the prior mortgagee's rights and then the mortgagor's, or (2) by lending money to the mortgagor to pay off the prior mortgagee and obtaining from the mortgagor an agreement in writing registered under S. 92, T. P. Act. These rights are now regulated by statute, and, in our opinion, it is no longer open to us to apply equitable principles which have not been embodied in the Transfer of Property Act. As Sulaiman C. J. said in I. L. R. (1937) ALL. 880[10] at p. 892:

"The entire law is now contained in Ss. 91 and 92 and also 95 and 101 of the new Act."

[22] A Division Bench of this Court took the same view when construing S. 9, C. P. Tenancy Act: *see* I. L. R. (1941) Nag. 607[4] at p. 612 Reference may also be made to the observations of the Privy Council where, dealing with S. 60, T. P. Act, they say that questions of redemption are governed and delimited by the Act: *see* I. L. R. (1942) ALL. 608[11] at pp. 621, 623. What applies to redemption applies equally, in our opinion, to the allied question of subrogation.

[23] The Allahabad Full Bench say at p. 895 that:

"If the vendee .... has taken the property and undertakes as part of the sale consideration .... to discharge a prior debt, he is making the payment out of the money which really belongs to his transferor and is not paying money which belongs to him himself."

[24] The Nagpur Full Bench takes the same view at p. 218. But at p. 219 a distinction is drawn between a stranger-purchaser and one who falls within S. 91, T. P. Act:

"Different considerations apply where *D*, (the purchaser) is a subsequent mortgagee or other person falling within S. 91, T. P. Act or a transferee in circumstances that cause him not to be in the position of a mortgagor."

What these considerations are the Full Bench do not say. It will be nesessary, therefore, to examine the local decisions under S. 9.

[25] In A. I. R. 1927 Nag. 119[1] Kinkhede A. J. C. considered that the auction-purchaser has a dual capacity. In one he steps into the shoes of the holder of the first charge and in the other he is a

purchaser of the equity of redemption. He accordingly has the option of redeeming as owner or of falling back on his first charge and enforcing it.

[26] This case was decided in 1927 before the Transfer of Property Act was amended by Act 20 of 1929. Unfortunately no facts are set out in the report so we do not know whether the learned A. J. C., was dealing with a stranger-auction-purchaser or the landlord. If he was dealing with a stranger, then, for the reasons we have already given, we do not think the law laid down there holds good after the amendment. But if he is referring to the landlord then different considerations apply.

[27] Niyogi J. considered the matter in I. L. R. (1936) Nag. 138.[6] In this case one S purchased the holding from the absolute-occupancy tenant in 1920 in execution of a simple money decree, but never got physical possession. Shortly before the purchase, namely in 1919, and again after the purchase, in 1923, the landlord instituted two suits against the tenant for arrears of rent. He obtained two decrees, which were consolidated, and at the auction the holding was purchased by one H in the year 1925. In 1930 H sold the holding to the landlord at least that is how the transaction is described though of course there could be no sale in such a case. It would be a surrender. Thereupon S sued H and the landlord for possession. That suit was dismissed. Thereupon S filed the suit with which Niyogi J. was concerned for redemption. He claimed the right to pay off the rent decrees and to get possession. Niyogi J. held he could not redeem. He held that S's only remedy was to pay off landlord's first charge under S. 9 (3), C. P. Tenancy Act, in the execution proceedings (*see* p. 140), and that once the holding was sold S's right of redemption disappeared.

[28] It is to be observed that S, in that case, was not a chargeholder. At no time had he any charge on the land. He was in the simple position of purchaser of the holding. As there were arrears of rent extant upon the land at the time of his purchase it was his duty to pay them. He did not pay them, therefore he was in no better position than the tenant himself. As the tenant could not have redeemed after the sale H, who stood in the tenant's shoes, could not do so either. Whether the case was rightly decided or not we need not say, but it is to be distinguished from a case like the present where the person in H's position has a charge upon the land and acquires the holding in satisfaction of his own charge. Grille J. (as he then was) distinguished Niyogi J's decision on this ground in S. A. No. 287 of 1937[5] and he pointed out that Niyogi J. did not dissent from Kinkhede A. J. C's view but distinguished it saying that that case "bears no analogy to the present case."

[29] In I. L. R. (1937) Nag. 498[2] Gruer J. dealing with a stranger-auction-purchaser at the landlord's auction, held that he was in no better position than an auction-purchaser who buys in execution of a simple money decree. If the estate is encumbered at the time of his purchase he takes it subject to those encumbrances. But, curiously enough, a decree for redemption was passed and the stranger-auction-purchaser was allowed to claim the money he had paid at the landlord's auction sale, (p. 502). We gather this means the purchase price and not merely the amount of the rent decree. But whichever it is we find it difficult to reconcile this with the finding that the stranger-purchaser is in no better position than an auction purchaser, who buys in execution of a simple money decree. A purchaser at an auction gets no better title than his judgment-debtor, and mortgagees who were not parties to the suit are not affected by it: *see* Mulla's Civil Procedure Code, Edn. 11 pp. 266 and 906; also 18 Cal. 164[12] at pp. 164, 179. Such a purchaser stands in the shoes of the owner and like any other owner of the right to redeem he must either discharge the encumbrances on the property or have his property sold. He cannot use a prior encumbrance as a shield unless he has a right of subrogation or comes in under S. 101, T. P. Act. A person who purchases in execution of a simple money decree has no such right. Accordingly, we find it difficult to reconcile Gruer J.'s conclusions with the decree which he passed.

[30] The next decision in order of time is Grille J.'s decision in S. A. No. 287 of 1937.[5] In his case the landlord himself purchased. A prior mortgagee had, however, obtained a decree for foreclosure shortly before and entered into possession. Accordingly, the landlord purchaser sued for possession. Grille J. held that he was in the same position as stranger-purchaser. He purchased subject to the mortgage and accordingly was not entitled to possession. His duty was to redeem the mortgage. This is a question we shall have to consider later.

[31] Next follows a decision of Pollock and Dig by JJ. in I. L. R. (1940) Nag. 522.[3] They were concerned with stranger-auction-purchasers. The suit was by mortgagees to enforce their mortgage. It was held that the suit was competent and that the stranger-purchasers must redeem. But it was also held that if they redeemed they would be given credit for Rs. 107-3-9, the amount of the rent decree. This was done because the lower Court had so ordered and that part of the decree was not appealed against. Pollock J. observed at p. 524. "I express no opinion on the correctness

of that decision." We have already dealt with this and doubt whether the first Court's decree was legally substainable to that extent. The High Court's position is of course understandable. There was no appeal against that part of the decree and so the High Court could not have interfered. But the first Court neither permitted subrogation nor treated the purchasers as mortgagors pure and simple. If there was subrogation it would have been the duty of the plaintiffs mortgagees to redeem the purchasers. But that was not the decree. The mortgagees were permitted to enforce their mortgage and the *purchasers* were told to redeem. The purchasers were to be given credit for the Rs. 107-3-9 only if they redeemed. Otherwise, we gather the property was to be put to sale, and there was no direction to the effect that this sum should be refunded to them out of the sale proceeds. Even such a direction would, in our opinion, have been wrong. As we have said, the matter is now regulated by statute, and there is no room for the application of some vague and hitherto unknown equity.

[32] The last case is I. L. R. (1941) Nag. 607.[4] There a subsequent mortgagee paid the landlord the arrears of rent due on the holding without the intervention of Court. When the prior mortgagee sued on this mortgage the subsequent mortgagee claimed priority to the extent of the landlord's first charge. He contended that he stepped into the landlord's shoes and became a holder of the landlord's first charge the moment he paid the arrears of rent in order to save the holding from sale. It was held that the charge was extinguished the moment the rent was paid and so the subsequent mortgagee could not get priority.

[33] This analysis of the case law reveals that the only case which dealt with the rights of a landlord-purchaser was Grille, J's decision in S. A. No. 287 of 1937.[5] He held that the landlord was in no better position than a stranger-purchaser. This is the position we have to consider.

[34] Now, the Division Bench in I. L. R. (1941) Nag. 607[4] at pp. 611, 612 say that S. 9, C. P. Tenancy Act, confers no right of subrogation. Therefore, if subrogation is sought, the matter must be brought within S. 92, T. P. Act. We have already said that we agree with this view because the matter is now governed by statute.

[35] Section 92 lays down two conditions. First, the person claiming the right must be one of the persons referred to in S. 91, and second, he must have redeemed property subject to a mortgage (which will also include a charge because of S. 100). Now, the landlord has a charge upon the property and so falls within the class mentioned in Cl. (a) of S. 91, but when he brings the property to sale he does not, in our opinion, redeem that charge. A stranger who purchases at the auction does not redeem the charge, nor is he a person "interested." He pays the full price and buys free of that particular encumbrance. What happens to his purchase money is no concern of his unless he takes the precaution of obtaining a right of subrogation by writing registered under the second part of S. 92. We have already dealt with this. In the same way we do not see how the landlord can be said to be redeeming his own charge when he purchases instead of a stranger. He does not redeem it but extinguishes it by the sale. Accordingly, we are of opinion that he does not come in under S. 92.

[36] That leaves S. 101 which deals with merger. Here the conditions are these. The section starts by saying,

"Any ..... person having a charge upon immoveable property ..... may purchase or otherwise acquire the rights in the property of the mortgagor" (which as the context shows will include a charge-holder).

Now, the landlord is, in our opinion, such a person. He has a charge upon the property and he either purchases or "otherwise acquires" the property at the auction. Therefore, he comes, within this portion of the section. The section continues,

"Without thereby causing the ..... charge to be merged as between himself and any subsequent mortgagee ..... and no such subsequent mortgagee ..... shall be entitled to foreclose or sell such property without redeeming the prior ..... charge."

[37] In our opinion when the *landlord* purchases at his own auction S. 101 comes into play and he is entitled to set up his own charge. The position is otherwise when a stranger purchases. To that extent we, with the utmost respect dissent from Grille J's decision in S. A. No. 287 of 1937.[5] The plaintiff must accordingly redeem the landlord's charge before he can enforce his own mortgage.

[38] The next question we have to determine is the extent of that charge. The matter is complicated because the plaintiff is only interested in the Bhonslawala field while the landlord's decrees in his rent suit covered two fields—Bhonslawala as well as Bhivseni. Now, the defendant landlord is not only the holder of the first charge because there has been no merger, but he is also a purchaser of the property. That results in splitting up of the charge. Had there been only one field in dispute the defendant would have been entitled to Rs. 1027-2-6 which is Rs. 565-4-6 plus Rs. 461-14-0, the amount of the two decrees we have mentioned at the outset of our judgment. He would also have been entitled to have added to this the amount of four other decrees with

which we shall deal later. But as the charge is, in our judgment, split by reason of the defendant being the owner of the right to redeem as well as a chargeholder, the defendant will be paid so much of the total of the six decrees which he has obtained as is proportionately assignable to the Bhonslawala field. On this payment being made the plaintiff will be entitled to enforce his mortgage against the defendant in the usual way, and if the defendant does not pay up the field will be sold.

[39] We direct a splitting up of the first charge for this reason. The original owner of the property, Mt. Kautikabai, the tenant, has disappeared and the defendant stands in her shoes. If the defendant were to be paid the whole of the Rs. 1027-2-6 then the plaintiff would stand in the position of an assignee of the first charge. He would not, by reason of this payment, become owner of the right to redeem. Before he could reach that position it would be necessary for him to enforce this first charge. But such enforcement has to be against somebody and that somebody is the owner of the right to redeem or whoever stands in his shoes; and it is axiomatic that the owner of the right to redeem can redeem.

[39a] Now, the original owner of the property has disappeared, and the defendant stands in her shoes. Therefore, the only person who can now redeem is the defendant. But it would be absurd to hold that he can redeem the whole property because then a vicious circle would be created and there would be no end to the action. Plaintiff 1 would redeem the entire first charge and step into the defendant's shoes. Next the defendant, as owner of the right to redeem, would re-redeem the plaintiff and we would be where we were before with the plaintiff seeking to enforce his charge against the Bhonslawala field and the defendant out of pocket to the extent of the first charge which he has redeemed.

[40] In our opinion, the true position is this. The plaintiff is proceeding against a particular field. He cannot in this suit travel beyond that and obtain other property to which he has no title. The defendant, on the other hand, is entitled to use his prior charge as a shield against the plaintiff's attack on the field in dispute in this case. But as regards the other field, the defendant is the owner of it. He has purchased it and there is now no encumbrance on it. The plaintiff cannot be permitted to proceed against it in this suit because this suit is confined to the Bhonslawala field. Therefore, so far as the prior charge which relates to both fields is concerned, the defendant is in the position of a chargeholder who has acquired an indefeasible right as owner to a portion of the charged property, namely, the Bhivseni field. This attracts the provisions of S. 60, T. P. Act, and results in a splitting up of the charge, and that results in piecemeal redemption.

[41] A question of *lis pendens* was raised. The plaintiff's charge was created on 23-4-1930. This was during the pendency of the first rent suit (Civil Suit No. 2 of 1930) which was constituted on 11-2-1930. It was contended that the charge was consequently inoperative against the defendant.

[42] We do not think any question of *lis pendens* arises Section 52, T. P. Act, does not prohibit a transfer of property during the pendency of a litigation. All it says is that such transfer shall not affect the right of any party to the suit. The defendant's only right in the litigation was to have the property brought to sale in satisfaction of a first charge which, as such, obtained priority over all other charges. The creation of a subsequent encumbrance did not affect that right. The defendant still got priority. His rights in the litigation were consequently not affected and so S. 52 was not called into play.

[43] It was next argued that the defendant purchased the equity of redemption without notice of the plaintiff's charge and so it does not bind him. This is material only in so far as it affects the defendant's title as owner and not as a chargeholder. If he wants to rely on his rights as owner then he must show, not only that he had no notice of the prior charge but also that with due diligence he could not have known. The plaintiff's charge-decree was registered on 21-8-1930 and this operates as notice. *See* 52 ALL. 985[13] at p. 990 and the observations of the Privy Council in 39 Cal. 527[14] at p. 556 where their Lordships say :

"If Gajadhur Mahto had taken the ordinary precaution of inspecting the register ..... before he took his mortgage ..... he would have found that the "(property)" had been charged ..... It is to be presumed that Gajadhur Mahto took the ordinary precautions before parting with his money, which a prudent intending mortgagee would take."

This contention has no force.

[44] A question was raised regarding the defendant's right of pre-emption under the Tenancy Law, but we are not concerned with that in this suit and say nothing about it beyond setting out the fact that the defendant raised the point before us in order, as he says, to safeguard his right hereafter and to show that he had not abandoned it.

[45] A question of improvements also arises. The defendant claimed Rs. 850-0-0 for this under S. 51, T. P. Act. The lower Court holds that he spent Rs. 700 but has omitted to include this in the decree. This figure was not challenged but it was urged that the profits of the field should

be deducted. It was argued that if the defendant wants to occupy the position of a chargeholder and claim to be redeemed then he must account for the profits.

[46] We do not think this is right. The defendant is not primarily a chargeholder. He is the owner of the property. The plaintiff has only a charge on it and had no right to possession. Therefore, the owner-defendant could do what he liked with the profits. The question of the prior charge only arises because of the statutory protection which S. 101, T. P. Act, gives. In order to protect his interests, which have priority over the plaintiff's, the defendant can use his prior encumbrance as a shield and demand that he be reimbursed for what he paid towards redemption of this field. That, however, is a right given to the defendant. It is a special privilege conferred on him alone and does not impair his position otherwise as owner of the right to redeem. The plaintiff gets no extra rights because of this, therefore, as he was not entitled to possession under his charge decree, no question of accounting for profits arises. The defendant will accordingly be allowed Rs. 700 for the improvements he has made.

[47] The result then is this. The defendant has six decrees for arrears of his rent in his favour. They are as follows: Exhibit D-13 in Civil Suit No. 2 of 1930 for Rs. 565-4-6, Ex. D-17 in Civil Suit No. 247 of 1933 for Rs. 461-14-0, Ex. D-19 in Civil Suit No. 485 of 1933 for Rs. 259-11-6, Ex. D-21 in Civil Suit No. 555 of 1933 for Rs. 15-14-0, Ex. D-22 in Civil Suit No. 616 of 1935 for Rs. 21-12-6, Ex. D-23 in Civil Suit No. 434 of 1936 for Rs. 123-8-9. Total Rs. 1,448-1 3.

[48] The lower Court has only taken the first three into account. It is admitted on behalf of the plaintiff that he will also have to pay the amount of the other three. But the lower Court has not made any apportionment between the Bhonslawala field and the Bhivseni field on the one hand, and the occupancy and absolute occupancy fields in each decree on other. The defendant's charge is against the absolute occupancy fields only, so that will have to be separated. Both these errors will be corrected, as also the omission to allow the defendant credit for the Rs. 700 spent on improvements.

[49] The lower Court has passed a decree for redemption treating the plaintiff as the owner of the right to redeem. As we have pointed out, that is not correct. The defendant was the first to purchase that right. The existence of a mortgage or charge does not prevent the mortgagor from selling or otherwise transferring his right of redemption. Accordingly, the first to purchase the equity steps into the owner's shoes. Once the equity is sold it cannot be sold over again, and the second purchaser gets no title to it. The plaintiff is, therefore, no more than a chargeholder, and all he can do is to enforce his charge. In doing so the defendant, as owner of the equity, has the right to redeem.

[50] It will now be ascertained how much out of the Rs. 1448-1-3 which appertains to the two absolute occupancy fields is apportionable to the Bhonslawala field. If the parties can agree on a figure, that will be accepted. If not, that will have to be determined. The decree will then direct that the plaintiff do pay to the defendant that sum plus a further Rs. 700 within 6 months. No interest will be awarded on either of these sums because the defendant has been in possession for four years, and in so far as he is setting up his rights as a chargeholder he must be taken to have appropriated the profits towards the interest. If this sum is not paid within the time mentioned, or such further time as may be allowed, the plaintiff's suit will stand dismissed with costs in the lower Court and here.

[51] If the money is paid as above then the decree will proceed along the lines of an ordinary decree for sale on a mortgage except that the date fixed for payment will be nine months hence instead of the usual six. That will give the defendant three months from the date of receipt of his money to exercise his own right of redemption.

[52] As regards the price which the defendant must pay to the plaintiff, that will be such part of the Rs. 55,000 plus interest (but not costs of the plaintiff's charge decree dated 23rd April 1930 in Civil Suit No. 16 of 1927) as will be proportionately assignable to the field in suit. Here also, as in the defendant's case, the plaintiff's charge is split up because the plaintiff, like the defendant, has purchased a part of the charged property. Here also, if the parties can agree on a figure it will be accepted, otherwise it will have to be determined.

[53] The suit has not been framed as one on a mortgage or charge. But as the plaintiff has asked for possession outright, which is the higher right, and as he has set out most of the material facts in the plaint, and in view of the uncertainty about the law, we think it proper to mould the claim as above.

[54] The plaintiff asks in the appeal that he be given possession unconditionally and without being asked to pay the defendant any sum. He fails in this, and if technicalities were pushed to their utmost he would fail altogether because his proper course was to sue on his charge and afford the defendant an opportunity of redemption after redemption of the defendant's prior charge. Accordingly, he will pay the defendant the costs of this appeal. The costs in the first

Court will follow the usual course in a mortgage suit for sale.

[55] As regards the defendant's costs in his appeal. He has appealed against the decree granting possession to the plaintiff and has contended in the 10th ground of appeal that the plaintiff is not entitled to possession even on redemption. This contention we have upheld to this extent. The plaintiff must first redeem the defendant's first charge. When he has done that the defendant, as owner of the right to redeem, will be at liberty to redeem the plaintiff. As between the plaintiff and the defendant, the defendant is the owner of the property because he purchased it first. Accordingly, he is the one entitled to keep it if he is prepared to redeem the plaintiff's charge on it. The plaintiff's remedy accordingly is not possession but sale as on a mortgage if his (the plaintiff's) charge is not redeemed.

[56] The defendant accordingly succeeds on this upto a point. But as he has nowhere offered to pay off the plaintiff's charge and redeem him he does not succeed to the full extent on that point. On the other point he has asked that the figure of Rs. 2040-8-0 which the lower Court fixed as the price of redemption, that is to say, the figure which the plaintiff was ordered to pay the defendant for redemption of the defendant's first charge, be increased by Rs. 2100. We have dealt with this in para. 55 of the judgment. Since writing the above the parties have agreed that Rs. 1,375-15-0 out of the Rs. 1448-1-3 is apportionable to the Bhonslawala field. Therefore, as held in para. 55 the plaintiff will pay to the defendant Rs. 2075-15-0 (being Rs. 1375-15 0 plus Rs. 700) within six months. This means that the defendant has failed regarding the bulk of the Rs. 2100 by which he desires the decree to be enhanced. We think it right, therefore, that each party bear its own costs in the defendant's appeal, that is First Appeal No. 76 of 1940.

[57] The parties are not able to agree about the apportionment dealt with in para. 57, (para. 50 of report). It will, therefore, be necessary for us to collect data on which the apportionment can be made. Counsel on both sides agree that the valuation of the properties be made in the year 1930 because, as we are dealing with a proportion the exact year of valuation will not make much difference, the various items of property will increase or decrease in value proportionately and so their relative values will not be affected. In view of this, the lower Court will try, and determine, the following issues, after taking evidence and hearing the parties.

(1) What was the price of the Bhonslawala field in the year 1930?

(2) What was the price in 1930 of the remaining properties (after excluding the Bhonslawala field) covered by the plaintiff's charge decree dated 23-4-1930 in Civil Suit No. 16 of 1927?

[58] The findings and records to be returned within three months. Objections to be filed within a fortnight of the receipt of the findings in this Court.

S.C. *Order accordingly.*

A. I. R. (35) 1948 Nagpur 324 *[C. N. 110.]*

POLLOCK AND PADHYE JJ.

Trimbak Raoji and another — Plaintiffs-Appellants v. *Lonkaran and others — Defendants—Respondents.*

Letters Patent Appeal No. 9 of 1944, Decided on 29-12-1947, from appellate decree of Puranik J., in S. A. No. 226 of 1940, D/- 25-8-1944.

(a) Hindu law—Joint family—Suit against—Parties —Suit for foreclosure against manager — Minor member not made party — Manager can represent him — Decree is binding on him unless prejudice is shown — Civil P. C. (1908), O. 34, R. 1.

Though a member of a joint Hindu family may not actually be a party to a suit for foreclosure he can be effectively represented by the manager and the family as a whole can be bound by a decree passed in such a litigation. This may be so even if the mortgagee may have no notice of the interest of the member not impleaded in the suit. A member of a joint family claiming redemption of a mortgage in spite of a decree extinguishing the mortgage must prove that he was prejudiced as to the right of redemption because he was not effectively represented in the mortgage suit: 1 A. I. R. 1914 P. C. 136; 2 C. P. L. R. 221 and 8 N. L. R. 136, *Rel. on.*; 7 A. I. R. 1920 P. C. 1, *Disting.* [Para 7]

Annotation: ('44 Com.) Civil P. C., O. 34, R. 1, N. 12.

(b) Hindu law — Joint family—Manager—Minor can be manager—Guardians and Wards Act (1890), S. 21.

There is nothing in the Hindu law which absolutely forbids a minor though a senior member of a joint Hindu family from occupying the status of a managing member of the joint Hindu family, particularly when such a senior member has a capable guardian to represent him. A minor in order to be a managing member need not be of an age capable of having a wife and a son: 4 A. I. R. 1917 Mad. 612, *Dissent.*; 8 N. L.R. 136, *Rel. on.* [Para 10]

Annotation : ('46-Man.) Guardians & Wards Act, S. 21 N. 1.

(c) Hindu law—Joint family—Manager—Representation—Fact that he was sued in representative capacity need not be mentioned—Civil P. C. (1908), O. 7, R. 5.

In a suit against the manager, it is not necessary, in order to bind the minor members who were not impleaded as defendants, by the decree, that the capacity in which the manager is being sued, should be specifically mentioned in the plaint and pleadings. It is sufficient if the person sued has a representative capacity and this fact should be established by independent evidence: 34 All. 296, *Disting.*; 14 A. I. R. 1927 P. C. 56; and 22 A. I. R. 1935 Nag. 14, *Rel. on.* [Para 12]

Annotation : ('44-Com.) Civil P. C., S. 50 N. 12.; O. 1, R. 8 N. 17 ; O. 7 R. 5, N. 1.

Cases referred :—

1. ('12) 8 N. L. R. 136 : 17 I. C. 141, Bajirao v. Gulabsingh.

2. ('14) 36 All. 383 : 1 A.I.R. 1914 P. C. 136 : 41 I. A. 216 : 24 I. C. 504 (P.C.), Sheo Shankar Ram v. Mt. Jaddo Kunwar.
3. ('20) 47 Cal. 924 : 7 A. I. R. 1920 P. C. 1 : 47 I. A. 91 : 56 I. C. 274 (P.C.), Ganpat Lal v. Bindbasini Prasad.
4. ('16) 39 Mad. 608 : 4 A. I. R. 1917 Mad. 612 : 33 I. C. 894, Mohideen Ibrahim Nachi v. Ibrahim Sahib.
5. ('89) 2 C. P. L. R. 221, Gopal Rao v. Gangay of Mouza Imloi.
6. ('12) 34 All. 296 : 39 I. A. 109 : 14 I. C. 629 (P.C.), Balwant Singh v. R. Clancy.
7. ('27) 51 Bom. 450 : 14 A. I. R. 1927 P. C. 56 : 54 I. A. 122 : 101 I. C. 44 (P.C.), Lingangowda v. Basangowda.
8. ('35) 31 N. L. R. 352 : 22 A. I. R. 1935 Nag. 14 : 154 I. C. 333, Madhodas v. Gangabai.

Dr. D. W. Kathaley—for Appellants.

Y. S. Tambe—for Respondents.

Judgment. — Sonba, who was the owner of field No. 120 and two other fields at Dhamangaon, mortgaged them on 5 6-1884, (Ex. B-21) in favour of Ghamji Marwadi. Of the mortgaged fields, field No. 120 was purchased subsequently on 13-4-1900, (Ex. P-18) by Raoji. Raoji died on 18-9-1908, leaving two minor sons Trimbak and Gangadhar as his heirs; the younger (Gangadhar), who was born on 6-4-1906, died on 18-9-1937, leaving behind a widow Susbila who, according to the law in force on 18-9-1937, represented her husband's share in the joint family property for her life.

[2] The mortgage, dated 5-6-1884, was the basis of Civil Suit No. 138 of 1910 instituted by the mortgagee against Trimbak treating him as the sole representative of Raoji. Gangadhar was not impleaded as a defendant as his existence was not probably known to the mortgagee. Thimbak was, to begin with, wrongly shown as major but was subsequently shown as a minor aged 10 years and was represented in the suit by his paternal uncle, Daji as his guardian. This suit was contested but it ended in a preliminary decree passed on 30-3-1912. The appeal preferred against it was dismissed, and ultimately the decree was made final on 19-4-1913 and the mortgagee took possession of the mortgaged porperty on 27-5-1913.

[2a] Out of the three mortgaged fields the persons who were in possession of the other two, i. e. other than No. 120, which was in the possession of Trimbak, pleaded paramount title and were discharged from the mortgage suit. After obtaining a final decree for foreclosure, the mortgagee no doubt took possession of those two fields but the persons in possession applied under O. 21, R. 100, Civil P. C., and obtained possession thereof. The mortgagee submitted to dispossession and the mortgage security was reduced, the mortgage being enforced against field No. 120 alone.

[3] On the death of Gangadhar on 18-9-1937, the present suit for possession of field No. 120 on redemption of the mortgage dated 5-6-1884, and for surplus profits was instituted on 2-12-1937 by Trimbak and Sushila, the widow of Gangadhar. The redemption of the mortgage was claimed mainly on the ground that Trimbak, though impleaded in the mortgage suit, was not properly represented as his mother, who was the natural guardian, was not shown as his guardian and one Daji, who was fraudulently shown as guardian, did not make any defence and guard his interests. The other brother, Gangadhar, was not impleaded in this suit. The plaintiffs further pleaded that the mortgage was split up and from the profits of field No. 120 the mortgagee who was in possession had received much more than 1/3rd of the amount due on the mortgage and they therefore claimed the return of the surplus.

[4] The suit was dismissed throughout, by the first Court, by the lower appellate Court and by this Court in second appeal. All the Courts held that Trimbak was duly represented by the guardian Daji who represented the minor properly and efficiently and Gangadhar was also properly represented by Trimbak and the guardian Daji, Trimbak being in the position of a managing member of a joint Hindu family. In any case, it was held that there was in the circumstances of the case no prejudice to Gangadhar.

[5] The plaintiffs, Trimbak and Sushila, have now preferred this Letters Patent appeal and the main question urged before us is that in any case the right of redemption of Gangadhar was not extinguished and that that right has now vested in his widow Sushila. It was argued with much force that a minor could not, according to the principles of Hindu law, be a manager of a joint Hindu family and represent other minor co-parceners in that family. The learned counsel for the appellants pointed out that a manager of a joint Hindu family has certain powers and obligations and one of his powers is to alienate joint family property for legal necessity. A minor would not be able to exercise this power as, in fact, a contract by a minor, even according to the Hindu law, is void. The learned counsel urged further that as a fact Gangadhar was not represented as Trimbak was not sued in his representative capacity, even if he had any, and the mortgagee was not even aware of Gangadhar at all. According to the learned counsel, 8 N. L. R. 136,[1] was not correctly decided and it could also be distinguished as all that it decided was that a minor father or his guardian represented his minor son.

[6] In 36 ALL. 383,[2] their Lordships of the

Privy Council in a similar suit for redemption observed thus at pp. 386-387:

"There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the Courts upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself, and no question arises under S. 85, T. P. Act, 1882, because the mortgagee had no notice of the plaintiffs' interests."

Their Lordships have also indirectly approved the following observations of the High Court at p. 386:

"On appeal to the High Court of Judicature it was held that they were bound by the foreclosure decrees on the ground that the joint family was effectively represented in the suit, and that in such case the Court is not bound to set aside the execution proceedings where substantial justice has been done merely because every existing member of the family was not formally a party to the suit."

[7] It thus follows that though a member of a family may not actually be a party to the suit he can be effectively represented and in fact the family as a whole can be bound by a decree passed in such a litigation. This may be so even if the mortgagee may have no notice of the interest of the member not impleaded in the suit. A member of a joint family claiming redemption of a mortgage in spite of a decree extinguishing the mortgage must prove that he was prejudiced as to the right of redemption because he was not effectively represented in the mortgage suit.

[8] It has not been shown to us that Gangadhar was in any way prejudiced because he was not included in the array of defendants in the mortgage suit. His elder brother Trimbak was impleaded and was represented by his paternal uncle Daji who was then the only adult male member in the family and who, on the very admissions of Trimbak and Gangadhar, was actually managing their property: (*vide* Exhibit P-3) In fact, these brothers sued Daji for rendition of accounts as a manager of their property during their minority and obtained a decree against him in Civil Suit No. 214 of 1928. Though the mother of Trimbak and Gangadhar was alive at the date of the mortgage suit Daji was allowed to act as Trimbak's guardian because he was regarded as the only competent person to guard the interests of the minor. If Gangadhar had been shown as one of the defendants he would have been in the same position as Trimbak and would have been represented by Daji as his guardian. It has already been shown that Daji did everything which a prudent guardian would do in conducting the litigation in the interests of a minor. It is neither alleged nor proved that the result of the litigation would have been otherwise and that the foreclosure of the mortgaged property would have been avoided if Gangadhar was actually impleaded in the suit. Gangadhar died on 18-9-1937 when he was a little more than 31 years of age, and in 1928 he had joined Trimbak in instituting a suit against Daji. If he had any grievance against the mortgage decree or the foreclosure of the mortgaged property, he had sufficient time to sue for redemption. It appears that Gangadhar had no grievance against the foreclosure decree, and he did not consider himself prejudiced thereby. The present suit for redemption instituted soon after the death of Gangadhar is purely an afterthought on the part of Trimbak. This is, in our view, sufficient to refuse the relief of redemption asked for in the present suit.

[9] In 47 Cal. 924[3] the head of a joint family, had mortgaged family property for purposes binding on the entire family. The mortgage was sued upon and the two sons of the mortgagor though impleaded were admittedly not represented. In the mortgage decree which was passed, this mortgaged property was put to sale, and the property was purchased by the mortgagee who also took possession thereof. The two sons then filed a suit for redemption on the only ground that they were not represented in the mortgage suit. Their Lordships of the Privy Council refused to allow the right of redemption as it was extinguished by the mortgage decree and that right could not be revived until the sale was set aside. In the present case, which was instituted nearly 24 years after the foreclosure, no relief is claimed to set aside the foreclosure decree.

[10] There is nothing in the Hindu law so far as we have seen and nothing has been pointed out to us by Dr. Kathalay, the learned counsel for the appellants, which absolutely forbids a minor though a senior member of a joint Hindu family from occupying the status of a managing member of the joint Hindu family, particularly when such a senior member has a capable guardian to represent him. On the other hand, S. 21, Guardians and Wards Act, positively contemplates that a minor member can be a managing member of an undivided Hindu family. We do not see in the section any jurisdiction to hold that the minor in order to be a managing member must be of an age capable of having a wife and a son. Sir D. F. Mulla in a very learned book dealing with Principles of Hindu Law, at page 590 of the 10th edition observed:

"There is no rule of Hindu law that the managing member of an undivided family should be an adult. He may be a minor..."

The learned counsel for the appellants relied on the observations of Sadasiva Ayyar J. in 39 Mad. 608[4] at p. 614:

"I am very doubtful whether a minor can at all be the managing member of a Hindu family, though he is the senior male member."

The learned Judge characterised S. 21, Guardians and Wards Act as somewhat anomalous and suggested that the Legislature should amend the section. The Legislature has not however thought it necessary to amend the section in these 32 years.

[11] In 2 C. P. L. R. 221[5] which was decided by the Judicial Commissioner, Central Provinces, the learned J. C. held:

"Where a mortgage is effected by the managing members of a Hindu joint family and a decree for foreclosure or sale is obtained in a suit against those members alone and the property is absolutely foreclosed or passes under a sale to a third party, the transfer by foreclosure or sale would bind the interest of those members of the family who are not parties to the suit."

At p. 224 there is a paragraph which can be usefully reproduced below:

"It might be contended, that, granting that the mortgage was valid against the minor, still the law allows him a right of redemption, and he should not lose this right in a suit to which he was not a party. But the Judicial Committee refers to the case of Nanomi Babuasin and Madan Mohan in which it was said: 'If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the suit or execution proceedings, they ought not to be barred from trying the fact, or the nature, of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing, unless they can prove that the debt was not such as to justify the sale.'"

[12] The authority in 2 C. P. L. R. 221[5] has not been shaken anywhere in the last 60 years. On the other hand it is followed in 8 N. L. R. 136.[1] At pp. 138-139 the learned Additional Judicial Commissioner observed as follows:

"It appears to me that this case should be decided on the same principles as that in 2 C. P. L. R. 221[5] since it is not a case under the Transfer of Property Act. No exactly similar case to the present can be found, but it seems to me that if the person who would naturally be the manager of the family is incapacitated by minority from acting as manager, and the other members (in this case the son) are incapacitated by still greater minority, the person who is guardian of the minor who would naturally be manager takes the place of that manager as regards the other minors and fully represents them. In this case their mother was the guardian of Narayan and his two brothers and of Narayan's son. In the ordinary course Narayan or one of his brothers would have been manager and the plaintiff would have been adequately represented by that manager. As things stood I think he was adequately represented by the mother-guardian of his father and uncles."

[13] The learned counsel for the appellants relied on 34 ALL. 296[6] and further urged that Trimbak was not sued in a representative capacity. The decision in 34 ALL. 296[6] was based on its special facts in which the document was executed by one who was in fact a minor on the date of execution describing him as a major. That decision is of no help in the present case. It is not necessary, as held in 51 Bom. 450,[7] 31 N. L. R. 352[8] and other decisions, that the capacity in which the defendant was sued should be specifically mentioned in the plaint and pleadings. It is sufficient if the person sued had a representative capacity and this fact could be established by independent evidence. It is plain that a decree passed against such a person would bind the entire family. The learned counsel for the appellants also referred us to Art. 44, Limitation Act, and pointed out that there is a difference between the position of a guardian and a managing member of the family. This was nowhere disputed by the other side and is not relevant to the decision of the present appeal.

[14] In our view, the decision of this Court appealed against is correct and this appeal is therefore dismissed with costs.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 327 *[C. N. 111.]*

POLLOCK AND PADHYE JJ.

Vinkar Mandal, Basim and another — Defendants — Appellants v. *Narayanrao Gopalrao Dabhade and anothers — Plaintiffs — Respondents.*

Letters Patent Appeal No. 2 of 1945, Decided on 29-12-1947, from appellate decree of Bose J. in S. A. No. 432 of 1941, D/- 11-12-1944.

(a) Co-operative Societies Act (1912), S. 43 (2) (m) — Rules (C. P.) under—Withdrawal of member at any time is allowed unless rules otherwise provide—Such member trading in manner forbidden by rules — He cannot be fined — Civil Court can entertain suit in respect of it.

The general principle is that any member of a voluntary association or society, who is not under any contractual or other obligation to perform some undertaking, can withdraw at any time he pleases, and it is immaterial whether his resignation is accepted or not, unless the rules otherwise provide. The member ceases to be member when he tenders his resignation and the society has no power to impose fines on him because he thereafter traded in a way forbidden by the rules of the society.

The act of the Society in fining would be ultra vires and the civil Court would have jurisdiction to entertain a suit in respect of it, the jurisdiction not being barred by R. 26 and the matter being not one "touching the business of the Society:" (1896) 1 Ch. 409, *Ref.* [Paras 1 & 2]

Annotation: —('46-Man) Co operative Societies Act, S. 43 N. 4.

(b) Co-operative Societies Act (1912), S. 43 (2) (1)—Rules (C. P.) under—"Dispute touching business of Society".

The imposition of a fine on past members for not trading in accordance with the rules of the society by which they had ceased to be bound is not a matter touching the business of the society and has nothing to

do with the society which has no power to interfere with the trading activities of outsiders. [Para 2]

Annotation :— ('46-Man) Co-operative Societies Act, S. 43 N. 2.

(c) Letters Patent (Nag), Cl. 10—New point.

It is not open to the appellants to take a new point in Letters Patent Appeal: 26 A. I. R. 1939 Nag. 97, *Ref.* [Para 2]

Annotation : — ('44-Com) Civil P. C. App. III, Letters Patent (Cal.) Cl. 15, N. 14.

Cases referred :—

1. (1896) 1 Ch. 409 : 65 L. J. Ch. 324 : 73 L. T. 716, Finch v. Oake.
2. ('40) I. L. R. (1940) Nag. 37 : 26 A. I. R. 1939 Nag. 97 : 181 I. C. 533, Jagannath v. Jamnavallabh.

A. L. Halve — for Appellants.

R. S. Dabir — for Respondents.

Judgment.—This is a Letters Patent appeal against the decision of Bose J. We agree with him that, the general principle is that any member of a voluntary association or society, who is not under any contractual or other obligation to perform some undertaking, can withdraw at any time he pleases, and that it is immaterial whether his resignation is accepted or not, unless the rules otherwise provide, as was held in (1896) 1 Ch. 409.[1] The plaintiffs therefore ceased to be members when they tendered their resignations, and the defendant-society had no power to impose fines on them because they thereafter traded in a way forbidden by the rules of the society.

[2] It is contended that the jurisdiction of the civil Courts is barred by R. 26 of the rules under the Co-operative Societies Act. That rule requires that any dispute touching the business of a co-operative society between members or past members of the society and the committee or any officer shall be referred to the Registrar. This point was not dealt with by Bose J., and it is not open to the appellants to take a new point in Letters Patent appeal: *see* I. L. R. (1940) Nag. 37.[2] We may however say that the point has no force. The imposition of a fine on past members for not trading in accordance with the rules of the society, by which they had ceased to be bound, was not a matter touching the business of the society and had nothing to do with the society which had no power to interfere with the trading activities of outsiders. The imposition of the fines was *ultra vires* of the society and therefore, as was held by Gruer J., in this case on 25-3-1937, the civil Courts have jurisdiction to entertain these suits. The appeal is dismissed with costs.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 328 *[C. N. 112.]*

PADHYE J.

Mt. Bhagabai w/o Dalpat — Plaintiff— Appellant v. *Ghanshamdas s/o Lakhusa — Defendant — Respondent.*

Second Appeal No. 325 of 1943, Decided on 11-9-1947, from decree of Addl. Dist. Judge, Khandwa, D/-30-1-1943.

(a) Transfer of Property Act (1882), S. 123 — Gift deed duly executed, attested and registered — Gift accepted by donee — Title passes to donee — Any mental reservation or secret intention on part of donor does not invalidate gift.

Where a gift has been effected by a registered instrument duly executed and attested and the gift has been accepted and acted upon by donee the effect of such instrument is that title legally passes from the donor to the donee and any mental reservation or secret intention on the part of the donor to the contrary is indeed ineffective and cannot prevent the legal effect of a validly executed gift deed. [Para 9]

Annotation: — ('45-Com.), T. P. Act, S. 123, N. 6.

(b) Limitation Act (1908), Art. 142 — Suit for possession — Plaintitiff's husband in occupation and management within 12 years of suit—No plea that husband's possession was on plaintiff's behalf —Plaintiff held still entitled to prove that husband's possession was on her behalf and not adverse to her.

Where in a suit for possession, the plaintiff has pleaded her possession of the field in suit within 12 years as owner, it is open to her to prove it by adducing evidence showing that she was in actual physical possession or that she was in possession as owner through her agents, managers or relations. When the field was in actual possession and management of the plaintiff's husband during such period, it is open to the plaintiff to prove that all the rights constituting possession were in her all along and mere occupation was in her husband who was managing the field in suit on her behalf, even in the absence of a plea that the possession and management of her husband was on her behalf. In any way the plaintiff is entitled to show that possession and management by her husband was never on his own behalf and did not constitute adverse possession so as to extinguish her title. [Para 12]

Annotation : — ('42-Com.), Lim. Act, Arts. 142 & 144, N. 87.

(c) Limitation Act (1908), Art. 142 — Adverse possession — Husband and wife — Gift of field by husband to wife — Possession delivered — Subsequent possession and management by husband must be presumed to be on wife's behalf — Mere secret change of intention or mortgage of field by husband without knowledge of wife does not change nature of possession.

Where a field is gifted by a husband to his wife and the gift deed recites that the possession has been delivered to the wife, it must be presumed, on the principle that possession follows title, that the wife was in possession since the date of gift. If in such a case the husband is in actual possession and management of the field gifted and the husband and the wife are living together cordially, there is a strong presumption that the possession of the husband was on behalf of his wife and not adverse to her. Having thus taken up or continued management of his wife's property on her behalf a mere secret change of intention or the acts of the husband such as a mortgage deed executed in respect of such field without the knowledge of the wife

would not help him to prescribe against the wife: *Case law referred.* [Paras 15, 16]

Annotation : — ('42-Com.), Lim. Act, Arts. 142 & 144, Ns. 57 and 58.

(d) Limitation Act (1908), Art. 142 — Adverse possession — Onus of proof — Husband and wife — Husband's possession over wife's property pleaded to be adverse — Very heavy burden lies on person so pleading.

One who pleads adverse possession has a strong burden to discharge and the strength of the burden depends on the circumstances of the case. It is very heavy in a case where a husband's possession over the property of his wife is pleaded to be adverse. Even ordinarily the burden of effective adverse possession cannot be discharged without a clear and convincing evidence that possession is hostile to the real owner and amounted to a denial of such owner's title. This is much more so when the husband or persons claiming through the husband rely upon the husband's possession to be adverse possession: *Case law referred.* [Para 20]

Annotation : ('42-Com.) Lim. Act, Arts. 142 and 144, N. 87.

Cases referred:—

1. ('27) 50 Mad. 193 : 14 A. I. R. 1927 P. C. 42 : 54 I. A. 89 : 100 I. C. 105 (P. C.), Kalyansundaram Pillai v. Karuppa Mooppanar.
2. ('41) I. L. R. (1941) Nag. 655 : 26 A. I. R. 1939 Nag. 7 : 181 I. C. 203, Meharban v. Yusuf Khan.
3. ('37) I. L. R. (1937) Nag. 254 : 24 A. I. R. 1937 Nag. 129: 171 I. C. 271, Shankarsa v. Punam Chand.
4. ('30) 17 A. I. R. 1930 P. C. 57 : 24 S. L. R. 138: 121 I. C. 204 (P. C.), Siddik Mohomed Shah v. Mt. Saran.
5. ('41) 1941 N. L. J. 534 : 28 A. I. R. 1941 Nag. 357: I. L. R. (1942) Nag. 564:197 I. C. 612, Seth Narainbhai v. Narbada Prasad.
6. ('34) 30 N. L. R. 88 : 20 A. I. R. 1933 Nag. 387 : 148 I. C. 237, Sheodin Lal v. Narayandas.
7. ('27) 5 Rang. 576 : 15 A. I. R. 1928 Rang. 13 : 105 I. C. 598, Maung Aung Tin v. Maung San Nyun.
8. ('38) 25 A. I. R. 1938 Nag. 89: 173 I. C. 103, Ramji v. Madki.
9. ('34) 12 Rang. 238 : 21 A. I. R. 1934 P. C. 67 : 147 I. C. 328 (P. C.), Lim Charlie v. Official Receiver.
10. ('75) 24 Suth W. R. 274, Sooda Ram Doss v. Joogul Kishore.
11. ('76) 25 Suth W. R. 542, Sheikh Abdool Khalek v. Poran Bibee.
12. ('17) 41 Bom. 5 : 3 A. I. R. 1916 Bom. 159 : 36 I. C. 715, Ibrahim Bhura Jamnu v. Isa Rasul Jamnu.
13. ('35) 22 A. I. R. 1935 P. C. 53:154 I. C. 27 (P. C.), Ejas Ali v. Special Manager, Court of Wards.
14. ('22) 26 C. W. N. 666 : 9 A. I. R. 1922 P. C. 181: 44 Mad. 883 : 48 I. A. 395 : 66 I. C. 451 (P. C.), Kuthali Moothavar v. Kunharan Kutty.
15. ('35) 14 Pat. 327 : 22 A. I. R. 1935 P. C. 36 : 62 I. A. 40 : 153 I. C. 929 (P. C.), Srischandra Nandy v. Baijnath Jugal Kishore.
16. ('35) 62 Cal. 921, Upendranath Roy v. Jitendranath.
17. ('36) 63 Cal. 300, Surendra Kumar Roy v. Ahmad Nawab.
18. ('43) I. L. R. (1943) Nag. 726, Nagorao v. Jageshwar.
19. ('34) 61 Cal. 262 : 21 A. I. R. 1934 P. C. 23 : 61 I. A. 78 : 147 I. C. 545 (P. C.), Secretary of State v. Debendralal Khan.
20. ('03) 27 Bom. 43, Tarubai v. Venkatrao.
21. ('15) 11 N. L. R. 164 : 2 A. I. R. 1915 Nag. 125 : 31 I. C. 464, Dina v. Bishambar Singh.
22. ('24) 47 Mad. 572 : 11 A. I. R. 1924 P. C. 150 : 51 I. A. 257 : 80 I. C. 835 (P. C.), Ambu Nayar v. Secretary of State.
23. ('03) 27 Cal. 943 : 27 I. A. 136 : 7 Sar. 714 (P. C.), Radhamoni Debi v. Collector of Khulna.
24. ('30) 11 Lah. 638 : 17 A. I. R. 1930 P. C. 281 : 57 I. A. 273 : 127 I. C. 537 (P. C.), Jahanded Khan v. Abdul Ghafur Khan.

R. S. Dabir—for Appellant.

M. R. Bobde and B. R. Mandlekar—for Respondent.

Judgment. — This is a second appeal by the plaintiff arising out of a suit for possession of field No. 11, area 2.73 acres of mauza Bhota, tahsil Burhanpur. The suit was dismissed by the trial Court and that decree is upheld by the lower appellate Court.

[2] The field in suit admittedly belonged to Dalpat of the village Bhota. In 1920 the plaintiff was a widow and Dalpat took a fancy to marry her by *pat* marriage. Dalpat had then a wife and children and he was also pretty advanced in age. The plaintiff and her brother were not, therefore, willing to accept the offer of Dalpat unless Dalpat transferred some property by way of gift to the plaintiff as a condition precedent to the *pat* marriage. Evidently the plaintiff wanted to make some provision for herself in the event of disagreement with or death of Dalpat. Dalpat agreed to gift away the field in suit to the plaintiff and he actually executed a gift deed on 15-3-1920 in plaintiff's favour. This gift deed was duly attested and registered and the gift was accepted by the plaintiff. According to the plaintiff she was thus the owner of the field in suit from 15-3-1920 and that she was also in possession thereof as owner all along till her dispossession by the defendant in February 1940. The present suit for possession was instituted on 19-1-1942.

[3] The defendant on his part alleged that the plaintiff had never any title to the field in suit and that she was never in possession thereof. It was alleged that the gift deed, even if proved, was nominal and executed under undue influence and coercion with the result that the title to the property in suit never passed to the plaintiff and that it always remained in Dalpat. It was further alleged that Dalpat continued in possession of the field in suit as the owner even after 15-3-1920 and that the plaintiff was never placed in possession of that field. It was further pleaded that the plaintiff was never in possession of the field within 12 years of the date of suit and that her title, if any, was in fact extinguished by the adverse possession of Dalpat and his transferees. Dalpat, it was alleged, dealt with this property as the owner and mortgaged and sold it and the plaintiff having permitted him to do so she is now estopped from asserting her own title to the prejudice of the bona fide

mortgagees and the purchasers for valuable consideration.

[4] The plaintiff asserted her possession and denied knowledge of the alleged mortgage deeds and sale-deeds. She contended that her possession and enjoyment were never disturbed before dispossession by the defendant in February 1940. She also denied all adverse allegations in the written statement which included the allegation that Dalpat's possession was adverse to the plaintiff.

[5] The learned Judge of the lower appellate Court disagreeing with the first Court held that the gift deed dated 15-3-1920 was duly executed, attested and registered. He, however, held that the gift deed was merely a paper transaction as Dalpat never intended to pass the title to the plaintiff. Dalpat was, therefore, according to the learned Judge, the owner of the field in suit till 18-1-1930 when he sold the same to Ganpat, his son-in-law. The Judge of the lower appellate Court negatived the plaintiff's contention that the sale in favour of Ganpat was nominal and in fraud of the creditors. It was ultimately held that the plaintiff had no title to the field in suit at any time and that the title, if any, was extinguished by the adverse possession of Dalpat and his transferees.

[6] On the main question of title to the field in suit the decision of the lower appellate Court is indeed difficult to understand. It is clear from the record that the plaintiff and her brother insisted on some property being gifted to the plaintiff as a condition precedent to her marrying Dalpat by *pat*. Dalpat accepted this condition and actually fulfilled it by executing a valid gift deed in plaintiff's favour. The gift deed was produced by the plaintiff in Court and on that account it can be safely presumed that this gift deed was handed over by Dalpat to the plaintiff and it remained all along with her. The gift deed was acted upon by the plaintiff and she actually married Dalpat and they two lived happily and cordially together until Dalpat's death in or about 1932.

[7] These being the facts which are undisputed and which are in any case duly established it is surprising that the lower appellate Court should have held the gift deed as a paper transaction and did not transfer title in plaintiff's favour.

[8] On 15-3-1920 when Dalpat executed the gift deed he could have no intention to commit fraud on his would-be-wife by executing a nominal gift deed in her favour. On the one hand the plaintiff was anxious to have a valid gift in her favour and on the other Dalpat was eager to have the plaintiff as his wife. In these circumstances it is difficult to imagine that Dalpat would have acted with mental reservation or with secret intention of not transferring title to the field in plaintiff's favour in spite of his having executed a duly registered gift deed in plaintiff's favour.

[9] Under S. 122, T. P. Act a gift is the transfer of certain existing immovable property made voluntarily and without consideration by the donor in favour of the donee and accepted by the latter. Such transfer is effected under S. 123, T. P. Act by a registered instrument duly executed and attested. The effect of such instrument is that title legally passes from the donor to the donee and any mental reservation or secret intention on the part of the donor to the contrary is indeed ineffective and cannot prevent the legal effect of a validly executed gift deed. In the gift deed dated 15th March 1920 Dalpat clearly and unequivocally admitted that the title to the field in suit has, as a result, of that gift deed, passed to the plaintiff who was thereafter to be the exclusive owner of that property. He has also admitted that the field was placed in possession of the plaintiff who was entitled to the possession thereof and that she was free to get the property mutated in her name and to enjoy it in any manner she liked. Acting on these recitals and the gift deed, the plaintiff acted to her prejudice and married Dalpat. It was therefore no longer open to Dalpat to urge that the title in the field in suit still remained with him and not with the plaintiff. The lower appellate Court should have therefore held that the title to the field in suit passed to the plaintiff and she was the owner of the field and that the defendant was estopped from pleading and proving, contrary to the apparent tenor of the document, that is the gift deed, and the admissions of Dalpat contained therein, that Dalpat continued to be the owner of the field in suit. As already stated above, the gift was accepted and acted upon by the plaintiff and thus it was perfectly valid. It was held by their Lordships of the Privy Council in 50 Mad. 193[1] that acceptance by the donee may be either express or implied and very slight evidence would be sufficient to prove acceptance. In fact their Lordships held that mere delivery of the gift-deed by the donor to the donee was quite sufficient to prove acceptance. In this case as observed above, the gift deed was acted upon by the plaintiff and it was on the strength of that gift deed that she married Dalpat by *pat*. There is thus no force in the defence that after 15th March 1920 the title in the property in suit continued with Dalpat and not with the plaintiff.

[10] The question which next calls for decision is whether the plaintiff-appellant has proved her possession and dispossession as

alleged in the plaint or whether the defendant proved adverse possession as pleaded by him. As held in I. L. R. (1941) Nag. 655[3] a suit falls within Art. 142, Limitation Act when the facts admitted in the plaint or pleadings establish that the plaintiff's case is based on possession and dispossession within 12 years of the date of suit. All other suits for possession would be governed by Art. 144, Limitation Act. In I. L. R. (1937) Nag. 254[3] it is held that in suits falling under Art. 142 the plaintiff must prove dispossession within 12 years of suit. The questions as to possession and dispossession of the plaintiff within 12 years and adverse possession pleaded by the defendant are often so intermixed that the two questions have to be considered together. It is more so in the present case as both these questions depend upon the determination of the nature of Dalpat's possession from 1920 to 1930 or 1932. But before entering into that question a word must be said on the point of pleadings in the case.

[11] The plaintiff-appellant pleaded in the plaint that from the date of gift i. e. 15th March 1920 she was in possession of the field in suit as owner until her dispossession in February 1940 by the defendant. This implies that whoever were in possession or occupation or management of the field in suit from 1920 to 1940 were in possession on behalf of the plaintiff. This position is also clear from her denial of the defendant's allegation regarding adverse possession of the defendant and of his predecessors-in-title including Dalpat. It is no doubt true that nothing has been pleaded explicitly about Dalpat's management and like other mofusil pleadings, the pleadings in this case are vague and inartistic. This has to be said of pleadings on either side. The parties have not taken care to make use of the several provisions of the Civil Procedure Code and to have the pleadings definite and specific. According to the trial Court and the lower appellate Court the plaintiff did not plead that possession and management, of Dalpat was on her behalf and she could not be allowed to adduce evidence to prove the nature of Dalpat's possession. Relying on A. I. R. 1930 P. C. 57,[4] the Courts have discarded the plaintiff's evidence on that point. In my opinion the lower Courts were not right in discarding this evidence.

[12] When the plaintiff has pleaded her possession from 1920 to 1940 as owner it should be open to her to prove it by adducing evidence showing that she was in actual physical possession or that she was in possession as owner through her agents, managers or relations. In 1941 N. L. J. 534,[5] the Divisional Bench of this High Court pointed out the distinction between possession as owner and a bare occupation. The concept of possession is a complex one and it need not include actual occupation. It comprises the right to possess, and the right and ability to exclude others from possession. The adverse possession of which the law speaks is an ouster from all those rights which constitute possession in law. It was thus open to the plaintiff to prove that all the rights constituting possession were in her all along and mere occupation was in Dalpat who was managing the field in suit on her behalf. In any way the plaintiff was entitled to show that possession and management by Dalpat was never on his own behalf and did not constitute adverse possession so as to extinguish her title.

[13] The proposition that possession is *prima facie* adverse is true in the case of a stranger entering into possession but it is not necessarily true when the person occupying the property is the agent or a near relative who is ordinarily expected to help the owner in the management of the property. There is a strong presumption in these cases that the occupation and management is permissive and on behalf of the owner. In 30 N. L. R. 88,[6] at p. 92, it is held that where a person who would naturally manage the minor's property actually leases out a portion of that property in her own name it does not amount to an assertion of hostile title so as to constitute her possession adverse to the true owner. In 5 Rang. 576,[7] the possession and management of the father over the property which he gifted to the children from the deceased wife was construed as permissive possession on behalf of the children and not adverse to them. The possession of the guardian over the property of the minor ward was similarly construed as permiesive, in A. I. R. 1938 Nag. 89.[8] In 12 Rang. 238[9] their Lordships of the Privy Council observed thus :

"Where the facts of the case are consistent with the ownership of the property remaining in the person who acquired it by a registered sale deed and also with the defendant being in possession of the property with the permission of the owner from the time when the owner had acquired the property until his death, and where there is no evidence that the defendants' possession of the property was inconsistent with the continuance of the title of the owner, the defendant cannot in a suit for possession by the legal representative of the owner retain the property on the ground of title by adverse possession."

[14] The relations between husband and wife are very close and by fiction they are regarded as part of the same body. In the nature of things and particularly by the custom of the country a wife always looks to her husband for safeguarding her interest and for management of her property, and she would least suspect, when their relations are cordial and when they live together happily as husband and wife, that the husband

would entertain an intention to acquire title to her property by adverse possession. It is held in 24 Suth. W. R. 274 [10] and 25 Suth. W. R. 542,[11] that when a man and his wife live together and the husband is in possession of the property of the wife his possession must be construed to be on behalf of the wife and not adverse to her and on this principle the husband is presumed to be the agent of his wife. In 41 Bom. 5,[12] the possession of the husband who occupied one of the two gifted houses with another wife was held not adverse to the wife to whom the houses were gifted. 12 Rang. 238,[9] already quoted above leads to the same conclusion.

[15] In the present case the plaintiff married Dalpat soon after the gift of the field in suit in her favour and thereafter she lived very cordially as Dalpat's wife till his death in or about 1932. During this long period, Dalpat is not shown to have even denied her title to her knowledge and he took no steps to have the gift deed in plaintiff's favour caceelled. In the gift deed he expressly admitted delivery of possession to the plaintiff. A heavy burden would lie on Dalpat in these circumstances if he were to plead that his possession was adverse to the plaintiff. Having taken up or continued management of his wife's property on her behalf a mere secrect change of intention or the acts of Dalpat such as the mortgage deeds executed without the knowledge of the plaintiff, would not help him to prescribe against the plaintiff. It is necessary for Dalpat who was either an agent or who stood in a fiduciary relationship with the plaintiff to bring it to the knowledge of the plaintiff that his possession was adverse to her. There is absolutely no evidence on this point and in the absence of such evidence the possession of Dalpat must be construed to be on behalf of the plaintiff in spite of his one-sided acts or his secret intention to hold the property adversely to the plaintiff.

[16] As a result of the gift deed, dated 15th March 1920 the title to the field in suit passed to the plaintiff as already held above and as a result of the application of the principle, possession follows title, it would be presumed that the plaintiff was in possession of the gifted field from 15th March 1920. This presumption is strengthened by the admission of Dalpat in the gift deed that possession was transferred to the donee, that is the plaintiff; and once the possession of the plaintiff started, the presumption in favour of the continuity of that possession is attracted and it is for one who urges against this presumption to establish it and to prove that the possession of the plaintiff was discontinued or intercepted or negatived by the adverse possession of that person. The mere fact that Dalpat was managing the field on account of the special relations between him and the plaintiff is not of much consequence as that would not amount to his possession being adverse to that of the plaintiff. Acts which create adverse possession must be scrutinized in the light of the relation between the parties and if a husband who was the donor of the property to his wife, the donee, relies on adverse possession on proof of his title he must make out a very strong case. In such cases it is quite possible that while legal possession may rest with the wife, the possession or management in fact may be with the husband and his possession would not thus be adverse to her. Moreover possession is not the same as adverse possession. For construing mere possession as adverse possession, the adverse possessor must prove the animus and this has not been proved in the present case. The plaintiff and Dalpat were admittedly residing together till Dalpat's death and during all this period it could not be said that the plaintiff was excluded from the possession of the field in suit. Both of them must be visiting this field as also other fields and the usufruct of this field as also of the other fields must be enjoyed by both of them. In these circumstances there is no possibility of one of them holding property adversely to the other.

[17] In A. I. R. 1935 P. C. 53,[13] their Lordships of the Privy Council observed thus :

"The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

The defendant has not shown that the possession of Dalpat was in any way adverse to the plaintiff. He has also not shown when and how Dalpat's possession became adverse to the plaintiff. Dalpat, as pointed out above, entered into possession at best as an agent on behalf of the plaintiff, his wife (the donee) and there is no evidence on record of dispossession of the plaintiff or discontinuance of possession by her during the life-time of Dalpat. I therefore, hold that the plaintiff was in legal possession of the field in suit during the life-time of her husband and that the possession and management of the property by her husband Dalpat was permissive on her behalf.

[18] It is however urged that the possession of Ganpat in whose favour Dalpat executed the sale deed on 18-1-1930 was decidedly adverse to the plaintiff and the present suit is filed more than 12 years after that date. This contention assumes firstly that the sale deed in favour of Ganpat was genuine and not bogus and fraudulent as alleged by the plaintiff and secondly that there was a transfer of possession on

18-1-1930. Ganpat was examined in this case as D. W. 8. He deposed thus :

"I then accordingly gave that amount of Dalpat and thus paid the entire consideration of the sale deed ; two days after that the sale deed was registered. I was present that time. After that we went to Bhota and stayed there for 2 to 4 days. I took possession of the fields and the houses."

It may be noted that this sale deed was presented for registration at Burhanpur on 22-1-1930 and obviously therefore according to this witness the possession was taken by him (assuming that it was taken) some time after 22-1-1930. The present suit was filed on 19-1-1942 that is within 12 years of the registration of the sale deed and alleged possession by Ganpat. The plaintiff has however denied that Ganpat ever took possession of the property and, according to her, she continued to be in possession and enjoyment of the property until dispossessed by the present defendant. She pleaded that the sale deed in favour of Ganpat was bogus and fraudulent. In view of the finding which I have given that Ganpat took possession of the field (assuming that he took possession) some time after 22-1-1930, that is, within 12 years of the date of suit, it is not necessary for me to enquire into and to record a finding whether the sale deed dated 18-1-1930 was genuine or bogus. Even if it was genuine still Ganpat and the transferees from Ganpat would not acquire any title to the property as the title to the property vested in the plaintiff and she admittedly never transferred the property in their favour. If it was at all necessary for me to give a finding on this point I would have found much difficulty in upholding the finding of the lower appellate Court that the sale deed was genuine and not bogus. There are several material circumstances which clearly point to the non-genuine nature of the sale deed in favour of Ganpat. However, that point need not be laboured further.

[19] In view of the finding that I have recorded about the title of the plaintiff and her possession within 12 years of the date of suit the plaintiff's claim ought to have been decreed. I have however to deal with the plea of adverse possession advanced by the defendant.

[20] As I have said above the two pleas namely the plaintiff's possession within 12 years and the defendant's adverse possession for more than 12 years are inter-mixed and the finding on the first plea which I have recorded above to a large extent negatives the defendant's plea of adverse possession. But apart from that there is, in my view, no sufficient evidence to establish adverse possession for more than 12 years by the defendant and his predecessors-in-title. One who pleads adverse possession has a strong burden to discharge and the strength of the burden depends on the circumstances of the case. It is very heavy in a case like the present where a husband's possession over the property of his wife is pleaded to be adverse. Even ordinarily the burden of effective adverse possession cannot be discharged without a clear and convincing evidence that possession is hostile to the real owner and amounted to a denial of such owner's title. This is much more so when the husband or persons claiming through the husband rely upon the husband's possession to be adverse possession.

[21] In 26 C.W.N. 666[14] at p. 673 their Lordships of the Privy Council pointed out that adverse possession can only be proved by proving its adequacy, continuity and exclusiveness. These are also the remarks by their Lordships of the Privy Council in 14 Pat. 327[15] and by the High Court of Calcutta in 62 Cal. 921[16] and 63 Cal. 300.[17] In 63 Cal. 300[17] at p. 313 it is pointed out that :

"The proposition that adverse possession need not be brought to the knowledge of the person against whom it is to operate has been reaffirmed in 14 Pat. 327[15] in which their Lordships have further pointed out that the proposition is nevertheless subject to the qualification that when the party claiming by adverse possession fails to show that the person possessed against by exercising due vigilance ought to have been aware of what was happening, his claim must fail, whether his possession be adequate in continuity or not."

[22] There is no reason for the plaintiff in the case to hunt for the record of the Registrar's office and to find out whether the husband has transferred her field to somebody else nor is there any evidence that either Dalpat or any one else ever informed the plaintiff that her property was being dealt with by Dalpat as his own. There is thus no reason for the plaintiff to suspect that it was unsafe to allow Dalpat to manage the property, and that if she does so allow there is the risk of the property being lost to her on account of Dalpat's possession being adverse to her. In my view, therefore, it has not been proved that the possession of Dalpat became adverse to the plaintiff since 15-3-1920. There is consequently no force in the plea of estoppel that was raised by the defendant.

[23] In my view therefore the plaintiff's title is not extinguished on account of the adverse possession of the defendant or his predecessor-in-title for more than 12 years before the date of suit. Finally in this respect I would rely on the observations in I. L. R. (1943) Nag. 726[18] at pp. 732, 733, 734 :

"The lower appellate Court has found that even if the plaintiff's predecessor had exercised possession, it was neither to the knowledge of the true owner nor continuous. It may be conceded on the authority of 61 Cal. 262[19] that adverse possession need not be shown to have been brought to the knowledge of the rightful owner, but this rule can apply only to a person who is

a complete stranger. Ordinarily ignorance on the part of the true owner of his right or of the infringement of that does not prevent the operation of the statute but when a person is in possession which is either permissive or held in a fiduciary capacity such as that of servant or an agent he cannot by a mere secret and undisclosed wish alter the character of his possession so as to set the time running in his own favour : *see* 27 Bom. 43.[20] Ganpat and Jagannath (the vendors) were the Pujaris and R. B. Buti (the vendee) was a member of the Managing Committee of the temple. They had both been appointed by the Raje Bahadur. Consequently their possession was lawful and the principle is well known that possession is never considered adverse if it can be referred to a lawful title : see 11 N. L. R. 164[21] at p. 167. The act of transfer by the the Pujaris and purchase by the plaintiff's predecessor no doubt prove an intention to assert a hostile title against the true owner but unless that was brought to the notice of the person affected could not set the limitation running against him. In 47 Mad. 572[22] their Lordships of the Judicial Committee pointed out that a licensee cannot claim title only from possession, however long, unless it is proved that his possession was adverse to that of his licensor to his knowledge with acquiescence. This principle applies with equal validity to one who is in possession in a fiduciary capacity such as the parties to the material sale deed in the present case were. The reason is obvious; their possession by virtue of their special relationship to the real owner was initially not independent but subordinate to the master. Such a subordinate possession could not become adverse, i. e., independent unless it was coupled with a denial of the true owner's title or assertion of a hostile title to the knowledge of the true owner. That the possession required to establish a title to immovable property under the Limitation Act must be adequate in continuity was laid down by the Judicial Committee in 27 Cal. 943[23] and was affirmed in 61 Cal. 262.[19] At all events, it appears clear from the findings of the Courts below that the actual possession of the plaintiff's predecessor for the requisite period was doubtful. The plaintiff could not succeed unless he established affirmatively his exclusive possession to the knowledge of the true owner for the requisite period of 12 years : *see* 11 Lah. 638.[24] That disposes of the plaintiff's appeal."

[24] The respondent did not rely on EX. D-8 and in fact he gave up that plea.

[25] Finally, and in view of what is stated above, the appeal is allowed and the plaintiff's claim for possession of the field is decreed with all costs.

S. C. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 334 *[C. N. 113.]*

BOSE AND PADHYE JJ.

Fatechand Ganeshram Agarwal — Plaintiff-Appellant v. *Wasudeo Shrawan Dalal and another—Defendants—Respondents.*

Second Appeal No. 361 of 1941, Decided on 7-11-1946, from appellate decree of Addl. Dist. Judge, Bhandara, D/- 26-3-1941.

(a) Civil P. C. (1908), O. 14, R. 2 — Preliminary issue of limitation raised by defendant—Allegations in plaint to be taken as true.

Where the defendants ask the Court to decide an issue, such as a preliminary point as to limitation, on the very allegations of the plaintiff, they must be taken to admit for the sake of argument that the allegations of the plaintiff in his plaint are true reserving to themselves the right to show that these allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled. Hence for the purpose of deciding such point the statement of the defendants has to be ignored: 40 Cal. 598 (P. C.), *Rel. on.* [Para 6]

Annotation: ('44-Com.) C. P. C., O. 18 R. 1 N. 4 Pt. 2.

(b) Limitation Act (1908), S. 3—Applicability to arbitration proceedings.

The law of limitation as laid down in the Limitation Act applies to arbitration proceedings. The arbitrators, like a statutory Court, have no power to entertain and allow a claim presented beyond the period of limitation prescribed by the relevant Article in Sch. I to the Act. Section 3 of the Act thus applies in arbitration proceedings and it would be incorrect to urge that Ss. 4 to 25 of the Act would not apply as this would lead to unjust and anomalous results : 16 A. I. R. 1929 P. C. 103, *Rel. on.* [Para 10]

Annotation: ('42-Com.) Lim. Act, S. 3 N. 27 Pt. 2.

(c) Limitation Act (1908), S. 14— Time taken for arbitration proceedings — Exclusion of.

The word 'Court' in S. 14 does not mean only the statutory Courts but includes arbitrators and proceedings before them are civil proceedings before a Court within the meaning of that section. Therefore, the time spent in arbitration proceedings should be excluded from computation of the period of limitation for a suit instituted subsequently in respect of the same subject-matter provided the other requirements of S. 14 are satisfied. Whether the subsequent proceedings are before arbitrators or before a statutory civil Court makes no difference in the application of S. 14. An arbitration agreement merely clothes the arbitrators with power to decide the dispute between the parties to the reference but the cause of action in proceedings before arbitrators as also in the civil suit is one and the same and that is the dispute regarding the right or the title which one party claims and the other party denies : 16 A. I. R. 1929 P. C. 103 ; 30 A. I. R. 1943 All. 162 and 17 A. I. R. 1930 Cal. 5, *Rel. on*; 20 A. I. R. 1933 Nag. 130, *Dissent.* [Paras 13, 17 and 18]

Annotation : ('42-Com.) Lim. Act, S. 14 N. 5 Pt. 5; N. 18 Pt. 10.

(d) Limitation Act (1908), S. 19 — Admission of unsettled account contained in arbitration agreement.

An agreement to refer a dispute to arbitration contained an unqualified admission of the fact that the defendants purchased from the plaintiff certain goods and that a difference cropped up in the account in respect of those dealings :

Held that the legal effect of such an admission was that whoever on account should be shown to be the debtor was bound to pay the debt to the other. Such an admission amounted to an acknowledgment of liability within S. 19 and was not subject to a condition that the defendants would be liable only if the liability is ascertained by the arbitrators. It would afford a fresh starting point of limitation quite independently of the settlement of account by the arbitrators : 2 N. L. R. 130 (P. C.), *Foll; Case law discussed.* [Paras 21 & 24]

Annotation: ('42-Com.) Lim. Act, S. 19 N. 19 Pt. 8; N. 46 Pt. 15.

(e) Civil P. C. (1908), O. 6, R. 17 — Amendment seeking additional ground of exemption from limitation.

Where the plaintiff seeks to amend his plaint by relying on an additional ground of exemption from limitation based on a letter written by the defendant and on which the defendant himself has relied in his written statement it cannot be said that the defendant is being taken by surprise by such amendment especially when the plaintiff has relied on such ground in his

previous written replies. Moreover such an amendment cannot be said to introduce a fresh cause of action or any substantial change in the cause of action on which the suit is based and therefore it should be allowed even at a late stage. The fact that the plaintiff has not produced the letter in question cannot be a valid ground for refusing the amendment : 22 A. I. R. 1935 Mad. 158 ; 25 A. I. R. 1938 Nag. 388; 24 A. I. R. 1937 Cal. 485 and 22 A. I. R. 1935 Bom. 213, *Rel. on.*

[Paras 27 & 31]

Annotation : ('44-Com.) C.P.C., O. 6 R. 17 N. 12 Pt. 17.

Cases referred.—

1. ('13) 40 Cal. 598 : 40 I. A. 56 : 18 I. C. 949 (P. C.), Kanhaya Lal v. National Bank of India Ltd.
2. ('33) 29 N. L. R. 272 : 20 A. I. R. 1933 Nag. 130 : 144 I. C. 948, Maharaj Sai v. Kedarnath.
3. ('29) 56 Cal. 1048 : 16 A. I. R. 1929 P. C. 103 : 56 I. A. 128 : 115 I. C. 713 (P. C.), Ramdutt Ramkissen v. E. D. Sassoon & Co.
4. (1899) 68 L. J. Q. B. 252 : 80 L. T. 116, In re Astley and Tyldesley Coal and Salt Co.
5. ('29) 56 Cal. 639 : 17 A. I. R. 1930 Cal. 5 : 120 I. C. 710, Abdul Rahim Oosman & Co. v. Ojamshee Purshottamdas & Co.
6. ('43) I. L. R. (1943) All. 467 : 30 A. I. R. 1943 All. 162 : 207 I. C. 571, Beharilal Baijnath Prasad v. Punjab Sugar Mills Co. Ltd.
7. ('06) 2 N. L. R. 130 : 33 I. A. 165 : 33 Cal. 1047 (P. C.), Maniram v. Rupchand.
8. ('87) 10 Mad. 259, Sitayya v. Rangareddi.
9. ('36) 17 Lah. 737 : 23 A. I. R. 1936 Lah. 629 : 165 I. C. 723, Municipal Committee, Amritsar v. Ralia Ram.
10. ('17) 40 Mad. 701 : 4 A. I. R. 1917 Mad. 892 : 35 I. C. 575, B. Ramamurthy v. T. Gopayya.
11. ('32) 19 A. I. R. 1932 Lah. 470 : 137 I. C. 840, Kanshi Ram v. Arjun Das.
12. ('39) 26 A. I. R. 1939 Sind 113 : I. L. R. (1939) Kar. 693 : 181 I. C. 596, Tikamdas v. Kalianji.
13. ('37) 24 A. I. R. 1937 Mad. 38 : 169 I. C. 340, Jankirama v. Narasimha.
14. (1854) 1 Kay 678, Prance v. Sympson Kay.
15. ('37) 24 A. I. R. 1937 Pat. 616 : 171 I. C. 946, Shocharan Das v. Chhakowri Sao.
16. ('19) 6 A. I. R. 1919 Mad. 838 : 48 I. C. 89, Narayanswamy v. Gangadhara.
17. ('39) I. L. R. (1939) Nag. 194 : 25 A. I. R. 1938 Nag. 388 : 176 I. C. 728, Lachhamansingh v. Mahendralal Choudhari.
18. ('35) 22 A. I. R. 1935 Mad. 158 : 154 I. C. 707, Muthammal v. Gurusami.
19. (1887) 19 Q. B. D. 394 : 56 L. J. Q. B. 621 : 35 W. R. 820, Weldon v. Neal.
20. ('37) 24 A. I. R. 1937 Cal. 485 , Jogendra Narayan v. Debendra Narain.
21. ('35) 22 A. I. R. 1935 Bom. 213 : 156 I. C. 531, Percy F. Fisbar v. Ardeshir.
22. ('08) 10 Bom. L. R. 346, Yakub Ibrahim v. Bai Rahimatbai.

M. R. Bobde and A. R. Kulkarni —for Appellant.
R. Kaushalendra Rao and G. R. Pradhan —for Respondents.

Judgment. — This is a second appeal by the plaintiff against the dismissal of his suit on a preliminary point of limitation by the trial Court and also by the lower appellate Court and that is the only question which calls for decision in this appeal.

[2] The suit from which this appeal arises was instituted on 24th August 1938. It was for the recovery of Rs. 4052-15-3 due from the defendants for the price of goods supplied and the amounts advanced by the plaintiff to them, from 24-5-1933 to 22-1-1934. A suit of this nature is for purposes of limitation governed by Arts. 52 and 57, Limitation Act, which prescribe three years as the period of limitation. The plaintiff's suit was thus instituted beyond the prescribed period of limitation.

[3] Where a suit is instituted after the expiration of the prescribed period of limitation O. 7, R. 6, Civil P. C., requires that the plaint shall show the ground or grounds upon which exemption from such law is claimed. It is therefore necessary to examine the pleadings on record in this light.

[4] The plaintiff pleaded that the subject-matter in dispute in this suit was by agreement of the parties referred to arbitration. The agreement of reference was executed by them on 26-8-1935 and handed over to the arbitrators. The plaintiff awaited the result of the arbitration but finding that the arbitrators did not at all move in the matter he decided to file a suit and, in fact, had a plaint drafted on 1-9-1936. At this stage the defendants approached the plaintiff, paid him Rs. 500-0 0 and requested him to await the result of the arbitration for some time more. The plaintiff acceded to this request. He waited for a long time and ultimately served the arbitrators with registered letters on 30-4-1938, 2-5-1938 and 11-7-1938, but the arbitrators did not care to reply. The plaintiff therefore filed the present suit. In para. 6 of the plaint, the plaintiff claimed exclusion of the period from 26-8-1935 to 11-7-1938 from computation of the period of limitation and in para. 9 the cause of action is said to have accrued on the dates on which the plaintiff's letters were received by the arbitrators.

[5] The defendants admitted execution of the agreement dated 26-8-1935 but denied that it was handed over to the arbitrators, or that the arbitrators assumed jurisdiction. They denied that the plaintiff was entitled to exclusion of time from 26-8-1935 to 11-7-1938 and further averred that the plaintiff did not prosecute the proceedings before the arbitrators in good faith and with due diligence as is required by S. 14, Limitation Act. The defendants denied that the agreement dated 26-8-1935 contained an acknowledgment of liability by the defendants within the meaning of S. 19, Limitation Act so as to permit a fresh period of limitation to be computed from that date. The defendants denied the agreement dated 1-9-1936 and they further denied that the alleged agreement gave a fresh cause of action and a fresh start of limitation.

[6] As observed by their Lordships of the Privy Council in 40 Cal. 598[1] at p. 609, where

the defendants ask the Court to decide an issue on the very allegations of the plaintiff, they must be taken to admit for the sake of argument that the allegations of the plaintiff in his plaint are true reserving to themselves the right to show that these allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled. For the purpose of deciding the point involved in this appeal the statement of the defendants has thus to be ignored. From the relevant allegations of the plaintiff, he should be taken to have relied on the following grounds of exemption from the bar of limitation :

(a) that the period between 26-8-1935, that is the date of reference to the arbitrators and 11-7-1938, that is the date when, according to him, the arbitration proved abortive, should be excluded under S. 14, Limitation Act, in computing the period of limitation prescribed for the suit ;

(b) that the period of limitation be computed afresh from 26-8-1935, the date of the agreement of reference to arbitration, as according to the plaintiff, that document contained an acknowledgment of liability in respect of the subject-matter in the suit; and

(c) that the agreement dated 1-9-1936 referred to in para. 3 of the plaint furnished to the plaintiff a fresh cause of action and the present suit filed within three years of that date should be held to have been filed within time. The plaintiff, somewhat later, wanted to rely on an additional ground of exemption as would appear from what follows.

[7] In para. 11 of the written statement filed on behalf of defendant 2 on 4-11-1938, and subsequently adopted by defendant 1 the defendants alleged that they sent a registered letter dated 16-10-1936 to the plaintiff admitting the liability for Rs. 70-7-0 only and they remitted that amount by money order but the plaintiff refused to receive it. On these grounds, they claimed that the plaintiff was not entitled to the interest claimed and the costs incurred by him in the suit. In the written reply dated 21-11-1938 the plaintiff admitted the receipt of the defendants' letter dated 16-10-1936 and the refusal to receive the money-order sent to him by the defendants. In the oral statement dated 18-1-1939, the plaintiff admitted the money order coupon and undertook to produce the original letter dated 16th October 1936, though, in fact, it was not produced. In the second written reply filed by the plaintiff on 20th June 1939, he pleaded that the defendants' letter dated 16th October 1936, contained a valid acknowledgment of the plaintiff's claim, and that it gave a fresh starting point for computation of the period of limitation for his suit. This plea was repeated in a subsequent written reply filed by the plaintiff on 19th March 1940. These written replies were permitted by the trial Court to be placed on record creating an impression that the additional ground of exemption pleaded therein would be available to the plaintiff without any further steps being taken by him. On 6th April 1940 the trial Court, however, refused to take this additional ground of exemption into consideration without a suitable amendment of the plaint and the plaintiff filed an application for amendment immediately. The trial Court disallowed the amendment by its order dated 13th April 1940 and the lower appellate Court upheld that order. It is urged in this appeal that the amendment should have been allowed and the plaintiff should have been permitted to take advantage of this additional ground of exemption pleaded by him.

[8] The record of the trial Court shows a great deal of laxity in observing the rules of pleadings. The first written statement by defendant 1 was filed on 11th October 1938 and the last of the plaintiff's replies was filed on 19th March 1940. During this period of a year and a half the defendants were permitted to file written statements from time to time; the oral statements which are not strictly pleadings were recorded on more hearings than one and the plaintiff was allowed to place on record three written replies. The parties and the Judges who handled this case during this period are equally to be blamed for this laxity. We find from the order-sheets of the trial Court that the case was fixed for recording evidence on 20th March 1939 and 21st March 1939. No evidence was recorded on those dates because of a somewhat vague proposal by the the parties that they would appoint arbitrators, if possible. The case was adjourned on this account from time to time till 30th June 1939 infructuously. Thereafter on 10th July 1939 the trial Court ordered the suit to be stayed and referred the subject-matter of the suit to the arbitrators already appointed by the parties by their agreement dated 26th August 1935. The suit was thus held up till the aforesaid order of the trial Court was set aside in appeal on 5th January 1940. On 23rd January 1940 the trial Judge ordered the parties to file additional pleadings and schedules, but before this was done, the record of the case came before another presiding Judge, who on 13th April 1940 framed preliminary issues and disposed of the suit on one of those preliminary issues, namely, the issue of limitation. Thus from 20th March 1939 the suit was held up for one reason or the other till 6th April 1940. These facts are set out as they are material for deciding the question of amendment already referred above.

[9] The learned counsel for the appellant urged that the plaintiff's suit was within limitation even apart from the acknowledgment contained in the defendants' letter dated 16th October 1936. He argued that the plaintiff was entitled to exclusion of time from 26th August 1935 to 11th July 1938 under S. 14, Limitation Act, and that the case reported in 29 N. L. R. 272[2] on which the Courts below relied was not correctly decided. He contended that the word 'Court' in S. 14, Limitation Act, should include every tribunal constituted either under a statute or by agreement of parties, having power to adjudicate upon the disputes between the parties before it and to give a final and binding decision thereon.

[10] The word 'Court' is not defined in the Limitation Act, but it is defined in S. 3, Evidence Act, as under —

"Court includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence."

This definition indicates that for the purpose of the Evidence Act arbitrators are not a Court. The legislature, it appears, thought fit to make that exception so that the arbitrators who are often laymen should not be bound by the technical rules contained in the Evidence Act. It is, however, otherwise, regarding the provisions of the Limitation Act. It is well settled that the law of limitation applies in arbitration proceedings and that the law is as laid down in the Limitation Act, 1908. Thus, the arbitrators, like a statutory Court, have no power to entertain and allow a claim presented beyond the period of limitation prescribed by the relevant Article in Sch. 1 to the Limitation Act, 1908. Section 3, Limitation Act, thus applies in proceedings before the arbitrators and it would be incorrect to urge that though S. 3 and the Articles in the Schedule to the Limitation Act apply to the arbitration proceedings, Ss. 4 to 25 of the Act do not apply. This would lead to unjust and anomalous results.

[11] The learned counsel for the appellant relied on the decision of their Lordships of the Privy Council in 56 Cal. 1048[3] which was distinguished by Staples A. J. C. in 29 N. L. R. 272.[2] The facts before their Lordships of the Privy Council were, no doubt, not identical with the facts in 29 N. L. R. 272,[2] or with the facts in the present case. The exact point before their Lordships was whether the time spent in the first arbitration proceedings which proved abortive should be excluded from computation of the period of limitation when the same claim is put forward before arbitrators appointed subsequently. It is not however the actual decision but the principles enunciated by their Lordships in that decision which are material and this, we say with respect, was not correctly appreciated by the learned Judge who decided 29 N. L. R. 272.[2] If the law of limitation as contained in the Limitation Act was not applicable to arbitration proceedings the question which arose for decision before their Lordships would not have arisen at all. In fact, their Lordships placed the matter beyond doubt when they observed thus :

"The first question of law which arises is the important general one, whether the Limitation Act, 1908, applies to arbitration proceedings."

Their Lordships answered this question in the affirmative and cited with approval the following observation in (1899) 68 L. J. Q. B. 252[4]

"a submission to arbitration does not *per se* exclude the right of either party to raise the defence of the Statute of Limitation."

[12] In the course of their judgment their Lordships further expressed their agreement with the reasoning of Greaves J. which is reproduced below :

"It remains for me to decide whether, in computing the period of limitation, the time occupied in prosecuting the proceedings above referred to is to be excluded. It is urged that, having regard to the wording of S. 14, Limitation Act, this section cannot apply. This argument, however, does not seem to me to be well founded. If limitation, as I think it does, applies in arbitration proceedings, the law of limitation applicable is that laid down in the Limitation Act, 1908, which is expressed to apply to suits, appeals and certain applications to Courts. If, therefore, this Act is to be applied to arbitration proceedings, notwithstanding the words above referred to, I see no reason why S. 14 of the Act should not apply. If it is said that the wording of the section is not apposite to arbitration proceedings, it could equally be said that the wording of the Act itself is not apposite. In my view, therefore, in computing the period of limitation, the time occupied in the proceedings which ended in the decision of the Judicial Committee is to be excluded."

Their Lordships further observed in that case thus

"The Limitation Act has no application in terms to arbitration proceedings and, as Greaves J. has pointed out, if the words 'suit instituted, appeal preferred, and application made' in S. 3 are to be applied to arbitration proceedings, it seems to follow that the same interpretation must be put upon them in S. 14, and that civil proceedings in a Court must be held to cover civil proceedings before arbitrators whom the parties have substituted for the Courts of law to be the judges of the dispute between them."

[13] In view of what is stated above it is clear that arbitrators are a 'Court' and that proceedings before them, are civil proceedings before a Court, within the meaning of S. 14, Limitation Act. It would therefore follow that time spent in arbitration proceedings is to be excluded from computation of the period of limitation in a suit instituted subsequently in respect of the same subject-matter, provided the other requirements of S. 14, are satisfied.

[14] We are fortified in our view by the following observation of Lort-Williams J. in 56 Cal. 639.[5]

"In my opinion, the proceedings before the arbitrator were proceedings in a Court within the meaning of the section" (which means S. 14, Limitation Act.)

[15] This question is considered very elaborately by a Division Bench of the Allahabad High Court in I. L. R. (1943) ALL. 467.[6] In that case the dispute between the parties was referred to arbitrators by the agreement dated 6-12-1931 and the proceedings before the arbitrators continued till 2-12-1937. On 2-12-1937 one of the arbitrators applied for withdrawal from the arbitration proceedings, and consequently the proceedings proved abortive. On 24-1-1938 one of the parties to the dispute instituted a suit which was then *prima facie* beyond the prescribed period of limitation. He however claimed that the period from 6-12-1931 to 2-12-1937 which was spent in arbitration proceedings should be excluded from computation under S. 14, Limitation Act. The learned Judges of the Allahabad High Court in allowing the exclusion of time relied on the cases already noted above and also on the opinion of Mr. Chitaley in his Commentary on the Indian Limitation Act, Vol. 1, p. 548. Many of the arguments advanced before us by the learned counsel for the respondents were considered and repelled by the learned Judges in that case and we express our respectful agreement with that decision and the reasoning contained therein. It was further observed in that case that even though the failure of arbitration proceedings may not be due to a defect of jurisdiction, nevertheless S. 14 applied on the ground that there was 'a cause of a like nature' to a defect of jurisdiction within the meaning of S. 14, Limitation Act.

[16] In 27 N. L. R. 272[2] the learned A. J. C. held that S. 14, Limitation Act, did not apply firstly because the proceedings before arbitrators are not proceedings before a Court within the meaning of S. 14 with reference to a subsequent civil suit, and secondly because the arbitration did not fail for want of jurisdiction in the arbitrators or for a cause of a like nature within the meaning of S. 14, Limitation Act. He also observed that the proceedings before the arbitrators cannot be held to be on the same cause of action as a civil suit. According to the learned Judge the cause of action in proceedings before arbitrators is the agreement of reference whilst in a civil suit the cause of action is the right or title which the plaintiff alleges in himself. These are the grounds on which the learned Judge distinguished the Privy Council decision in 56 Cal. 1048.[3]

[17] We find ourselves unable, with respect, to endorse the learned Judge's appreciation of the decision in 56 Cal. 1048[3] and the reasons of the learned Judge on which S. 14, Limitation Act, was held inapplicable do not also commend themselves to us. In our opinion there is no warrant for holding that the proceedings before arbitrators are proceedings before a Court with reference to subsequent arbitration proceedings but not with reference to a subsequent civil suit. In fact, this is opposed to the pronouncement of their Lordships of the Privy Council

"that civil proceedings in a Court must be held to cover civil proceedings before arbitrators whom the parties have substituted for the Courts of law to be the judges of the dispute between them."

Once it is clear that proceedings before arbitrators are civil proceedings before a Court, then it makes no difference in the application of S. 14, Limitation Act, whether subsequent proceedings are before arbitrators or before a statutory civil Court. Where arbitrators refuse to function either expressly or impliedly as can be gathered from their conduct, they become *functus officio* and the arbitration fails; the same situation arises where the award given by the arbitrators is set aside by a civil Court. On this point we have already expressed our respectful agreement with the opinion of the learned Judges of the Allahabad High Court where they held that even if the failure of arbitration proceedings may not be due to a defect of jurisdiction, nevertheless the failure was due to a cause of a like nature to a defect of jurisdiction. Further we do not agree with the learned Additional Judicial Commissioner that the cause of action in proceedings before arbitrators is the agreement of reference. The agreement merely clothes the arbitrators with power to decide the dispute between the parties to the reference but the cause of action in proceedings before arbitrators as also in the civil suit is one and the same and that is the dispute regarding the right or the title which one party claims and the other party denies. For these reasons, we find ourselves unable, with respect, to agree with the decision of the learned Additional Judicial Commissioner in 29 N.L.R. 272.[2]

[18] In view of what is said above, it is not necessary to consider in detail the arguments advanced by the learned counsel for the respondents. Suffice it to say, that in our opinion the word 'Court' in S. 14, Limitation Act, does not mean only the statutory Courts as contended by him. Nor do we think that the cases relied on by him in which time spent in proceedings before a Railway Board or a conciliator was not excluded under S. 14, Limitation Act, are in point. In those cases the officers dealing with the dispute had no powers as the arbitrators have to give a final and a binding decision.

[19] In the result, we disagree with the decisions of the Courts below on preliminary issue 1 (a) and decide that issue in favour of the plaintiff. It is now for the lower Court to decide whether the other requirements of S. 14, Limitation Act, are satisfied.

[20] The next question to be considered is whether the agreement of reference dated 26-8-1935, contains an admission of liability by the defendants within the terms of S. 19, Limitation Act. The first part of the agreement contains an unqualified admission of the fact that the defendants purchased from the plaintiff goods e. g. crude oil, diesel oil etc., and that a difference cropped up in the account in respect of those dealings. It is not disputed and it cannot be disputed in view of the observations of their Lordships of the Judicial Committee in 2 N. L. R. 130[7] that the legal effect of such an admission is that whoever on account should be shown to be the debtor is bound to pay the debt to the other. Their Lordships were dealing in 2 N. L. R. 130[7] with an admission more or less similar to the one contained in the first part of the agreement dated 26-8-1935 and they held that it constituted a conditional acknowledgment of liability, the only condition being that the balance should be ascertained to be against the person making the admission.

[21] The contention of the learned counsel for the respondent in this respect is that the document contains a conditional admission, the condition being that the liability should be ascertained by the arbitrators appointed under that document. In our opinion, this contention is not sound. In 2 N. L. R. 130[7] their Lordships of the Judicial Committee referred with approval to a case in 10 Mad. 259[8] which was very like the case before us. In that case 'A' acted as a commission agent for 'B' and 'C'. A dispute between them as to the liability of 'B' and 'C' was referred to arbitration. In a memorandum signed by 'B' and 'C' they denied that the balance would be found due to 'A' but admitted that accounts must be taken and that they would be liable if any balance is found due to 'A'. The arbitrators made an award which was subsequently set aside by the Court. In a suit subsequently filed by 'A' against 'B' and 'C' it was held that what was contained in the memorandum was a sufficient acknowledgment within the terms of S. 19, even though 'B' and 'C' denied that any balance would be found due by them.

[22] In 17 Lah. 737[9] there was a dispute between the Municipal Committee and a contractor as to the amount due to the latter and it was referred to an arbitration which eventually failed. The question before the learned Judges was whether the document embodying the resolution of the Committee admitting an unsettled account between the parties which was to be referred to arbitration contained an acknowledgment which extended the period in spite of the fact that the arbitration eventually failed. It was contended on behalf of the Committee that the acknowledgment was coupled with a condition namely an implied promise to pay such sum as would be found due by an arbitrator and as the arbitration failed there was no acknowledgment of liability at all within the terms of S. 19 and reliance was placed on 40 Mad. 701.[10] The learned Judges held, distinguishing the Madras case, that quite apart from an implied promise to pay whatever would be found due by an arbitrator, the admission of an outstanding account constituted an acknowledgment of liability within the terms of S. 19 and that it afforded a fresh starting point of limitation. The other cases relied on by the learned counsel for the appellant *viz.*, A I. R. 1932 Lah. 470[11] and A. I. R. 1939 Sind 113[12] also negative the respondent's contention.

[23] The learned counsel for the respondents relied on 40 Mad. 701[10] which turned mainly on the construction of the particular agreement which in effect contained the statement by the defendants to the following effect:

"We deny that anything is due to you, but as you threaten a suit, we shall agree to refer matters to arbitration and if the arbitrators give an award holding us liable to pay any sum, we shall pay it to you."

The learned Judges of the Madras High Court observed that there was in that document no admission of a subsisting jural relationship of debtor and creditor and that a mere reference to arbitration which is a mode of settling disputes and not an admission of any liability, does not import any such relationship. In A. I. R. 1937 Mad. 38,[13] Venkataramana Rao J. relying on (1854) 1 Kay. 677[14] at p. 681 held that for an acknowledgment of a right to account there need not be an acknowledgment that a debt or even a specified amount thereof is actually due. It is enough (as observed by Wood V. C. in the aforesaid case) that there was an acknowledgment that an account is pending, and that the defendant promised to pay the balance, if any, due from him upon such account. The learned Judge further observed that the decision in 40 Mad. 701[10] was only an authority for the proposition that a mere reference to arbitration with an agreement to pay whatever the arbitrators decide would only be a conditional acknowledgment depending upon the decision of the arbitrators. The other cases, namely A. I. R. 1937 Pat. 616,[15] A. I. R. 1932 Lah. 470[11] and A. I. R. 1919 Mad. 838[16] relied on by the learned counsel for the respondents were also decided on the con-

struction of particular documents which the learned Judges had to interpret in those cases. These cases are clearly distinguishable.

[24] In our opinion the acknowledgment contained in the agreement dated 26 8-1935 was not subject to a condition that the defendants would be liable only if the liability is ascertained by the arbitrators. Following the principles laid down in 2 N. L. R. 130[7] we hold that the agreement dated 26-8-1935 contains an acknowledgment of liability within the terms of S. 19, Limitation Act and that it affords a fresh starting point of limitation quite independently of the settlement of accounts by the arbitrators.

[25] We do not find much substance in the argument of the learned counsel for the appellant advanced on the basis of the alleged agreement dated 1-9 1936. It is moreover not necessary for us to consider it in detail as the plaintiff's suit is not based on that agreement, or on the cause of action alleged to be furnished thereby. In a suit based on the cause of action furnished by the dealings between the parties, this oral agreement cannot help the plaintiff in removing the bar of limitation.

[26] The only question which remains to be considered is regarding the amendment of the plaint disallowed by the lower Courts. The amendment is disallowed mainly on the ground of delay and also on the further ground that letter dated 16-10-1936 which is said to contain the acknowledgment sought to be pleaded was not produced. We are of opinion that looking to the nature of the amendment applied for it should not have been disallowed on those grounds.

[27] By this amendment, the plaintiff was only seeking to rely on an additional ground to remove the bar of limitation and this ground was based on the letter of the defendants on which they themselves relied in their written statement. The defendants cannot therefore complain that they are being taken by surprise. Moreover the amendment was not introducing a fresh cause of action or introducing any substantial change in the cause of action on which the suit was based. It is only when the amendment applied for is of a fundamental character that the question of delay becomes material and as observed in I. L. R. (1939) Nag. 194[17] such amendments should not be allowed except under special circumstances. On the other hand, where the amendment is not of a fundamental character it should be allowed readily and at any stage except that the other side may in suitable cases be compensated by the award of costs which, it is said, is a panacea which heals every sore in litigation.

[28] It is clear from the record that the plaintiff pleaded as early as 4th November 1938 and again on 20th June 1939 that the defendants' letter dated 16th October 1936 contained an acknowledgment of liability by the defendants in respect of the subject-matter of the suit. What was done on 6th April 1940 was that the same matter was put in the form of an application for amendment as required by the Court. In our opinion there can be no valid ground at all for disallowing the amendment of this nature. The non-production of the letter dated 16th October 1936 can equally be no ground for disallowing the amendment as the defendants themselves have admitted the relevant portion of that letter and the plaintiff can appropriately produce it, if the amendment is allowed.

[29] It is pointed out by Sir Dinshah Mulla in his commentary on O. 7, R. 6, Civil P. C., that even where the plaint does not show any ground of exemption the Court of first instance should allow the plaint to be amended save under very exceptional circumstances. In the present case the plaint did show the grounds of exemption from limitation and the plaintiff merely wanted to add one more ground. In A.I.R. 1935 Mad. 158[18] the learned Judge pointed out that an amendment should be allowed at any stage where no new relief is prayed for or a fresh cause of action added by the amendment. It was observed that an additional ground of exemption does not change the cause of action. It was further observed that under O. 6, R. 17, Civil P. C., not only is the Court given power but it is under a duty to allow such amendments as will enable the real questions in issue to be raised. The learned Judge referred with approval to the weighty remarks of Lopes L. J. in (1887) 19 Q.B.D. 394[19] at p. 396 :

"However negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side."

[30] In A. I. R. 1937 Cal. 485[20] the Division Bench of the Calcutta High Court interfered with the order of the lower Court disallowing amendment when by that amendment the plaintiff wanted only to add another ground of exemption from limitation. The learned Judges pointed out that while exercising the discretion in the matter of amendment the following observations of Lord Buckmaster must be borne in mind :

"All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by any means of amendment, the subject-matter of the suit etc."

In the opinion of the learned Judges the amendment seeking to add one more ground of exemp-

tion from limitation is not either to substitute one cause of action for another or to change the subject-matter of the suit and such an amendment should therefore be readily allowed. In A.I R. 1935 Bom. 213[21] the learned Judge observed that the Court may at any stage of the proceedings of a suit allow a party to amend its pleadings by permitting him to substitute one ground of exemption from limitation for another, and in this matter reliance was placed on 10 Bom. L. R. 346.[22]

[31] In our opinion the Courts below acted with material irregularity and against the established principles of law in disallowing the amendment. The application dated 6th April 1940 for amendment should have been allowed and we accordingly allow it. The lower Court should permit the letter dated 16th October 1936 to be produced and placed on the record so that it would be in a position to decide if it contains an acknowledgment within the meaning of S. 19, Limitation Act.

[32] The decree of the lower appellate Court dismissing the plaintiff's suit is set aside with costs, and the suit is remanded to the first Court for disposal according to law.

K.S. *Suit remanded.*

A. I. R. (35) 1948 Nagpur 341 *[C. N. 114.]*

BOSE J.

Uttamrao Shripat Bhutekar—Complainant—Applicant v. *Asru Hanwanta Bhutekar and another—Accused—Non-applicants.*

Criminal Revn. No. 58 of 1947, Decided on D/- 14-10-1947, from order of Addl. Sessions Judge, Buldana, 30-11-1946.

(a) Crminal P. C. (1898) Ss. 253 (1) –Warrant case —It is duty of Magistrate to call and examine persons said by complainant to know facts, before discharging accused under S. 253(2) on subsequent hearing—Criminal P. C. (1898), Ss. 259, 247.

In a warrant case, under S. 429, Penal Code, when the offence alleged is cognizable and non-compoundable, the Magistrate cannot discharge the accused under S. 253 (2) on the ground that "the complainant being absent there is no evidence against accused person", when the complainant had said on affirmation in his examination on the previous hearing that though he knew nothing personally, he had been told the facts by two persons whom he named. Before it can be said that there is no evidence, it is incumbent on the Magistrate to call and examine such witnesses as are said to know the facts : 23 A. I. R. 1936 Nag. 192, *Ref.* [Paras 2 & 3]

There is a difference between a summons case and a warrant case. In the former, S. 247 applies and the accused can be acquitted if the complainant does not appear upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned. In warrant cases S. 259 applies and the power to discharge the accused in the absence of the complainant is only given in compoundable and non-cognisable cases. [Para 6]

Annotation:—('46-Com) Cr. P. C. S. 253, N. 2; S. 259 N. 2 S. 247 N. 2.

(b) Criminal P. C. (1898), S. 253 (2)—Reasons for discharge of accused must be recorded —Omission is not curable.

Under S. 253 (2), the reasons need not be recorded in any particular form and it would be enough if the reasons which motivated the discharge of the accused can be gathered from the order, but reasons there must be in some form or other. There must be enough material in the order to satisfy the High Court that the discharge was for good and proper causes. Omission to record reasons is not curable irregularity. [Para 5]

Annotation:—('46-Com) Cr. P. C. S. 253 (2) N. 7.

Case referred:—

1. ('36) I. L. R. (1936) Nag. 205 : 23 A. I. R. 1936 Nag. 192 : 166 I. C. 709 : 38 Cr. L. J. 307, Thakurdas v. Narayan.

N. B. Chandurkar—for Applicant.
S. N. Kherdeker—for Non-applicants.
R. Kaushalendra Rao, Government Pleader — for the Crown.

Order.—The non-applicants were prosecuted under S. 429, Penal Code, for mischief by killing a buffalo. The complaint was filed on 25-7-1946. There were eight hearings and on the ninth the complainant was absent. Accordingly, the trying Magistrate, purporting to act under S. 253 (2), Criminal P. C., discharged the accused. He did not say that he considered the charge to be groundless, but merely said that :

"The complainant being absent there is no evidence against the accused persons."

[2] Now of course, if there is no evidence against an accused person, that is a good ground for discharging him. But before it can be said that there is no evidence, it is incumbent on the Magistrate to call and examine such witnesses as are said to know the facts. When the complainant was examined on 25-7-1946 he stated on affirmation that he knew nothing personally but had been told the facts by two persons whom he named. The Magistrate was bound in these circumstances to call these two witnesses and examine them.

[3] This is a warrant case. An offence under S. 429, Penal Code, is cognisable and non-compoundable. The procedure for such trials is laid down in Chap. 21. Section 252 (2) requires the Magistrate to

"ascertain from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution"

and then says

"and shall summon to give evidence before himself such of them as he thinks necessary."

Then comes S. 253 which provides in sub-s. (1) for the discharge of the accused

"if upon taking all the evidence referred to in S. 252"

he finds no case made out etc. *See* also I. L. R. (1936) Nag. 205[1] at p. 214.

[4] Sub-section (2) leaves the Magistrate a large discretion for discharging the accused if he considers the charge to be groundless, but he can only do this "for reasons to be recorded."

[5] It was argued that the omission to record reasons was a curable irregularity. I agree that the reasons need not be recorded in any particular form and that it would be enough if the reasons which motivated the discharge can be gathered from the order, but reasons there must be in some form or other. There must be enough material in the order to satisfy the High Court that the discharge was for good and proper cause. The only reason which can be gathered from the order is that as the complainant was absent there is no evidence. But that was not the complainant's fault. He had already named two of the persons who were likely to know the facts of the case.

[6] The absence of the complainant is not sufficient in cognisable and non-compoundable cases under Chap. 21. There is a difference here between a summons case and a warrant case. In the former, S. 247 applies and there the accused can be acquitted if the complainant does not appear

"upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned."

In warrant cases S. 259 applies and the power to discharge the accused in the absence of the complainant is only given in compoundable and non-cognizable cases. The orders of the lower Court are set aside and the trying Magistrate is directed to proceed with the trial.

R.G.D. *Order set aside.*

A. I. R. (35) 1948 Nagpur 342 *[C. N. 115.]*

HEMEON J.

Narayan Prasad and others—Applicants v. *Emperor.*

Criminal Revn. No. 190 of 1947, Decided on 26-9-1947, from order of Addl. Sessions Judge, Damoh, D/- 5-4-1947.

Evidence Act (1872), Ss. 133, 144—Public servant extorting bribe — Evidence of bribe given —Very little corroboration is required— Penal Code (1860), Ss. 161 and 165.

The rule of the Court which requires corroboration of the evidence of an accomplice as against each accused, if it applies at all, applies with very little force to a case in which the accused is charged with extorting a bribe from other persons. The objections which usually arise to the evidence of an accomplice do not really apply where the alleged accomplice, that is, the person who pays the bribe, is not a willing participant in the offence, but is really a victim of that offence. In cases of this kind, where the payment of the bribe has not been voluntary, very slight corroboration would be sufficient to make the evidence of such persons admissible against the receiver of the bribe: 22 A. I. R. 1935 Bom. 230 and 34 A. I. R. 1947 P. C. 135, *Rel. on.* [Paras 9 & 10]

Annotation:—('46-Man) Evidence Act, S. 114., N. 4 S. 133, N. 7.

Cases referred:—

1. ('35) 59 Bom. 486 : 22 A. I. R. 1935 Bom. 230 : 156 I. C. 615 : 36 Cr. L. J. 968, Kamalkhan v. Emperor.
2. ('47) 34 A. I. R. 1947 P. C. 135 : 26 Pat. 460 (PC), Srinivas Mall v. Emperor.

V. R. Sen—for Applicants.

R. Kaushalendra Rao, Government Pleader—for the Crown.

Order.—Narayan Prashad, Patwari, Bhawani Prashad, revenue peon, and Abdul Majid, revenue peon, were convicted and each sentenced to undergo 3 consecutive terms, each of 3 months rigorous imprisonment, and pay Rs. 75 fines by the First Class Magistrate, Damoh, under S. 161, read with S. 34, Penal Code. In appeal the Additional Sessions Judge, Damoh, held Narayan Prashad liable under S. 165, ibid, maintained the jail punishment awarded and set aside the fines. Bhawani Prashad was also adjudged liable under that section but on one count only and he was sentenced to undergo 3 months rigorous imprisonment. His fines too were set aside. Abdul Majid was acquitted. Narayan Prashad and Bhawani Prashad have now come up in revision to this Court.

[2] The case against them shortly stated was to the effect that while they were engaged in grain procurement work in mouza Gadhola, Hatta tahsil, Saugor District, in April-May 1945, they received illegal gratifications from Prahlad Singh (P. W. 1), Bhopal Singh (P. W. 2) and Bahadur Singh (P. W. 3) with the consequence that they did not procure from them the stipulated quantity of grain. An anonymous petition despatched in July 1945 was received by the Tahsildar, Hatta, and S. P. Sukul (P. W. 7) carried out the investigation in the course of which Prahlad Singh, Bhopal Singh and Bahadur Singh made the reports Exs. P-1, 3 and 4 respectively on 12-8-1945.

[3] The applicants asserted that they had demanded and received only the stipulated amounts of grain from each of those three witnesses, and that they had neither demanded nor received illegal gratification from any of them. They claimed in defence that they had been inculpated because of their refusal to depose against Mr. B. D. Tiwari, Naib-Tahsildar.

[4] Prahlad Singh's version was briefly to the effect that when he refused to supply 12 bags of wheat and 8 bags of *juar* as demanded by the accused as his father and uncle were not at home, they threatened to enter his house and remove that quantity forcibly. Eventually, the applicant Bhawani Prashad said that he would accept a smaller quantity if he were paid Rs. 20, but he agreed to take Rs. 15 and the accused decided that the quantity to be supplied by Prahlad Singh was only 3 bags of wheat and 1 bag of *juar*.

[5] Bhopal Singh claimed that when he refused to supply the two bags of wheat demanded by the accused, they threatened to enter his house

and demanded Rs. 5 from him. On his payment of that amount to the applicant Narayan Prashad they took only 1 bag of wheat from him.

[6] Bahadur Singh's version was that on his refusal to supply two bags of wheat to the accused, they were about to enter his house and Narayan Prashad demanded Rs.4 from him. When he paid that amount, only one bag of wheat was taken from him.

[7] Puransingh (P. W. 4) averred that after he had paid Rs. 5 in similar circumstances, the demand of 2 bags of wheat from him was met by the delivery of 1 bag of *juar*. On Kadore P. W 5's payment of Rs. 5 to Narayan Prashad, one bag of wheat was accepted in lieu of two bags thereof demanded. Ujyar Singh (P. W. 6) had been taken from his village Khiria to Gadhola to assist the applicants in grain procurement and from his testimony it was shown that in the distribution of the money received by them at Gadhola each received Rs. 28. This would signify that the total amount collected was Rs. 84, but from the testimony of Prahlad Singh (P. W. 1) and Puransingh (P. W. 4) who also averred that each of the accused received Rs. 28 it would appear that the total amount collected was Rs. 86. Prahlad Singh could not say what happened to the extra Rs. 2, but Puransingh stated that it remained with the applicant Bhawani Prashad. The point is not, however, of any salient importance as it was clear from the independent and reliable evidence of Ujyar Singh (P. W. 6) that each of the accused received Rs. 23.

[8] That evidence did not, it is true, refer specifically to the amount recovered from Prahlad Singh and the other Gadhola witnesses, but it did corroborate their testimony concerning the unlawful recovery of money at that place and of its distribution among the accused and if the Gadhola witnesses can be regarded as accomplices, substantial corroboration of their evidence was not required.

[9] In 59 Bom. 486,[1] Wadia J. made the following observations :

"But in cases of bribery the persons who pay the bribe and those who act as intermediaries are the only persons who can ordinarily be expected to give evidence about it. It is not possible to expect absolutely independent evidence about the payment of a bribe, and a distinction has to be made between persons who have voluntarily paid a bribe to a public servant in order to secure some advantage for themselves, and persons, such as Krishna, Dadu and Namu in this case, who have been compelled by improper pressure put upon them by a public servant to pay a bribe. In cases of this kind, where the payment of the bribe has not been voluntary, very slight corroboration would, in my opinion, be sufficient to make the evidence of such persons admissible against the receiver of the bribe."

In the same case Beaumont C. J. said:

"In my opinion, the rule of the Court which requires corroboration of the evidence of an accomplice as against each accused, if it applies at all, applies with very little force to a case like the present, in which the accused is charged with extorting a bribe from other persons. The objections which usually arise to the evidence of an accomplice do not really apply where the alleged accomplice, that is, the person who pays the bribe, is not a willing participant in the offence but is really a victim of that offence."

In A. I. R. 1947 P. C 135[2] their Lordships of the Judicial Committee of the Privy Council in dealing with the contention that reliance had been placed on the uncorroborated evidence of accomplices observed:

"Section 133, Evidence Act, expressly provides that 'an accomplice shall be a competent witness against an accused person' and that 'a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.' No doubt the evidence of accomplices ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must however vary according to the extent and nature of the complicity: sometimes, as was said by Sir John Beaumont C. J. in 59 Bom. 486,[1] accomplice is 'not a willing participant in the offence but a victim of it.' There is ground for saying that the accomplices in this case acted under a form of pressure which it would have required some firmness to resist."

[10] If, as stated, the evidence of the Gadhola witnesses required corroboration, that supplied by Ujyar Singh was sufficient. The evidence of the Gadhola witnesses had necessarily to be received with caution, but there is no reason why it should be disbelieved. The applicants had undoubtedly collected money to which they were not entitled and exerted pressure on the villagers who were reluctant to supply the amount of grain demanded from them. The reports Exs. P-1, 3 and 4 had been made belatedly, but there was nothing unusual in the delay, as villagers ordinarily are reluctant to move against Government servants and in the present case they had themselves gained advantage from the payments to the applicants.

[11] The evidence of the defence witnesses was disbelieved by both Courts for cogent reasons with which I am in agreement. There was manifestly no substance in the defence plea that the accused had been incriminated because of their refusal to testify against Mr. B. D. Tiwary, Naib Tahsildar.

[12] Two of Narayan Prashad's convictions were in order and are maintained, but the third which is in respect of the amount paid by Prahlad Singh must be set aside. Prahlad Singh had paid Rs. 15 not to this applicant but to the applicant Bhawani Prashad and the latter was convicted therefor. That conviction too was in order and is maintained. As to sentence, Narayan Prashad shall undergo two concurrent terms, each of 3 months rigorous imprisonment. He as patwari was undoubtedly the chief offender. With regard to the applicant Bhawani Prashad, who was merely a tahsil peon, the po-

sition is different and the ends of justice will be met if he is ordered to pay a substantial fine. The sentence of imprisonment awarded to him is accordingly set aside and in lieu of it he is sentenced to pay a fine of Rs. 200. In default of payment he shall undergo 3 months rigorous imprisonment. Subject to these modifications the application is dismissed.

R.G.D. *Application dismissed.*

A. I. R (35) 1948 Nagpur 344 *[C. N. 116.]*

HEMEON AND SEN JJ.

Mt. Bhukhin w/o Gajraj —*Accused* — *Appellant* v. *Emperor.*

Criminal Appeal No. 94 of 1947, Decided on 25-7-1947, from order of Sessions Judge Raipur, camp Bilaspur, D/- 14-4-1947.

(a) Evidence Act (1872), S. 24 — Retracted confession—It may form basis of conviction if believed —But it is unsafe to convict on it without independent corroboration — Corroboration must be in material particulars—Criminal P. C. (1898), S. 164.

A retracted confession, if believed to be true, may form the basis of a conviction; but as a rule of caution it is unsafe to base a conviction even of the maker on a retracted confession alone without some independent corroboration. The corroboration must be in material particulars so as to satisfy the Court that the confession, even though retracted may be acted upon : 26 A.I.R. 1939 Cal. 65 (FB), *Ref.* [Para 15]

Annotation:—('46-Man) Evi. Act, S. 24, N. 9.
('46-Com) Cr. P. C., S. 164, N. 18.

(b) Criminal P. C. (1898), S. 164—Police custody —Accused handcuffed and one constable standing guard on dais when confession recorded by Magistrate—Confession held made under influence of police—Evidence Act (1872), S. 26.

The accused must be free and unhampered at the time when his confession is recorded and should not be subject to the influence of the police. [Para 16]

The accused persons were produced before a Magistrate in the custody of the guard provided by the police. The Magistrate who recorded the confessions noted that one constable stood guard on the dais when the confessions were recorded. Two of the accused were handcuffed when their confessions were recorded:

Held, that it was impossible to be sure that the confessions made by the accused persons in these circumstances were not made under the influence of the police. 24 A. I. R. 1937 Lah. 409, *Rel. on.* [Para 20]

Annotation:— ('46-Com) Cr. P. C. S. 164, N. 17.
('46-Man) Evi. Act, S. 26, N. 4.

(c) Evidence Act (1872), S. 24 — Inducement — Positive proof of, is not required for rejecting confession — Well-grounded conjecture reasonably based upon circumstances disclosed is sufficient.

Section 24 does not require positive proof (as defined in S. 3 of the Act) of improper inducement to justify the rejection of the confession; the word 'appears' indicating a lesser degree of probability than would be necessary if 'proof' had been required. A well-grounded conjecture, reasonably based upon circumstances disclosed in the evidence, is sufficient to exclude the confession, because it would be idle to expect the accused to prove the inducement, threat or promise; for in most cases such proof cannot be available : 12 A. I. R. 1925 Cal. 587, *Rel. on.* [Para 21]

(d) Criminal P. C. (1898), S. 164 — Confession must be voluntary — Magistrate must question accused with view to discover whether accused confesses voluntarily.

A Magistrate recording a confession of an accused must question him with a view to discovering whether he confesses voluntarily, and this questioning must be in pursuance of a real endeavour to find out the object of it, the requirement not being satisfied by putting a few formal questions. An attempt must be made by the Magistrate to elicit facts from the accused to help him in determining whether the statements were made voluntarily and were not made under improper inducement. [Para 22]

Annotation:—('46-Com) Cr. P. C., S. 164, N. 14.

(e) Criminal P. C. (1898), S. 164—Voluntary confession—Accused illiterate and ignorant woman—Confession full and detailed and facts stated in natural and proper sequence—Entire prosecution case set out therein—Everything necessary for prosecution to prove charge of murder admitted—Confession held was not voluntary and must be discarded. [Para 23]

(f) Criminal P. C. (1898), S. 164—Voluntary confession—Magistrate eliciting necessary facts by putting leading questions to accused—Procedure held highly objectionable and confession must be rejected as not voluntary.

A Magistrate who recorded a confession instead of allowing the accused to make a statement in his own words put three leading questions to the accused. The questions indicated that the Magistrate was told what the accused was to state and he elicited the necessary facts by putting him three leading questions.

Held, that the procedure adopted by the Magistrate was highly objectionable and the confession so recorded must be rejected as not voluntary. [Para 25]

Annotation:—('46-Com) Cr. P. C., S. 164, N. 14.

(g) Evidence Act (1872), S. 27—Accused making statement that he purchased poison pasted in arrow and producing arrow—Statement held did not lead to discovery and was inadmissible—Fact, however, that he produced arrow on which poison was found was held relevant.

An accused who was charged with abetment of murder by poisoning, made a statement that he purchased poison pasted in an arrow and produced an arrow.

Held that the statement did not lead to any discovery. His statement that he purchased poison pasted in an arrow related to the previous history and was not admissible : 34 A. I. R. 1947 P. C. 67, *Rel. on.* [Para 29]

Held further, that though the statement was not admissible, the fact that the accused produced an arrow which was subsequently seized and sent to the Chemical Examiner who reported that there was poison on it was relevant. [Para 29]

(h) Criminal P. C. (1898), S. 288—Discretion is to be judicially exercised—Prosecution and accused are entitled to notice.

The power under S. 288 is not to be lightly used. The discretion vested under that section has to be judicially exercised. As the evidence before the committal Court, which is admitted in evidence under S. 288, is substantive evidence, the prosecution and the accused are entitled to notice so that they may have an opportunity to test it by further cross-examination: 33 A. I. R. 1946 Nag. 321, *Foll.* [Para 34]

Annotation:—('46-Man), Evi. Act, S. 27, N. 3.

Cases referred:—

1. ('39) I. L. R. (1939) 1 Cal. 1 : 26 A. I. R. 1939 Cal. 65 : 179 I. C. 506 : 40 Cr. L. J. 199 (F. B.), Purnananda Das Gupta v. Emperor.
2. ('37) 39 P. L. R. 663 : 24 A. I. R. 1937 Lah. 409 : 173 I. C. 887, Haider v. Empreor.
3. ('25) 52 Cal. 67 : 12 A. I. R. 1925 Cal. 587 : 86 I. C. 414 : 26 Cr. L. J. 782. Emperor. v. Panchkori Dutt.
4. ('47) 34 A. I. R. 1947 P. C. 67 : I. L. R. (1948) Mad. 1 : 74 I. A. 65 : 230 I. C. 135 : 48 Cr. L. J. 533 (P. C.), Kottayya v. Emperor.
5. ('46) I. L. R. (1946) Nag. 946 : 33 A. I. R. 1946 Nag. 321 : 226 I. C. 377 : 47 Cr. L. J. 918, Deorao v. Emperor.

D. B. Najbile—for Appellant.

W. B. Pendharkar, Addl. Government Pleader—for the Crown.

Judgment.—This judgment will govern the disposal of Criminal Appeals Nos. 94, 145 and 146 of 1947 and Criminal Reference No. 29 of 1947. These proceedings arise out of the same sessions trial.

[2] Four persons were tried for murder. They were charged under S. 302 read with S. 34, Penal Code, for causing the death of Gajraj Raut on 7th July 1946 at Karma in furtherance of their common intention by giving him poison mixed in food. Mt. Bhukin was also charged under S. 302, Penal Code, for causing the death of her husband Gajraj. The other three accused were charged for abetment of murder under S. 302 read with S. 109, Penal Code, in addition to the charge under S. 302 read with S. 34, Penal Code.

[3] Mt. Bhukin was convicted under S. 302, Penal Code, for causing the death of her husband and was sentenced to death by the Court of Session on 14th April 1947. Criminal appeal No. 94 of 1947 has been filed by her to set aside her conviction and sentence. The Court of Session has made Criminal Reference No. 29 of 1947 under S. 374, Criminal P. C., for confirmation of the capital sentence.

[4] Bulthu, son of Ghasiram Kanwar, was convicted of abetment of murder under S. 302 read with S. 109, Penal Code, and sentenced to transportation for life. Criminal Appeal No. 146 of 1947 has been filed by him to set aside his conviction and sentence.

[5] The two other accused persons viz. Malikram, son of Sunhar Teli, and Bedmati, widow of Ghasiram, Kanwar, were acquitted. The Provincial Government has filed Criminal Appeal No. 145 of 1947 to set aside the order of acquittal of Malikram but has not filed any appeal against the order of acquittal of Bedmati. No reference will be made to her except when necessary while discussing the case of the other accused.

[6] The prosecution case briefly stated, was as follows. Malikram frequently visited the house of Gajraj who suspected that he was carrying on criminal intrigue with his wife Mt. Bhukin. Due to this suspicion he used to beat her. On 9th April 1946, the Ramnavami day, there was a serious quarrel between them and Gajraj gave a severe beating to his wife Bhukin. When Malikram subsequently turned up, Gajraj abused him and threatened to kill him. Due to this threat Malikram did not visit the house of Gajraj for two months. Gajraj suspected that Bedmati was a procuress and that at her place Malikram used to meet Bhukin. Gajraj had also threatened to kill Bedmati. Bhukin got nervous and sought the advice of the other three accused. Bulthu stated that he had some medicine and suggested that she might give it to her husband. A conspiracy to murder Gajraj was formed between all the four accused on Thursday, the 4th July 1946. On Sunday, the 7th July 1946, in the evening Bulthu brought some poison and handed it over to Bedmati who gave it to Bhukin and directed her to mix it in dal and give it to her husband. As Bhukin had no dal it was supplied to her by Bedmati. Bhukin mixed the poison in the dal as directed and served it to her husband when he took his meal on Sunday, the 7th July 1946, in the night. After taking his meals Gajraj went to sleep. Gajraj got up at midnight, complained of pain in the stomach and had a few vomitings and purgings. He died in the early hours of the morning of the 8th July and was buried the same day.

[7] Sukritdas (P. W. 1), the kotwar of Karma, made a report (Exhibit P 23) on Thursday, the 11th July 1946, at Ratanpur police station house which is at a distance of 15 miles from Karma where Gajraj Raut died. In that report the kotwar stated that he suspected that Bhukin had administered poison to her husband in the food which he took on the Sunday night. He alleged that she had criminal intimacy with Malikram, son of Sunhor Teli, but did not mention that he had admitted that he along with three others had poisoned Gajraj Raut. The effect of this omission will be considered when discussing the evidence regarding the extra-judicial confession alleged to have been made by Malikram in the presence of Bulthu to Sukritdas on the night of Tuesday, the 9th July 1946, before he made the report, Exhibit P. 23.

[8] After the report was made at the Ratanpur police station house, Abdul Hamid (P. W. 18) Head Constable moharir left for Karma accompanied by the kotwar. They arrived in the village in the evening at 7 O'clock the same day. The head constable started investigation on 12th July 1946. On that date he seized earth (Article E) from the place where Gajraj had vomited under seizure memo Exhibit P. 18. The next day he recorded the statement (Exhibit P.

19.) of Bulthu under S. 27, Evidence Act, regarding the purchase made by him of poison pasted in an arrow from Bamhni Khurd. Bulthu produced the arrow (Article F) which was seized from him under seizure memo Exhibit P-20. Dhoti (Article G) which Gajraj was wearing at the time of his death was seized under seizure memo (Exhibit P 21). The head constable made an application (Exhibit P-16) under S. 176 (2) Criminal P. C , to the Sub-Divisional Magistrate, Bilaspur, on 14th July 1946 for exhumation of the corpse of Gajraj from the grave. He also asked the District Superintendent of Police, Bilaspur, to send a doctor for medical examination. The head constable sent a report (Exhibit P-17A) through a constable and it was recorded as first information report (Exhibit P. 17) at the police station house, Ratanpur. He seized the dhoti (Article H) on which Gajraj was sleeping at the time of his death under seizure memo Exhibit P-22.

[9] Mohammad Yakub (P. W. 19), Sub-Inspector of Police, took charge of the investigation on 15th July 1946. The Sub-Divisional Magistrate, Bilaspur, passed an order (Exhibit P. 7) under S. 176 (2), Criminal P. C., on 15th July 1946 that the corpse of Gajraj Raut be disinterred and examined. The corpse was accordingly exhumed on 16th July 1946 and the inquest report is Exhibit P-8. As the body was in an advanced state of decomposition no injuries could be observed. The Sub-Inspector seized the register (Exhibit P 2) from Bodhiram (P. W.9) under seizure memo (Exhibit P-3). The four accused persons were arrested on 16th July 1946 at 8 p. m. On the 17th the Sub-Inspector seized 2 one rupee notes from Sonsai (P. W. 3) under the seizure memo (Exhibit P-1), and an arrow (Article B)from him under the memo Exhibit P-4. The Sub-Inspector recorded the statement (Exhibit P-5) of Bedmati under S. 27, Evidence Act, regarding stone (Article C) and wooden plate (Article D) which were seized under memo Exhibit P-6. The statement of Bedmati (Exhibit P-5) has been excluded from consideration as inadmissible because the articles C and D are common articles and were in no way connected with the crime.

[10] The Sub-Inspector in his application (Ex. P-14) dated 17-7-1946 asked that the Sub-Divisional Magistrate, Bilaspur, be requested to record the confessions of the accused. Two days were taken in deciding about the Magistrate who was to record the confessions. On 19-7-1946 it was settled that Mr. Tobin was to record their confessions. Accordingly they were produced before him and he gave them time to reflect and directed their production before him on 20-7-1946 for recording their confessions. Bhukin was produced before him on 20-7-1946 and Ex. P-24 is the record of her confession. Malikram, Bulthu and Bedmati were produced on 22-7-1946 and Exs. P-25 to P-27 are the records of their confessions.

[11] Mr. Razak, Assistant Medical Officer, Raipur, was present at the time the corpse of Gajraj was disinterred. He made the *post mortem* examination on 26-7-1946 of which the report is Ex. P-32. In the report he noted that he did not detect any injuries on the person of the deceased or find any disease, and stated that he could not give any opinion as to the cause of death of Gajraj. The Assistant Medical Officer preserved the viscera, had it sealed and sent it to the Chemical Examiner for report. A few other articles noted in Exs. P-30 and P-31 were also sent to the Chemical Examiner. The report of the Chemical Examiner is Ex. P-12 dated 12-9-1946. A charge-sheet against the four accused viz. Bhukin, Malikram, Bulthu and Bedmati was filed on 19-9-1946 under S. 302 read with Ss. 109 and 34, Penal Code.

[12] The first question for decision is whether Gajraj Raut died of aconite poisoning. (After considering the medical evidence and the report of the Chemical Examiner, the judgment proceeded:) On a careful consideration of the Chemical Examiner, we have no hesitation in holding that Gajraj died of aconite poisoning.

[13] The next question is whether there was a liaison between Malikram and Bhukin. (After considering the evidence their Lordships concluded thus.) The evidence on record is sufficient to establish that Gajraj did not like the frequent visits of Malikram to his house, that he suspected that Malikram was carrying on criminal intrigue with his wife Bhukin and that there used to be frequent quarrels between Gajraj and his wife Bhukin and he used to beat her due to suspicion.

[14] The next question for consideration is whether the confessions of the four accused viz., Bhukin, Malikram, Bulthu and Bedmati, were voluntary. The accused persons were arrested on Tuesday, the 16th July 1946, at 8 P. M. and were produced before Mr. Tobin, Magistrate First Class, on 19-7-1946, on which date he gave them time for reflection and directed that they be produced on 20-7-1946 for recording their confessions. Bhukin was produced on 20-7-1946 and the record of her confession is Ex. P-24. Malikram, Bulthu and Bedmati were produced on 22-7-1946 and the records of their confessions are Exs. P-25 to P-27 respectively. These confessions were retracted in the committal Court and the retractions were adhered to in the Sessions Court. In the memorandum of appeal Bhukin

has stated the circumstances under which she was made to confess by the Sub-Inspector.

[15] In I. L. R. (1939) 1 Cal. 1[1] at P. 20 it was observed:

"Therefore, normally a confession of guilt is the most conclusive evidence which one can have. But if that confession is 'retracted,' to use the word which has almost become a word of art, then it is certainly desirable, if not absolutely necessary, that there should be some corroboration of what the accused has said about himself even in respect of his own actions."

A retracted confession, if believed to be true, may form the basis of a conviction: but as a rule of caution it is unsafe to base a conviction even of the maker on a retracted confession alone without some independent corroboration. The corroboration must be in material particulars so as to satisfy the Court that the confession, even though retracted, may be acted upon.

[16] The accused persons were produced before Mr. Tobin, Magistrate 1st class, in the custody of the guard provided by the police. The Magistrate who recorded the confessions has noted that one constable stood guard on the dais when the confessions were recorded. Except Bhukin and Bedmati, the other two accused viz., Malikram and Bulthu were handcuffed when their confessions were recorded. The accused must be free and unhampered at the time when his confession is recorded and should not be subject to the influence of the police. In order to ensure that the confessions may be voluntarily made, instructions have been issued; *vide* Circulars 1-6, paragraphs 5 to 12, and the procedure to be followed and the safeguards to be observed by a Magistrate before recording a confession have been set out.

[17] In 39 P. L. R. 663[2] the confession of the accused was discarded because the accused was not only in the custody of the police but he was actually fettered and had a policeman on either sides of him. The Divisional Bench stated that it was impossible to be sure that a confession made in those circumstances was not made under the influence of the police.

[18] Sukritdas (P. W. 1), the kotwar of the village, stated that when he left Karma on 10-7-1946 to make a report at the police station house, he asked Baldeo (P. W. 4), the malguzar of the village, to keep a watch on Malikram. Baldeo stated that Malikram was confined to his house by keeping a watch over him till the arrival of the police. Baldeo further stated that when he returned to his village on 15th July he found that the three accused viz., Malikram, Baldeo and Bhukin, were confined in his *bada* and the next day Bedmati was arrested and that they were all kept in his *bada* till they were taken away on the 17th.

[19] Manglu (P. W. 5) stated that his mother Bhukin was confined in the *bada* of the malguzar for nearly three or four days while the head constable was investigating and that Bhukin did not return home till she was taken to Bilaspur. From the evidence of these two witnesses, it appears that the accused persons were confined in the *bada* of the malguzar before they were arrested on 16th July and that thereafter they were in the custody of the police up to 19th July when they were produced before the Magistrate. They were remanded to jail custody by the Magistrate on that date. Bhukin was produced on 20th July before the Magistrate in the custody of the guard provided by the police. Similarly, Malikram, Bulthu and Bedmati were also produced in the custody of the police guard on 22nd July 1946. When the confessions of these accused persons were recorded, a police constable stood guard on the dais. Bulthu and Malikram were also handcuffed when their confessions were recorded.

[20] The principle underlying the decision in 39 P. L. R. 663[2] is applicable and it is impossible to be sure that the confessions made by the accused persons in these circumstances were not made under the influence of the police.

[21] Section 24, Evidence Act, 1872, does not require positive proof (as defined in S. 3 of the Act) of improper inducement to justify the rejection of the confession; the word 'appears' indicating a lesser degree of probability than would be necessary if 'proof' had been required. As observed in 52 Cal. 67[3] at p. 84 a well-grounded conjecture, reasonably based upon circumstances disclosed in the evidence, is sufficient to exclude the confession, because it would be idle to expect the accused to prove the inducement, threat or promise; for in most cases such proof cannot be available.

[22] A Magistrate recording a confession of an accused must question him with a view to discovering whether the prisoner confesses voluntarily, and this questioning must be in pursuance of a real endeavour to find out the object of it, the requirement not being satisfied by putting a few formal questions. This has not been done in the present case. The confessions were recorded on the printed forms. The learned Magistrate merely put the stereotyped printed questions to the accused except Malikram and no attempt was made by him to elicit facts from the accused to help him in determining whether the statements were made voluntarily and were not made under improper inducement. The answers of the accused to the questions actually put by the Magistrate did not furnish data for the determination of the points stated above. In the case of Malikram the additional question that was put

to him and the answer given by him are reproduced below:

"Q. Did somebody tell you that you would be excused, if you made a (confessional) statement?

A. No sir."

The answer was bound to be in the negative the more readily the greater the influence, if any, that he may have been labouring under.

[23] The substance of the confession (EX. P-24) of Bhukin has been given in paragraph 5 of our judgment. The confession is full and detailed and the facts, have been stated in natural and proper sequence. The entire prosecution case has been set out therein. Everything necessary for the prosecution to establish a charge of murder has been admitted. In her confession she admitted that she had criminal intimacy with Malikram and that she used to meet him at the house of Bedmati. Bhukin stated that there was a serious quarrel with her husband who beat her severely and threatened to kill her and Malikram, that all the four accused conspired to kill Gajraj and that in pursuance thereof poison was procured and mixed in food which was served on Sunday night when Gajraj took his meal. Bhukin is an illiterate and ignorant woman. In our opinion it was impossible for her to make a coherent and a complete statement which she did unless she was tutored by someone familiar with the requirements of the law. The internal evidence furnished by the contents of the confession leave no room for doubt that it was not made voluntarily. As the confession was not voluntary it must be discarded.

[24] Apart from the statements contained in the confession EX. P-24, there is no independent evidence to prove that Bhukin used to meet Malikram at the house of Bedmati, that Gajraj had threatened to kill Bhukin and Malikram or that the four accused conspired to kill Gajraj. There is some evidence regarding the purchase of poison and of *dal* (pulse) which we shall discuss in a later paragraph.

[25] The record of confession (EX. P-25) of Malikram is unsatisfactory. Instead of allowing him to make a statement in his own words he was put three questions which are given below:

"Q. Were you in criminal intimacy with Bhukin Raotin?

Q. Did Gajraj Raot use to prohibit you from visiting his house?

Q. Did you think any remedy for this?

The questions indicate that the learned Magistrate was told what Malikram was to state and he elicited the necessary facts by putting him three leading questions. The procedure adopted by the learned Magistrate was highly objectionable and the confession so recorded must be rejected as not voluntary.

[26] There is a variation in the confession of Bhukin and of Malikram in the matter of the person who gave the *dal* to Bhukin. In her confession Bhukin stated that she had no *dal* and Bedmati gave it to her. She did not implicate Malikram or state that she had asked him to procure *dal* for her. This statement was made on 20-7-1946. Two days later, Malikram in his confession stated that Bhukin asked him to bring *urad dal* and that accordingly he purchased it from the shop of Bodhiram and gave it to Bedmati. This was an improvement with a view to implicating Malikram.

[27] Similarly, an improvement has been made in the matter of purchase of poison from Sonsai (P. W. 3). In his confessional statement (EX. P-19) recorded under S. 27, Evidence Act, Bulthu stated that he purchased poison from Sonsai and gave it to Bedmati who handed it over to Bhukin. This statement was recorded on 13-7-1946. There was no reference that Malikram had accompanied him at the time of purchase of poison. In his confession (EX. P-26) he stated that he brought poison and gave it to Bhukin but did not refer to Malikram. Similarly in the statements made before the police (EXS. D-1 and D-2) Sukritdas and Pachkaud respectively stated that Bulthu brought the poison from Sonsai but did not mention the name of Malikram. Malikram in his confession stated that he had accompanied Bulthu on the first day but no poison was given and that he did not accompany Bulthu on Sunday when he brought the poison. Bhukin in her confession stated that Malikram had accompanied Bulthu on both the occasions, when Bulthu went to purchase poison. The variation in the story has been made with a view to implicate Malikram who had not originally been stated to have accompanied Bulthu to purchase poison.

[28] Bulthu and Bedmati are Kanwars. Gajraj was a Raut. Malikram is a Teli. These are of different castes. No reasons have been stated why Bulthu should desire to encompass the death of Gajraj or enter into a conspiracy with the other accused to kill him. It has not been brought out that he was on inimical terms with Gajraj or that he was in any way interested in Bhukin or Malikram.

[29] The learned Sessions Judge has relied on the confessional statement (EX. P-19) recorded under S. 27, Evidence Act. The statement, however, was inadmissible. Bulthu made the statement and produced an arrow. The statement did not lead to any discovery. His statement that he purchased poison pasted in an arrow from Bamhni Khurd relates to the previ-

ous history and was not admissible in view of the decision in A. I. R. 1947 P. C. 67.[4] Their Lordships of the Judicial Committee observed at page 70 :

"..... it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered."

The learned Sessions Judge was, therefore, not right in relying on the confessional statement recorded in Exhibit P-19 which must be ignored. Though the statement is not admissible, the fact that the accused produced an arrow which was subsequently seized and sent to the Chemical Examiner who reported that there was poison on it is relevant. The only evidence about the purchase of poison is that of Sonsai (P. W. 3) which will be discussed later.

[30] The confession of Bulthu is Exhibit P-26. The confession has been retracted and there is no independent evidence to prove that there was a conspiracy to kill Gajraj or that Bulthu procured poison and gave it to Bhukin. It is, therefore, not safe to base a conviction upon his confession which has been retracted.

[31] Bedmati has been acquitted and no appeal has been filed against her acquittal. It is, therefore, not necessary to discuss her confession.

[32] On a careful consideration we have reached the conclusion that the confessions of Bhukin, Malikram and Bulthu (Exs. P-24, P-25 and P-26 respectively) were not voluntary and they appear to have been made under improper inducement. They are accordingly inadmissible in evidence under S. 24, Evidence Act, and must be ignored.

[33] The next question is whether Malikram made an extra-judicial confession. The extra-judicial confession is alleged to have been made on two different occasions. (After discussing the evidence on this point their Lordships concluded.) We accordingly hold that no extra-judicial confession was made by Malikram either on the 9th or 10-7-1946.

[34] The procedure adopted by the learned Sessions Judge was very irregular. He permitted the Public Prosecutor to cross-examine these witnesses under S. 154, Evidence Act, read with S. 288, Criminal P. C. No case had been made out for permitting cross-examination of these witnesses. The Public Prosecutor did not give any reasons why he wanted permission for cross-examination of these two witnesses. Similarly, the learned Sessions Judge gave no reasons why permission to cross-examine was granted. We pointed out in I. L. R. (1946) Nag. 946[5] at p. 956 that the power under S. 288, Criminal P. C., is not to be lightly used. The discretion vested under that section has to be judicially exercised. As the evidence before the committal Court, which is admitted in evidence under S. 288, Criminal P. C., is substantive evidence the prosecution and the accused are entitled to notice so that they may have an opportunity to test it by further cross-examination.

[35] Baldau (P. W. 4) and Manglu (P. W. 5) were examined on 11-2-1947 and Navratan on 12-2-1947. The learned Sessions Judge did not admit under S. 288, Criminal P. C., the depositions of Baldau and Manglu before the committal Court on 11-2-1947 but they were admitted on 12-2-1947. In the order-sheet it has not been stated that the depositions before the committal Court were admitted under S. 288, Criminal P. C., though in the endorsements on the depositions it has been so stated. [After discussing the evidence on the questions, (1) whether poison was purchased from Sonsai? (2) whether *urad dal* was purchased by Malikram from the shop of Bodhiram at instance of Bhukin? and (3) whether poison was mixed in the *urad dal* which was served to the deceased? their Lordships held that there was no reliable evidence to prove the purchase of the poison and the *dal* and that the evidence showed that there was poison in the *urad dal* or in the food which was given to the deceased on the night of Sunday, 7-7-1947. The judgment then continued thus :]

[36] Aconite may have been administered otherwise than through the *urad dal* or the food which was served on the night of Sunday, 7-7-1947. There is no legal evidence as to the circumstances in which aconite was administered to Gajraj and by whom.

[37] We accordingly hold that the conviction of Bhukin under S. 302, Penal Code, is not justified on the evidence on record. Criminal Appeal No. 94 of 1947 is accordingly allowed and we set aside the conviction of Bhukin under S. 302, Penal Code, and the sentence of death passed on her, and direct that she be set at liberty forthwith. The reference for confirmation of the death sentence automatically fails and is filed. The conviction of Bulthu under S. 302, read with S. 109, Penal Code, is not sustainable; and we allow Criminal Appeal No. 146 of 1947 and set aside his conviction under that section and the sentence of transportation for life passed on him. Bulthu shall be released forthwith.

[38] There is no legal evidence to justify a conviction of Malikram under S. 302, Penal Code, or under S. 302 read with S. 109, Penal Code. The order of acquittal passed by the learned Sessions Judge was proper and is upheld. Cri-

minal Appeal No. 145 of 1947 filed by the Provincial Government fails and is dismissed.

S.C. *Order accordingly.*

A. I. R (35) 1948 Nagpur 350 *[C. N. 117.]*

SHEVDE J.

Thandaram s/o Manwa—Judgment-debtor —Appellant v. *Kashiprasad and others — Decree-holders—Respondents.*

Misc. Appeal No. 23 of 1943, Decided on 31-10-1947, from order of Addl. Dist. Judge, Bilaspur, D/-22-12-1942.

(a) C. P. Money-lenders Act (13 [XIII] of 1934), S. 11 — Proceedings under — Provisions of O. 9, Civil P. C. apply to such proceedings—Civil P. C. (1908), O. 9.

The proceedings under S. 11 are not, strictly speaking, execution proceedings, but as they have to be treated as proceedings, under S. 47, Civil P. C., and as the order passed therein is to be deemed as an order under S. 47, Civil P. C., and appealable as such, the provisions of O. 9 of the Code must apply to the proceedings under S. 11. [Para 2]

Annotation : ('44-Com.) C. P. C. O. 9, Gen. N. 1.

(b) C. P. Money-lenders Act (13 [XIII] of 1934), S. 11—Proceedings under, attract S. 141, Civil P. C. —Civil P. C. (1908), S. 141.

The proceedings which are initiated under the provisions of S. 11 are undoubtedly in the nature of original proceedings which must attract the provisions of S. 141, Civil P. C. [Para 3]

Annotation : ('44 Com.) C. P. C., S. 141, N. 2.

Cases referred : —

1. ('44) I.L.R. (1944) Nag. 1 : 30 A. I. R. 1943 Nag. 340 : 214 I. C. 130 (F.B.), Bilimoria v. Central Bank of India Ltd., Bombay.
2. ('40) I.L.R. (1940) Nag. 468 : 27 A. I. R. 1940 Nag. 196 : 190 I. C. 807, Ganpatrao v. Jagannathrao.

G. R. Mudholkar—for Applicant.

R. G. Shiras and D. T. Mangalmoorti— for Respondents.

Judgment.—This appeal has been preferred by the judgment-debtor against the order of the lower Court rejecting his second application for instalments, under S. 11, C. P. Money-lenders Act. It is admitted that the judgment-debtor had previously filed an application, under S. 11 of the Act, for instalments on 12-12-1941, in respect of a certain money decree that was passed on 28-8-1933, that application is to be found typed at p. 1 of the paper book. That application was dismissed for default of the judgment-debtor, on 14-4-1942. On 14-7-1942 the judgment-debtor presented a second application, out of which this appeal arises, for instalments under S. 11, C. P. Money-lenders Act, and it was this application that was rejected by the learned Judge in the Court below, on the ground that it was not maintainable, as the first application, on the same allegations, was dismissed under O. 9, R. 8, Civil P. C.

[2] The crucial point in the case, which calls for decision, is whether the provisions of O. 9, Civil P. C., apply to the case at all. It is not disputed that the provisions of O. 9 of the Act do not apply to the application for execution; nor is it disputed that the said provisions do apply to an application, under S. 47, Civil P. C. It is, therefore, necessary in the first place to decide the nature of the proceedings, under S. 11, C. P. Money-lenders Act. It is significant to note that, under these provisions, an order that is passed on the application is to be deemed to have been passed under S. 47, Civil P. C. It, therefore, follows that although the proceedings under S. 11, Central Provinces Money-lenders Act, are not, strictly speaking, proceedings under S. 47, Civil P. C., still by fiction of law, the former proceedings have got to be treated on the same footing as the proceedings under S. 47, Civil P. C., and that an order passed in these proceedings has to be treated as an order passed under that section for the purpose of an appeal. If this fiction of law is to be adhered to, it follows as an inevitable corollary, that the proceedings under S. 11, Central Provinces Money-lenders Act, are not mere proceedings in execution. I am fortified in my view by the observations of the Full Bench in I. L. R. (1944) Nag. 1[1]. At pages 12 and 13 the learned Judges have observed :

"If the executing Court directs stay of execution of the decree it is, in reality, an order under S. 47. It cannot be deemed to be an order under that section. The use of the expression "shall be deemed to have been" involves a fiction. It is not in reality an order under the section but is treated as one passed under that section. As observed in I. L. R. (1940) Nag. 468[2] at p. 482, the provision is merely a compendious way of providing the various rights given where an order is made under S. 47, e. g., a right of appeal... If the order is passed by the executing Court in execution, it will be an order under S. 47. If however, the order is passed by the Court which passed the decree it would not be an order in execution and would not be an order under S. 47. The Legislature intended that an order granting instalments by the Court should be appealable and therefore it was necessary to introduce a statutory fiction and to treat it as an order under S. 47, Civil P. C. This makes it clear that the order contemplated under S. 11, is an order passed by the Court which passed the decree and not by the executing Court in execution."

It seems clear to my mind from the observations cited above that the proceedings under S. 11, Central Provinces Money-lenders Act, are not, strictly speaking, execution proceedings, but as they have to be treated as proceedings under S. 47, Civil P. C., and as the order passed therein is to be deemed as an order under S. 47 of the Code and appealable as such, the provisions of O. 9 of the Code must, therefore, come into play.

[3] It is admitted that the first application filed on 12th December was dismissed for default

on 14th April and that the judgment-debtor did not take any step to have the order set aside, under the provisions of O. 9, R. 9, Civil P. C. Instead, he preferred a second application on 14-7-1942, which was manifestly barred by the provisions of O. 9, R. 9, of the Code. It is not disputed that the second application of the judgment-debtor was based on the same identical allegations, on which his first application was based and when the first application was thrown out for default, the only remedy that was then open to him was, to apply for setting aside the dismissal, under the provisions of O. 9, R. 9, Civil P. C., read with S. 141 of the Code. I think that the proceedings, which are initiated under the provisions of S. 11, Central Provinces Money-lenders Act, are, undoubtedly, in the nature of original proceedings, which must attract the provisions of S. 141, Civil P. C. A Court executing the decree has no power to alter or vary the terms of the decree. The order directing payment of the decretal amount by instalments is an order which varies the decree. It is not within the competence of the Court executing the decree to alter or vary it. The proceedings under S. 11, Central Provinces Money-lenders Act, are always initiated with a view to alter or vary the terms of the decree, so that a decree for payment of money in a lump is sought to be converted into a decree for payment of money by instalments. In this view of the case, it can safely be stated that an application by the judgment-debtor, under S. 11, Central Provinces Money-lenders Act, for instalments, can be regarded in the nature of an original proceeding, within the meaning of S. 141, Civil P. C. I, therefore, agree with the learned Judge in the Court below in holding that the judgment-debtor's second application dated 14-7-1942, is barred by the provisions of O. 9, R. 9, Civil P. C.

[4] For the reasons stated above I affirm the order of the lower Court. The appeal before me is dismissed with costs. Counsel's fees Rs. 50.

V.R. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 351 *[C. N. 118.]*

POLLOCK AG. C. J. AND SHEVDE J.

Pralhad Ramchandra Deshpande and others — Appellants v. *Gendalal Motilal and others—Respondents.*

First Appeal No. 13 of 1943, Decided on 21-7-1947, from decree of First Addl. Dist. Judge, Nagpur, D/- 17-8-1942.

Hindu law—Adoption—Rights of adopted son—Joint family of two brothers *P* and *K* — *K* dying without issue—Subsequent mortgage by *P* and his son *S*—After institution of suit on mortgage widow of *K* adopting *D* as son to *K*—*D* cannot challenge mortgage.

Two brothers *P* and *K* were joint. *K* died without issue in 1906. Subsequently *P* and his son *S* executed a mortgage in 1929. After the institution of the suit on the mortgage, the widow of *K* adopted *D* as a son to the deceased *K* in 1939. *D* contended that his adoption dated back to the death of *K* in 1906 and that he was therefore entitled to challenge the mortgage executed by *P* and *S* in 1929.

Held, that *D* as a subsequently adopted son could not challenge the mortgage executed by *P* and *S* who were the only coparceners in existence at the time : 29 A. I. R. 1942 Nag. 19 ; 14 A. I. R. 1927 P. C. 139 ; 16 A. I. R. 1929 Mad. 296 and 26 A. I. R. 1939 Bom. 178, *Ref.* [Para 6]

Cases referred :—

1. ('41) I.L.R. (1941) Nag. 707 : 29 A. I. R. 1942 Nag. 19 : 198 I. C. 581, Bajirao v. Ramkrishna.
2. ('29) 52 Mad. 398 : 16 A. I. R. 1929 Mad. 296 : 118 I. C. 821, Veeranna v. Sayamma.
3. ('27) 50 Mad. 508 : 14 A. I. R. 1927 P. C. 139 : 54 I. A. 248 : 101 I. C. 779 (P.C.), Krishnamurthi Ayyar v. Krishnamurthi Ayyar.
4. ('39) I. L. R. (1939) Bom. 245 : 26 A. I. R. 1939 Bom. 178 : 182 I. C. 302, Basawantappa v. Mallappa.
5. ('34) 17 N.L.J. 100 : 21 A.I.R. 1934 Nag. 241 : 151 I. C. 1062, Vishwanath v. Bapu.
6. ('39) 26 A. I. R. 1939 Nag. 287 : 189 I. C. 273, Ganga Prasad v. Itwarsingh.

D. T. Mangalmoorti and M. R. Indurkar — for Appellants.

M. R. Bobde and P. P. Deo—for Respondent 1.

Judgment.—This judgment will also dispose of First Appeal No. 24 of 1943. These are cross-appeals arising out of a suit on foot of a mortgage. The mortgage-deed (Ex. P-1) was executed by Pralhad Ramchandra Deshpande, defendant 1 and his son Shankar Pralhad Deshpande, defendant 2 on 7-4-1929 as security for a sum of 1,10,000 which, according to the recitals in the deed, consisted of Rs. 68,800 paid by the mortgagee to various creditors of the mortgagors, Rs. 35,681 found due on a bond for Rs. 30,000 (Ex. P-3) executed by defendant 1 in favour of the mortgagees on 27-4-1927, and Rs. 5519-0-0 paid in cash at the time of registration. The debt was to carry compound interest at 9 per cent. per annum and was repayable in annual instalments varying in amount from Rs. 5500 for the first payable on 31-3-1930 to Rs. 12,000-0-0 for the last payable on 28-3-1941. Defaulted instalments were to carry compound interest at the rate of 12 per cent per annum, and in case of two defaults the entire amount was to become exigible. The security consisted of 13 villages in the Nagpur, Wardha and Chanda districts and a house in Nagpur town.

[2] Defendants 3, 4, 5 and 6 are the natural sons of Shankar, defendant 2 and grandsons of Pralhad, defendant 1, and it is not now disputed

that they were not in existence when the mortgage was executed and cannot challenge it. Prabhakar, defendant 4, however, stands in a different position. After the suit had been instituted, the widow of Kesheorao, brother of Pralhad, defendant 1 adopted Prabhakar, defendant 4 as a son to Kesheorao on 28-10-1939. It seems highly probable that the motive for this adoption was to protect part of the property against the claim of the mortgagee, but the validity of that adoption is not now challenged. The contention is that Prabhakar, as the nephew of defendant 1 and the cousin of defendant 2 by adoption, is not bound by the mortgage executed by them. The other defendants are transferees of small portions of the mortgaged property, and as regards them there is now no dispute.

* * * *

[3] We now turn to the question whether Prabhakar, defendant 4, as the adopted son of Pralhad's brother Kesheorao, can challenge the alienation. Kesheorao was joint with his brother Pralhad when he died without issue in 1906. His widow adopted Prabhakar as a son to Kesheorao in 1939 after the suit had been instituted, as we have said. The contention is that his adoption dates back to the date of Kesheorao's death in 1906 and that he is, therefore, entitled to challenge the alienation which was made in 1929. Reliance has been placed on the decision of this Court in I.L.R. (1941) Nag. 707.[1] There, there was a joint Hindu family consisting of two branches, one of which contained coparceners and the other only a widow with power to adopt. After the coparceners who belonged to the first branch had effected a partition between themselves the widow in the other branch adopted a son to her late husband, and it was held that there was no break in the continuity of the line into which the adopted son was introduced and that he was entitled to a share as a son representing his father's line. Stone C. J., however, went on to remark at p. 715:

"We need not stay to examine the very considerable number of cases, of which we may refer to 52 Mad. 398[2] as an example, which seeks to minimise the serious practical inconveniences which might follow from allowing that fiction to be entirely untrammelled. It is, we think, plain sense that can be reconciled with the above principle that persons in the position of the present 1st defendant—who between the years 1918 and 1936, was the manager of an undivided joint Hindu family consisting of himself and his two sons and a widow (at all material times, i. e., between those years, a mere maintenance-holder though potentially the mother of a son)—are not accountable in any way to any son that is brought on the scene after the act for which he seeks to make them accountable. So also it may well be that when one is considering the position of alienees they would be able to raise a defence on the ground that such a son brought into the family after the transaction impugned (that is to say, alienation) had been perfected cannot challenge such an act."

This of course was *obiter*, but there are other decisions to the same effect, and no decision to the contrary has been cited. In 50 Mad. 508[3] where it was held that a will by which a testator gave part of his property to his intended adopted son and part to others was not binding upon the adopted son, their Lordships appear to have considered the general question of the rights of an adopted son and to lay down the general principle:

"When a disposition is made *inter vivos* by one who has full power over property under which a portion of that property is carried away it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of."

[4] The learned counsel for the defendants has attempted to distinguish that decision on the grounds that here defendant 4 was adopted as a son to Kesheorao who took no part in the alienation and that Pralhad and Shankar were not the full owners of the property when they made the alienation; it appears to us, however, that their Lordships intended to lay down a general principle which covers the present case.

[5] Another case in point is 52 Mad. 398.[2] There again the facts were not the same as in the present case, for the adopted son was challenging an alienation made by his adoptive grandfather, but there are relevant remarks, and it was said at page 414:

"It seems to me that a sole surviving coparcener has always been regarded as the owner of the coparcenary property. The theory of relation back has only to do with establishing a line of succession to the adoptive father and in order to establish that line, it is necessary that certain intermediate holders should give way to the adopted son's superior claims as that of a natural born son of his adoptive father; there are limits."

A case directly in point is I. L. R. (1939) Bom. 245[4] where it was said (page 252):

"Now an adopted son becomes a member of the coparcenary only from the moment of his adoption. He is still then a stranger to the family and has no kind of interest in the family property. If there was prior to the adoption a sole surviving male member in the family, the question is simplified, for as full and sole owner he is competent to deal with the entire property as he likes and the subsequently adopted coparcener could not question the alienations whether valid or otherwise. That is because the rights of an adopted son do not relate back to a period earlier than the date of his adoption."

This is the view taken by Mayne, at page 278 (Edn. 10) of his work on Hindu law and Usage:

"Where an adoption defeats the estate of a person who is lawfully in possession, such holder if a male has the ordinary powers of alienation of a Hindu proprietor. No doubt he is liable to be superseded; but on the other hand, he never may be superseded. It would be intolerable that he should be prevented from dealing with his own, on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of rights which he obtained from one who, at the time, was perfectly competent to grant them.

Mulla at page 580 of Edn. 10 of his work on Hindu Law says :

"The rights of an adopted son arise for the first time on his adoption. Even where the adoption is made by a widow, his rights do not relate back (as it was supposed at one time) to the date of the death of the adoptive father."

Similarly in Edn. 8 of Sarkar's Hindu Law at page 217 it is stated :

"So, if the sole coparcener, in spite of the authority to adopt given by his deceased coparcener to his widow, alienates all or any of the family properties absolutely, even by gift, the son adopted after the alienation cannot question it and the ordinary doctrine, that adoption relates back to the date of the adoptive father's death, does not apply to such cases."

[6] There seems to be no authority whatever for the view that a subsequently adopted son can challenge an alienation made by coparceners who were the only coparceners in existence at the time, and the incovenience of taking that view is very clear. We therefore agree with the lower Court that it is not open to defendant 4 to challenge the mortgage.

* * * * *

[7] The other contention put forward by the plaintiff in his appeal is that about 165 acres which were *khudkasht* at the time of the mortgage and also at the time when the suit was instituted have since been recorded as *sir*, and that the lower Court has held that the defendants are entitled to retain cultivating rights in these lands and that only the proprietary rights can be put to sale under the mortgage. That view was based on the decisions in 17 N. L. J. 100[5] and A. I. R 1939 Nag. 287.[6] Those were decisions under the C. P. Tenancy Act of 1920 before it was amended by Act 10 [X] of 1940 which came into force on 1st May 1941. Under S. 49 (1), Tenancy Act, as it stood before the Amending Act of 1940, a proprietor who loses his right to occupy any portion of his *sir* land as a proprietor shall, at the date of such loss, become an occupancy tenant of such *sir* land Since the suit was instituted that section has been amended by Act 10 [X] of 1940. Under the section as amended a proprietor who loses his right to occupy his *sir* land as a proprietor shall, at the date of such loss, become an occupancy tenant of such *sir* land except when a transfer of such *sir* land is made by him expressly agreeing to transfer his right to cultivate such *sir* land. It has been disputed before us whether the unamended section or the amended section applies. It seems to us that this point does not arise for decision at this stage and that it will arise only when the defendants lose their right to occupy their *sir* land as proprietors. That may never happen, or the law may be further amended in the meanwhile. It would, in our opinion, be premature to decide the point at this stage, and if it becomes necessary to decide the point it should be decided in execution proceedings as was done in A. I. R. 1939 Nag. 287.[6]

[8] The appeal fails and is dismissed with costs.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 353 *[C. N. 119.]*

POLLOCK J.

Gondulal Ratanlal and another — Defendants — Appellants v. *Abdul Sattar and another — Plaintiffs — Respondents.*

Second Appeal No. 830 of 1944, Decided on 31-10-1947, from appellate decree of Addl. District Judge, Buldana, D/- 15-8-1944.

Specific Relief Act (1877), S. 41 — Alienation of minor's property by mother acting as de facto guardian — Suit by minor for possession on ground that mother had no power to alienate his share — Plaintiff can be required to refund so much of consideration as has benefited his estate.

One *S* who was a Mahomedan executed a deed of transfer of a field in favour of his wife *D* in the hope of defeating the claims of his creditors. The deed was however merely a nominal transaction and the title in the field did not pass to *D* Subsequently *S* died and his creditors obtained a decree against his legal representatives and attached the field. In order to pay off these debts *D* purporting to act on behalf of herself and as de facto guardian of her minor children executed a sale deed of the field. The minor children brought a suit for possession of their share in the field on the ground that *D* had no power to sell their share in the field :

Held, that when granting a decree in favour of the plaintiffs the Court had power to order that the plaintiffs should refund so much of the consideration as had benefited their estate : 14 A. I. R. 1927 Lah. 722; 18 A. I. R. 1931 Mad. 468 and 13 A. I R. 1926 Lah 170, *Rel. on* ; 26 A. I. R. 1939 Nag. 27, *Disting.* [Para 4]

Cases referred :—

1 (27) 14 A. I. R. 1927 Lah. 722 : 99 I. C. 734, Kairu v Dhera.

2 ('31) 18 A I. R. 1931 Mad. 468 : 131 I. C. 153, Abdul Majid v. Ramiza Bibi.

3 (26) 7 Lah. 35 : 13 A. I R. 1926 Lah. 170:94 I. C. 25, Rang Ilahi v. Mahbub Ilahi.

4 ('40) I. L R (1940) Nag. 553 : 26 A.I R. 1939 Nag. 27 : 180 I C. 457, Gulam Hussain v. Mir Jakirali.

K. B. Tare — for Appellants.

M. Y. Shareef — for Respondents.

Judgment. — The field in suit, survey No. 29 in mauza Palaskhed Nago in the Buldana district, with an area of 25 acres, 11 gunthas and an assessment of Rs. 31-2-0, was given by Government to Shaikh Hyder in 1927-28 as a reward for military service. Shaikh Hyder became indebted and on 9th September 1931 he executed a document, Ex. D-1, called a *mehrnama* by which he purported to transfer this field to his wife Dulanbi for a consideration of Rs 600 made up of Rs. 125 said to be due to her on account of *mehr* and Rs. 475 said to have been borrowed from her and spent on improving the field. Shortly afterwards Shaikh Hyder died. His creditors, who had obtained decrees either against him or against his legal representatives,

attached the field, and eventually on 24th February 1937 Dulanbi, purporting to act on behalf of herself and as guardian of the minor children of Shaikh Hyder and herself, executed a sale deed of this field in favour of the defendant Gondulal for an ostensible consideration of Rs. 1500. Gondulal, defendant 1 was placed in possession, and he transferred a life interest in this field to his wife Godavaribai, defendant 2. The present suit was brought by the surviving son and daughter of Shaikh Hyder for possession of their share in this field on the contention that Dulanbi had no power to sell their share in the field and that they were not bound by the sale. The lower Courts held that the plaintiffs were not bound by the sale and were entitled to a decree for possession of their share.

[2] The first question is whether Dulanbi became the sole owner of the field by virtue of the document executed in her favour on 9-9-1931. It is not disputed that this document was executed by Shaikh Hyder in the hope of defeating or delaying the claims of his creditors, but the question is whether he intended to transfer the field to his wife or whether it was a purely nominal transaction intended to transfer no title but merely to deceive his creditors. Such a transaction may be nominal and fraudulent or it may be fraudulent only. Both the lower Courts have held that this transaction was a merely nominal transaction. The only occasion on which it ever appears to have been acted on was on 1-3-1933 when Dulanbi executed a mortgage deed (Ex. D-2) in favour of Vithal for an ostensible consideration of Rs. 300, of which Rs 200 was required to repay a *taccavi* loan to Government. In that document she stated that this property had been given to her in *mehr* on 9-9-1931. On no other occasion, however, was it acted on. When the field was attached in execution against the legal representatives of Shaikh Hyder no objection was ever preferred by Dulanbi that the field was hers alone, and when she executed the sale deed of 24-2-1937 in order to pay off these debts she executed it on behalf of herself and the minor children. In these circumstances the lower Courts were justified in holding that the transaction of 9-9-1931 was a merely nominal transaction and that the title in the field did not thereby pass to Dulanbi.

[3] It is admitted that Dulanbi was merely a *de facto* guardian of the minor children and had no right to sell their share in the field. It therefore follows that the minors are not bound by the sale. It is admitted that plaintiff 1, Abdul Sattar, is entitled to 0-8-6 (2/3 share) and plaintiff 2 Hafizabi to 0-4-3 (1/3 share), and a decree for possession of these shares, totalling 0-12-10, was therefore rightly passed in their favour.

[4] The question remains, however, whether the plaintiff should be required to refund so much of the consideration as has benefited their estate. That the Court has power to order this was so held in A. I. R. 1927 Lah. 722,[1] A. I. R. 1931 Mad. 468[2] and 7 Lah. 35.[3] The learned Additional District Judge doubted whether the law was correctly laid down in these cases and referred to the decision in I. L. R. (1940) Nag. 553.[4] That, however, was an entirely different case. There the suit was brought by a mortgagee to recover the money due on an invalid mortgage, and it was held that the Court had no power to order persons not bound by the mortgage to make a refund. Here the plaintiffs are suing in effect for a declaration that the sale deed is not binding on them, and in such cases there is the above authority for holding that the Court has power to order that they should refund so much of the consideration that has benefited their estate.

[5] The ostensible consideration of Rs. 1,500 consisted, according to the recitals in the sale deed dated 23-2-1937, of Rs. 1,000 payable to Vithal, Rs. 180 payable to Shaikh Kalu, Rs. 240 previously advanced in cash, and Rs. 80 paid in cash at the time of registration. The mortgage of 1-3-1933 for Rs. 300 had been executed in favour of this Vithal, and there is an endorsement on the mortgage deed that Rs. 710 was paid by Gondulal in full satisfaction of this mortgage on 1-3-1937 and that a further sum of Rs. 290 was paid by him in satisfaction of some promissory note. The mortgage carried interest at 2 p. c. p. m., but on 1-3-1937 the Central Provinces Reduction of Interest Act was in force, though it was ignored. The lower appellate Court held that it was very doubtful whether anything like Rs. 1,000 was in fact paid to Vithal, who is a nephew of Gondulal, or whether Rs. 240 said to have been paid in cash before the registration was actually paid to Dulanbi. It is agreed that the debts binding on the estate which were paid off by means of this sale deed amounted to about Rs. 500 and the share of these debts for which the plaintiffs would have been liable was about Rs. 400. As against this the defendants have been in possession of the field for 10 years and they probably obtained the field fairly cheaply. They will continue to be entitled to Dulanbi's 0-3-2 share, and taking all these circumstances into consideration I do not think that equity requires that the plaintiffs should be ordered to make any refund.

[6] The appeal will accordingly be dismissed with costs.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 355 *[C. N. 120.]*

SHEVDE J.

Sadasheorao Govindrao Harshey and another — Judgment-debtors — Appellants v. *Laxmichand Gulabchand and another, Decree-holders and another. Auction-purchaser and another. Judgment-debtor — Respondents.*

Misc. Second Appeal No. 139 of 1944, Decided on 15-12-1947, from order of Addl. Dist. Judge, Saugor, D/- 24-4-1944.

(a) C. P. & Berar Relief of Indebtedness Act (14 [XIV] of 1939), S. 11 (1)—Mortgage-debt—Final decree for sale — 'Debt' does not cease to exist — Debt Relief Court has jurisdiction to prepare scheme for payment even after such decree.

A mortrage-debt does not cease to be a debt within the meaning of S. 2 (d) merely by reason of a final decree for sale. The Debt Relief Court, therefore, has jurisdiction to conciliate the mortgage-debt even after a final decree for sale has been passed and prepare a scheme for its repayment under S. 11 (1 : Misc. S. A. No. 155 of 1943, *Foll.* ; 31 A. I. R. 1944 Nag. 289, *Ref.* [Para 3]

(b) C. P. & Berar Relief of Indebtedness Act (14 [XIV] of 1939), S. 11 (1) — Conditional scheme for repayment — Debt Relief Court is competent to prepare such scheme.

There is nothing in the provisions of the Act to prohibit the Debt Relief Court from preparing a conditional scheme of repayment of the debt. [Para 4]

(c) C. P. & Berar Relief of Indebtedness Act (14 [XIV] of 1939), S. 13 (1) and (2)—Conditional scheme for repayment — Breach of condition — Scheme ceases to exist — Creditor need not apply under S. 13 (1)—Certificate under S. 13 (2) is not required

The provisions of S. 13 (1) would come into operation only on the basis of a subsisting scheme of payment, made by the Debt Relief Court ; but if the scheme ceases to have any legal effect by reason of a breach of the condition precedent attached to the scheme, the scheme no longer exists and in such a case it would not be neceesary for the creditor to apply to the Deputy Commissioner under S. 13 (1) of the Act. It is, therefore, quite competent for the creditor to directly approach the civil Court and ask it to carry on the proceedings from the stage at which they were stayed, at the instance of the Debt Relief Court, to their legal termination. A certificate under S. 13 (2) is not required. [Para 6]

(d) Civil P. C. (1908), S. 47 — Mortgage decree for sale — Minor sons of mortgagor not parties to those proceedings — Omission to make sons parties to execution proceedings held, in the absence of prejudice not sufficent to challenge execution proceedings.

In a mortgage suit, the mortgagor's two minor sons were not made parties. After a final decree for sale was passed, the judgment-debtor took proceedings before the Debt Relief Court. To these proceedings, he joined his sons as parties. A conditional scheme for payment of the martgage debt was drawn. The judgment-debtor having broken the condition attached to the scheme, the decree-bolder applied to the civil Court for execution and the property was sold. The sons were not joined as parties in the execution proceedings :

Held, that in the absence of any prejudice to the merits of the case or to the interests of the sons, they had no legal right to challege the execution proceedings and auction sale simply on the ground that they were not joined as parties in the execution proceedigs. [Para 7]

Annotation. — ('44 Com.) Civil P. C., S. 47, N. 7.

Cases referred :—

1. ('42) I. L. R. (1942) Nag. 357: 29 A. I. R. 1942 Nag. 88 : 200 I. C. 709, Balwant Singh v. Bindabai.
2. ('44) I. L. R. (1944) Nag. 568: 31 A. I. R. 1944 Nag. 289 (F. B.), Rukhmabai v. Shamlal.
3. Misc. S. A. No. 155 of 1943, D/- 21-10-1947, Dewaji v. Narayan.

R. J. Bhave — for Appellants.

A. R. Halwe; and P. R. Padhye — for Respondents No. 4 ; and Nos. 1 to 3 respectively.

Judgment. — Respondents 1 and 2, Laxmichand and Dulichand, are the decree-holders. They obtained a final decree for sale against respondent 4, Govind Rao Harshey, in Civil Suit No. 3A of 1937, in respect of the mortgaged property in suit and they started execution of the final decree for sale. In the meantime respondent 4 and his two infant sons Sadashiv Rao and Ramchandra Rao, now appellants, applied to the Debt Relief Court for settlement of the debts under the final decree for sale under S. 6 (1), C. P. & Berar Relief of Indebtedness Act, 1939 (14 [XIV] of 1939). The decree-holders were joined as parties. The scheme for payment of the mortgage-debt that was ultimately prepared by the Debt Relief Court was subject to a certain condition and it was laid down that in case of breach of that condition the scheme should cease to have effect and the whcle claim would become recoverable. The decree-holders thereafter applied to the civil Court for sale of the mortgaged property on the ground that the judgment-debtors had broken the condition that was attached to the scheme and that they were, therefore, entitled to recover the whole amount by way of execution. The final decree for sale was, therefore, executed, the property was put to sale and it was bought by the auction-purchaser, Mahila Vidyalaya, Saugor, which is represented by respondent 3, Gopal Rao Mutatkar.

[2] Thereafter the appellants came forward and applied to the civil Court on 28-9-1943 for setting aside the execution proceedings, including the auction sale, on the ground that they were illegal and without jurisdiction. Their application was dismissed by the execution Court on 13-12-1943. On appeal by the appellants, the learned First Additional District Judge of Saugor dismissed the appeal and upheld the order of the execution Court. The appellants have, therefore, preferred this miscellaneous (second) appeal.

[3] The first appellate Court held on the authority of the ruling reported in I. L. R. (1942) Nag. 357[1] that the Debt Relief Court had no jurisdiction to entertain the debtor's application for conciliation of the mortgage debt on the ground that it had ceased to be a debt by reason of the final decree for sale. That finding is now

untenable, for the simple reason that the case relied upon, has since been overruled by the Full Bench case in I.L.R. (1944) Nag. 568.[2] I have already held in Misc. S. A. No. 155 of 1943[3] that the mortgage debt does not cease to be a debt within the meaning of S. 2 (d), C. P. & Berar Relief of Indebtedness Act 1939, merely by reason of a final decree for sale. I have already stated my reasons in that case as to why a final decree for sale cannot be treated on the same footing as a final decree for foreclosure. For the reasons given in that decision I hold that the Debt Relief Court had jurisdiction to conciliate the mortgage debt and prepare a scheme for its repayment under S. 11 (1), C. P. & Berar Relief of Indebtedness Act 1939.

[4] The next question that calls for decision is whether it was competent for the Debt Relief Court to attach any condition to the scheme, that it was called upon to prepare for payment of debts under S. 11 (1) of the Act. So far as I can see, there is nothing in the provisions of the C P. and Berar Relief of Indebtedness Act, 1939 (14 of 1939) to prohibit the Debt Relief Court from preparing a conditional scheme of repayment of the debt. I, therefore, agree with the lower Courts in holding that the Debt Relief Court was quite competent to attach the condition.

[5] It was found by the execution Court that the judgment debtor Govind Rao Harshey had committed defaults in respect of the condition attached to the scheme prepared by the Debt Relief Court, and this finding was not presumably challenged by the appellants before the first appellate Court. Since the judgment-debtor Govind Rao Harshey failed to carry out the condition precedent, there is no doubt in my mind that the scheme prepared by the Debt Relief Court ceased to have effect and that the whole claim became recoverable.

[6] In the circumstances of the case I do not think that the provisions of S 13 (1), C. P. and Berar Relief of Indebtedness Act, 1939, would come into operation I think that these provisions would come into operation only on the basis of a subsisting scheme of payment, made by the Debt Relief Court; but if the scheme ceases to have any legal effect by reason of a breach of the condition precedent, the scheme no longer exists and in such a case it would not be necessary for the creditor to apply to the Deputy Commissioner, under S. 13 (1) of the Act. I, therefore, agree with the learned Judge in the Court below in holding that it was quite competent for the creditor to directly approach the civil Court and ask it to carry on the proceedings from the stage, at which they were stayed, at the instance of the Debt Relief Court, to their legal termination. The contention of the appellants that the civil Court could not execute the decree, in the absence of a certificate under S. 13 (2) of the Act, from the Deputy Commissioner concerned has, therefore, no force.

[7] It has been strenuously contended by the learned counsel for the appellants that the civil Court could not execute the final decree for sale as the appellants (the minor sons of the judgment-debtor Govind Rao Harshey) were not joined in the execution proceedings. It has been argued that they were parties in the proceedings before the Debt Relief Court and also parties to the conditional scheme that was prepared by that Court under S. 11 (1), C. P. and Berar Relief of Indebtedness Act, 1939. It has been urged that that scheme having superseded the decree of the civil Court, the minor appellants were necessary parties to the execution proceedings and inasmuch as they were not made so by the decree-holders, all the execution proceedings, including the auction-sale, were illegal and without jurisdiction. I do not think that there is any force in this contention also. It is admitted that the appellants were not parties to the mortgage suit, nor were they parties either to the preliminary decree or the final decree for sale. It cannot be disputed that they were fully represented by their father (the judgment-debtor Govind Rao Harshey) in the suit before the civil Court. It has not been alleged much less proved that the father had any interest adverse to that of his two infant sons and that he could not, therefore, represent them properly in the civil suit. As a matter of fact the sons-appellants had no *locus standi* in the execution proceedings, for the simple reason that they were not parties anywhere in the suit itself, out of which the execution proceedings arose. I really fail to understand why the father chose to join them as parties in his application made to the Debt Relief Court under S. 6 (1), C. P. and Berar Relief of Indebtedness Act, 1939. I do not know whether that was accidental or deliberate. It was obviously pointless to join the two minor sons in that application as the judgment-debtor Govind Rao Harshey was their father and manager of the family and in that capacity Govind Rao Harshey did and could represent them effectively in all the proceedings before the Court. It is, therefore, idle to contend that they have any legal right to challenge the execution proceedings and the auction-sale simply on the ground that they were not joined as parties in the execution proceedings. The learned counsel for the appellants has not been able to point out to me how their non-joinder has prejudiced the merits of the case or their own interest. It seems clear to my mind that this

technical objection is absolutely flimsy and it has been deliberately put forward, evidently at the instance of the father, with a view to set aside the auction-sale and recover back the mortgaged property if possible.

[8] In the result the appeal before me, fails and is dismissed with costs. Counsel's fee Rs. 75.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 357 *[C. N. 121.]*

GRILLE AND HIDAYATULLAH JJ.

Lachmandas Gobardhandas—Defendant—Appellant v. *Narayandas Amrulal and another—Plaintiffs—Respondents.*

First Appeal No. 74 of 1941, Decided on 10-9-1947, from decree of 2nd Addl. Dist. Judge, Jubbulpore, D/- 27-3-1941.

Civil P. C. (1908), S. 93—General sanction is not sufficient—Previous sanction must be obtained for each case.

The words "previous sanction of the Provincial Government" mean that there must be a previous sanction by the Provincial Government in every suit. This means that a general sanction is not enough and previous sanction must be obtained for each case. A sanction of this type has to be strictly proved because in the absence of a proper sanction the suit is without jurisdiction. In such a case, the presumption under S. 114, Evidence Act, cannot be drawn that all due formalities of law must have been complied with : 18 A. I. R. 1931 P. C. 121, *Rel. on.* [Para 4]

Annotation : ('44 Com.) Civil P. C., S. 93, N. 4.

Cases referred :—

1. ('31) 53 All. 910 : 18 A. I. R. 1931 P. C. 121 : 58 I. A. 460 : 132 I. C. 745 (P. C.), Gulzarilal v. Collector of Etah.
2. ('34) 15 Lah. 836 : 21 A. I. R. 1934 P. C. 217 : 61 I. A. 371 : 151 I. C. 221 (P. C.), Mohammad Akbar Khan v. Musharaf Shah.
3. ('43) I. L. R. (1943) All. 112 : 30 A. I. R. 1943 All. 74 : 205 I. C. 48. Sibte Rasul v. Sibte Nabi.
4. ('31) 58 Cal. 301 : 17 A. I. R. 1930 P. C. 193 : 57 I. A. 214 : 126 I. C. 422 (P. C.), Jitendranath Ghosh v. Manmohan Ghosh.
5. ('21) 17 N. L. R. 37 : 8 A. I. R. 1921 P. C. 123 : 48 Cal. 493 : 48 I. A. 12 : 62 I. C. 737 (P. C.), Raja Anand Rao v. Ramdas Daduram.
6. ('28) 55 Cal. 519 : 15 A. I. R. 1928 P. C. 16 : 55 I. A. 96 : 108 I. C. 361 (P. C.), Abdur Rahim v. Mahomed Barkat Ali.
7. ('15) 42 Cal. 914 : 2 A. I. R. 1915 P. C. 116 : 42 I. A. 91.28 I. C. 710 (P. C.), Ahmed Musaji v. Hashim Ebrahim Saleji.
8. ('35) 22 A. I. R. 1935 Nag. 28 : 157 I. C. 90, Rasulkhan v. Jumma Masjid Sabungarpura, Amraoti.

P. R. Padhye — for Appellant.

M. D. Khandekar — for Respondents.

Judgment. – This is a first appeal against the judgment and decree passed by Mr. W. S. Tak, Additional District Judge, Jubbulpore, in Civil Suit NO. 6A of 1939, decided on 27 3-1941.

[2] This was a suit under S. 92/93, Civil P. C., *inter alia* for the removal of the appellant from the trusteeship of a public temple Shri Jagannathji of mouza Kailwara Khurd, S. NO. 312, Tahsil Murwara, district Jubbulpore.

[3] The suit was brought by the plaintiffs (respondents) after obtaining the sanction of the Deputy Commissioner, Jubbulpore, on 9 9-1938 (Case NO. 4/9 of 1937-38 XXXIII VII). The claim of the plaintiffs was decreed.

[4] The case must fail on a preliminary point viz., that the previous sanction of the Provincial Government was not taken by the learned Deputy Commissioner as required by S. 93 of the Code. In 53 ALL. 910[1] at p. 913 their Lordships of the Privy Council held that the words "previous sanction of the Local Government" (now Provincial Government) meant that there must be a previous sanction by the Local Government in every suit. This means that a general sanction is not sufficient and previous sanction must be obtained for each case. Commenting on this decision Mulla in his Civil Procedure Code (Edn. 1941) p. 347 says :

"The effect of this decision is that the Collector or other officer appointed must in every case obtain the sanction of the Local Government before instituting a suit or giving his consent to the institution of a suit. The previous practice of Local Governments had been to give previous sanction generally and not in respect of each particular case and, therefore, the Public Suits Validation Act, 1932 (11 [XI] of 1932) was passed to validate pending suits filed under the previous practice. The Act also provides for the restoration of suits and appeals dismissed after 30-11-1931 (the date of the Privy Council decision) for want of sanction of the Local Government, on application made within six months of the commencement of the Act, i. e. 8 4-1932. In the case of suits already filed under the previous practice, it is not necessary to obtain the sanction of the Local Government."

The suit was filed in 1939 long after the decision of their Lordships of the Privy Council and therefore the validating Act does not apply to the present case. No such sanction by the Provincial Government has been brought to our notice and it is obvious that none had been obtained. A sanction of this type has to be strictly proved because in the absence of a proper sanction the suit is without jurisdiction. We are not prepared to draw a presumption under S. 114, Evidence Act, that all due formalities of law must have been complied with. The case reported in 15 Lah. 836[2] does not apply in this context. In that case presumption was drawn about some procedure in the matter of posting of notices. The case is easily distinguishable because a sanction must be strictly proved.

[5] Learned counsel for the respondents relied on I.L.R. (1943) ALL. 112.[3] In that case, the question whether the Legal Remembrancer was a person appointed under S. 93, Civil P. C., was not gone into because there was no plea. It was presumed therein that the law had been complied with and the matter was treated as concluded on the decree being passed without objection. With all due respect we do not consider the matter

concluded in the present case. Though there is no plea the plaintiffs can at any time be challenged to prove the sanction and it is not open to us to act on presumptions when patently there is no previous sanction. In 58 Cal. 301[4] it was held that there can be no investigation in execution proceedings into title on which the decree was based. This case is not in point. In 17 N.L.R. 37[5] one of the persons in whose favour sanction was given died, as also the trustee against whom the sanction had been obtained. It was held that the sanction was not exhausted. In 55 Cal. 519[6] compromises in S. 92 cases were discussed and in 42 Cal. 914[7] an omission to appeal from a preliminary decree was held fatal to an appeal from the final decree. These three cases are not relevant.

[6] In A.I.R. 1935 Nag. 28[8] Staples A. J. C. held that a previous suit, concluded without objection in respect of sanction, could not be said to be without jurisdiction and the bar of *res judicata* applied. We do not propose to examine the case because here an appeal is pending which is a continuation of the suit and the objection as to jurisdiction must be given its full effect. There is no question of *res judicata*.

[7] We accordingly hold that the suit was without jurisdiction and dismiss it. The appeal succeeds and is allowed. Since this objection was not taken by the appellant either in this Court or in the Court below, we make no order as to costs in this appeal and parties will bear their own costs. For the same reason we do not see any reason to alter the order regarding costs in the lower Court. Ordinarily costs should follow the event but in the special circumstances of this case we decline to interfere with the order of the lower Court.

D.S. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 358 *[C. N. 122.]*

HIDAYATULLAH J.

Zingu Deorao Umale and others — Plaintiffs — Appellants v. *Mahadeo Parashramji and another—Defendants—Respondents.*

Second Appeal No. 366 of 1943, Decided on 6-10-1947, from Appellate Decree of Addl, Dist. Judge, Amraoti, D/- 16-4-1943.

(a) Civil P. C. (1908), S. 11 — Bar of res judicata extends to facts and grounds for decision.

The doctrine of *res judicata* applies not only to the actual decision in the case but also to the facts and grounds for that judgment pleaded by the parties. Anything which is admitted and which is fundamental to the decision of the earlier suit is also part of the *res judicata* created by the judgment : (1926) A. C. 155, *Ref.* [Para 18]

Annotation : ('44 Com.) Civil P. C., S. 11, N. 1, Pt. 13.

(b) Civil P. C. (1908), S. 11—Plea of res judicata — Pleadings in earlier suit need not be set out at length — It is permissible to Court to look into pleadings in former suit.

In pleading *res judicata* it is not necessary to set out the pleadings in the earlier suit at length. In determining the question whether the issue which it is sought to raise now was fairly raised between the parties in the former suit, it is permissible to look to the pleadings : (1885) 29 Ch. D. 448; 8 A. I. R. 1921 Cal. 699 and 5 Mad. 239, *Rel. on.* [Para 21]

For this purpose, the proper course is to produce the written statements in the earlier suit : 29 A. I. R. 1942 All. 122, *Rel. on.* [Para 22]

Annotation : ('44 Com.) Civil P. C., S. 11, N. 6.

(c) Civil P. C. (1908), O. 6 Rr. 2 and 17—Estoppel by judgment — Plea of, should not be ruled out when there is material on record to sustain it — Suit based on plea of estoppel by judgment — Amendment into plea of estoppel in pais should be allowed.

A plea of estoppel should not ordinarily be ruled out if there is material on the record sufficient to sustain the plea. A liberal view of pleadings on such points should be taken. It is true that personal estoppel is not necessarily a question of policy but it is largely so and if the estoppel is apparent, Courts should be reluctant to disallow the plea so that a party may be allowed conveniently to change his ground. A plea of estoppel if it is warranted by the facts proved and admitted, can always be taken even if those facts have not been specifically pleaded : 17 A. I. R. 1930 Rang. 265, *Ref.* [Para 23]

A plea of estoppel *in pais* based on pleadings is merely ancillary to the main allegation of estoppel by judgment. In such a case it is the duty of the Court to allow plaintiff to amplify his pleadings so as to embrace all aspects of estoppel especially where the estoppel by judgment is pleaded before the period of limitation had run out and the grounds on which the earlier judgment proceeded was mentioned. To do otherwise would be to allow the defendant to take undue advantage of the technicalities of law to perpetrate an abuse of the process of Court. [Para 24]

Annotation : ('44-Com.) Civil P. C., O. 6 R. 2 N. 10 ; O. 6 R. 17, N. 1, 2, 3.

Cases referred :—

1. (1926) 1926 A. C. 155 : 95 L J.P.C. 79 : 134 L. T. 354, Hoystead v. Commissioner of Taxation.
2. (1803) 3 East 346, Outram v. Morewood.
3. (1843) 3 Hare 100, Henderson v. Henderson.
4. (1885) 29 Ch. D. 448 : 52 L. T. 96, Houstoun v. Marquis of Silgo.
5. ('21) 8 A. I. R. 1921 Cal. 699 : 70 I. C. 6, Sashikanta Acharya v. Sarat Chandra Rai.
6. ('82) 5 Mad. 239, Ali Moidin v. Kombi.
7. ('42) 29 A. I. R. 1942 All. 122 : I. L. R. (1942) All. 103 : 199 I. C. 190, Mahomed Khalil Khan v. Mahboob Ali Mian.
8. ('30) 8 Rang. 223 : 17 A. I. R. 1930 Rang. 265 : 125 I. C. 365, Co-operative Town Bank of Padigaon v. Shanmugam Pillay.
9. ('34) 21 A. I. R. 1934 P. C. 130 : 9 Luck. 178 : 61 I. A. 224 : 149 I. C. 480 (P. C.), Someshwar Dutt v. Tribhawan Dutt.

V. V. Kelkar — for Appellants.

K. V. Brahma and P. R. Padhye — for Respondents.

Judgment.—This is a second appeal against the judgment and decree of Mr. M. B. Paranjpe, Additional District Judge, Amraoti, in Civil Appeal No. 3-A of 1943, decided on 16-4-1943.

[2] The plaintiffs Kheoraj and his two brothers are the appellants in this appeal and their suit has been ordered to be dismissed by the trial Judge which decision has been upheld by the appellate Judge.

[3] The facts are that field survey NO. 45, area 9 .acres 25 gunthas in mouza Mangruli, pargane Varud, taluq Morsi, was gifted to Kheoraj (appellant 3) by Zingu and Pandu (appellants 1 and 2) on 11-6-1938. This gift deed is EX. P-11. The field being in possession of Champat (respondent 2) the suit was for possession. With Champat, was joined one Mahadeo s/o Parasramji who sold the said field by a registered sale deed on 7-1-1939, to Champat. This Champat pleaded that Mahadeo's father Parasramji had bought this field from one Mt. Bahena widow of Sakharam by a registered sale deed dated 15-3-1909.

[4] To understand further facts it is necessary to give the genealogical tree of the family of Sakharam. According to the plaintiffs it is as follows:

JANAJI

Krishnaji — Gundaji

Rajmal (d.1893) — Sakharam (d.1901) — Dcorao

=1. Mt. Sayatri (d.1929) — =Mt. Bahena (d. 1925) — Jhingoo (plff. 1) — Pandoo (plff. 2)

=2. Mt. Rayaja (1896)

Kaushalya (1926)

Vinayak — Mahadeo — Shanti — Mani.

Sakharam had a daughter by name Kaushalya. On 2-8-1933, Kheoraj (respondent 1) and another (Madanlal) had taken a gift of the field from the children of Kaushalya and had brought a Suit NO. 139-A of 1937, decided on 10-3-1938, but the suit was dismissed. That suit was against Mahadeo (respondent 1 here).

[5] The plaintiffs in that suit pleaded that Rajmal and Sakharam were real brothers and formed a joint Hindu family. After Rajmal's death in 1893 Sakharam succeeded to the whole of the property including the field in this suit. After Sakharam's death his widow Bahena succeeded to the property though both Sayatri and she remained in possession of the field. Bahena died about the year 1925 and Sayatri in 1929. Bahena's daughter Kaushalya died also in 1926. After Bahena's death, Kaushalya, it was alleged, succeeded to the estate as the daughter of the last male holder. After Kaushalya's death the field was gifted by the children of Kaushalya (through guardian father) to Kheoraj and Madanlal on 2-8-1933. Kheoraj (and Madanlal), therefore, claimed possession of the field from Mahadeo (respondent 1) who founded his claim to the field upon a sale deed in favour of his father Parashramji by Sayatri and Bahena. The plaintiffs in that suit alleged that the two widows had only a life interest and could not therefore transfer any interest beyond their lives.

[6] Mahadeo while admitting the relationship denied that Rajmal and Sakharam were joint and averred that the field belonged to Rajmal alone and after the co-widow Rayaja's death the surviving widow Sayatri sold the field to Parashramji, the father of the defendant, on 15-3-1909. It was further alleged that the signatures of Bahena and of one Udebhan (father-in-law and guardian of Kaushalya who was then a minor) were obtained in token of their consent though only by way of caution.

[7] Civil Suit NO. 139-A of 1937 was decreed in favour of Mahadeo and against Kheoraj and Madanlal, and it was held that the suit field belonged to Rajmal absolutely and on his death it passed into the possession of his widows Rayaja and Mt. Sayatri and that on the death of these widows the reversioner was Jhingoo (plaintiff 1). The judgment in Civil Suit NO. 139-A of 1937 is EX. P-1.

[8] Kheoraj, the unsuccessful plaintiff, did not stop there. He took a gift deed from Jhingoo and Pandu (EX. P-11) on 11-6-1938, and brought the present suit. Along with him he joined Jhingoo and Pandu who claimed in the alternative that possession be ordered to be given to them in case the gift deed for some reason was found defective.

[9] On this claim being put forward Champat as the vendee from Mahadeo took up the position, contrary to the pleas of Mahadeo in the first suit and the decision therein, that Rajmal and Sakharam formed a joint Hindu family and the revresioners after Bahena's death were her children and not Jhingoo and Pandu. In effect he took exactly the stand which had been successfully denied by his predecessor-in-title in the earlier suit.

[10] Kheoraj was naturally taken aback and asked for amendment of his pleadings by an application dated 26-11-1940. He set out the history of the earlier suit and stated as follows :

"It has been decided therein on 10-3-1938, A. D. that the field in suit belonged to Rajmal exclusively and on his death (it) passed into the possession of his widows, Mt. Rayaji and Mt. Sawitri as heirs and that the plaintiff 1, Jhingu son of Deo Rao was proper and legal next heir, i. e. a reversioner, of the deceased Rajmal on the death of his widows. The grounds on which the decision was given are all binding on the defendants in this suit. Sakharam's right, if any, has also come to an end also because of the adverse possession of Mt. Rayaji and Mt. Sawitri for over 12 years.

The plaintiff through his apprehension did not take these pleas in the original plaint as this suit was first

brought against defendant 1 only who was a party to Suit No. 139-A/37 and plaintiffs thought that defendant 1 would not take the same pleas against this suit, which were already decided in the previous litigation."

[11] He also produced certified copies of the judgment in the previous suit, EX. P-1, two written statements EX. P-2, dated 10th March 1938 and EX. P 4, dated 27th November 1937, and an oral statement dated 2nd December 1937, the last three being made by Mahadeo. This amendment was allowed by the trial Judge. Defendant 2 Champat on 24th January 1941 made an oral statement wherein he admitted that these statements were made but he denied their truth. On these amendments the Court framed three specific issues which may be quoted here.

"Issues	Finding
1. Did defendant 1 Mahadeo plead in the former Suit No. 139-A/37, exactly as pleaded by plaintiffs in this suit?	Yes.
2 If so, is it not an admission binding against defendant 2 Champat, his successor-in-title after such admission?	Yes.
3. If so, is defendant 2 not estopped by such admissions from denying the allegations in the plaint. and the reversionary title of plaintiffs 1, 2 to the suit field?"	Estopped."

[12] Parties led evidence and the trial Judge decreed the plaintiffs' case. An appeal was filed against this judgment and decree (Civil Appeal NO. 9-A of 1942) and the Additional District Judge (Mr. G. L. Yadu) by his judgment dated 31st October 1942, set aside the decree and remanded the case. His finding was that the plea of estoppel was not raised by the plaintiff and hence no decision could be given. His reasons can best be stated in his own words:

"Paragraph 4 of the judgment of the lower Court is reproduced below:

'In this suit the plaintiffs had pleaded facts exactly as pleaded by defendant 1 Mahadeo, in the former Suit No. 139-A of 1937. Defendant 2 denied this allegation as not being a party to that suit, and he also denied that such 'admission' could operate either as *res judicata* or could create estoppel against him.'

This observation of the lower Court is not borne out by the record inasmuch as no such plea was raised by the plaintiffs, much less was it denied by defendant 2. The plea referred to in the first sentence of the passage quoted above was put into the mouth of the plaintiffs by the lower Court evidently from a mere perusal of the certified copies (Ex. P-2 and Ex. P-4) of defendant 1's written statement in the previous suit. It is not for the Court to assume a pleading which has not been raised by the party concerned."

[13] The remand order appears to fall within O. 41, R. 23, Civil P. C., because no questions on the merits of the claim were gone into, the decision being based on the plea of *res judicata*. No appeal was filed against the order of remand under O. 43, R. 1 (u), Civil P. C., and therefore the order of remand cannot be questioned because of the bar contained in S. 105(2), Civil P. C.

[14] While remanding the case the learned Additional District Judge observed as follows:

"The findings, judgment and decree of the lower Court are therefore hereby set aside and the suit remanded to the lower Court for a fresh decision according to law, with advertence to the above remarks, after framing fresh and proper issues and recording further evidence, if adduced. In case the plaintiffs apply for amendment of pleadings so as to raise a plea of estoppel now, it would be for the lower Court to decide whether it should be allowed with due regard to the law of limitation."

[15] On the re-opening of the case the plaintiff filed on 20th July 1942 an application praying for the amendment of his pleadings. This application was opposed by the defendants. The learned trial Judge (Mr. L. N. Pathak) by an order dated 4th September 1942 dismissed this application. The reason given by the learned Judge was that the plea of estoppel was not raised to start with, though it could have been raised and as the plea of estoppel raised by way of an amendment was made after the limitation for the suit had run out it could not be allowed to be raised. In support of this order reliance was placed upon two passages in Sir Gilbert Stone's 'Pleadings' at pp. 213 and 216.

[16] On 8th December 1942 the learned Judge passed a judgment dismissing the plaintiff's suit. The findings in this suit were exactly the reverse of those given in the earlier suit though the matter related to the same field and the parties were the same.

[17] The plaintiffs appealed against this judgment and decree but the lower appellate Court dismissed the appeal confirming the judgment and the decree of the trial Judge. Against this decree the present appeal has been filed.

[18] The most important question is one of amendment. The learned trial Judge held that the amendment if allowed would alter the nature of the pleadings and this could not be allowed after the period of limitation had run out. The learned Judge said:

"I may at once say that the plaintiffs had never taken the plea of estoppel nor did they allege facts which constitute estoppel in the plaint. The remand order also confirms this finding. Thus I find that the plea now raised is a new plea which was not raised in the plaint, though it could have been raised."

Commenting thereafter on the delay that had taken place the learned Judge went on to say:

"The plaintiffs have pleaded *res judicata* (estoppel by record) and they cannot be allowed to plead estoppel *in pais* after the period of limitation"

There seems to have been a misapprehension on the part of the plaintiffs that they could only found their case on the plea of estoppel *in pais*. The doctrine of *res judicata* applies not only to the actual decision in the case but also to the facts and grounds for that judgment pleaded by the parties. Anything which is admitted and which is fundamental to the decision of the earlier suit is also part of the *res judicata* created by the judgment. In 1926 A. C. 155,[1] at p.

165, Lord Shaw delivering the judgment of the Privy Council in an appeal from Australia stated the principle in these words:

"Very numerous authorities were referred to. In the opinion of the Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle — namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

[19] In this case their Lordships cited with approval the observations of Lord Ellenborough C. J. in (1803) 3 East 346.[2]

"A finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession .... And it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

[20] In summing up the law on the subject it was said by Lord Shaw:

"It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The rule on this subject was set forth in the leading case in (1843) 3 Hare 100[3] at p. 114 by Wigram V. C. as follows: 'I believe I state the rule of the Court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.' This authority has been frequently referred to and followed, and is settled law".

[21] In pleading *res judicata* it is not necessary to set out the pleadings in the earlier suit at length. The leading authority on the subject is (1885) 29 Ch. D. 448.[4] In that case Pearson J. said that in determining the question whether the issue which it is sought to raise now was fairly raised between the parties in the former suit, it is permissible to look to the pleadings. This case has been applied in India in A. I. R. 1921 Cal. 699[5] at p. 701 and in that case it was held that it is permissible to look to the pleadings in the case. To the same effect is the ruling in 5 Mad. 229.[6] In that suit the facts were as follows:

"In 1870 the plaintiffs sued to redeem a mortgage of certain lands from the defendant's predecessors-in-title. The suit was dismissed on the ground that the plaintiffs' equity of redemption had been sold in execution of a decree to A. B. The plaintiffs having repurchased the equity of redemption from A. B. brought a second suit to redeem the lands in the defendant's possession."

It was held that the question whether the equity of redemption of the lands in suit had been sold to A. B. was *res judicata* and could not be reagitated by the defendant on the ground that the plaintiffs were litigating under a different title in the former suit This was a case of *res judicata* on the facts pleaded being applied to a defendant. This case has never been doubted.

[22] In the present case the plaintiff Kheoraj after his first amendment pleaded not only the bar of *res judicata* by the earlier judgment but has also produced the written pleadings of Mahadeo. He must therefore be held to have relied upon the admissions in those pleadings and also to plead estoppel. Though in some cases the statement as to the pleadings of the parties, contained in the judgment of the Court is considered sufficient (*see* the authorities cited by me before) the proper course is to produce the written statements: *see* A. I. R. 1942 ALL. 122.[7] Since this was done in this case and the defendant Champat admitted that such statements were in fact made by Mahadeo, his predecessor-in-title, nothing more need be said as to the correct procedure. I am, therefore, satisfied that the plaintiff had relied on these pleadings in the first suit as a bar.

[23] Now a plea of estoppel should not ordinarily be ruled out if there is material on the record sufficient to sustain the plea. A liberal view of pleadings on such points should be taken. It is true that personal estoppel is not necessarily a question of policy but it is largely so and if the estoppel is apparent, Courts should be reluc-

tant to disallow the plea so that a party may be allowed conveniently to change his ground. A plea of estoppel if it is warranted by the facts proved and admitted, can always be taken even if those facts have not been specifically pleaded: *see* 8 Rang. 223.[8]

[24] In the present case estoppel was pleaded by way of *res judicata* but stress was laid on the ground on which the earlier decision proceeded. This was understood to be a plea of estoppel. The remand order may have meant that an estoppel *in pais* was not specifically pleaded. Whether that decision was right or wrong is not now open but the essence of the new plea was present in the first amendment. In my opinion, the two Courts below have taken a very narrow view of the law of pleadings and their amendment. The structure of pleadings should not be stressed too strictly as was observed by their Lordships of the Privy Council in A. I. R. 1934 P. C. 130[9] at p. 132 where sufficient notice has been given to the other side. In my opinion there was fair notice to the defendant when the judgment and pleadings in the earlier suit were filed and were specifically relied on. A plea of estoppel *in pais* based on pleadings is merely ancillary to the main allegation of estoppel by judgment. In such a case it was the duty of the Court to allow plaintiff to amplify his pleadings so as to embrace all aspects of estoppel especially as the estoppel by judgment was pleaded before the period of limitation had run out and mentioned the grounds on which the earlier judgment proceeded. To do otherwise, in this case, would be to allow the defendant to take undue advantage of the technicalities of law to perpetrate an abuse of the process of Court.

[25] In my opinion, therefore, the amendment was wrongly disallowed. I set aside the decrees of the two Courts below and remand the case for further trial. The plaintiff-appellant will be allowed to amend his pleadings suitably. The trial Court will limit such pleadings to a plea of estoppel based on facts pleaded in the earlier suit and no more. The trial Court will write a fresh judgment and dispose of the case according to law.

[26] Costs of this appeal will be the costs in the suit and will abide the event.

V.B.B. *Case remanded.*

A. I. R. (35) 1948 Nagpur 362 *[C. N. 123.]*

PADHYE J.

Kashirao Panduji—Defendant — Applicant v. *Ramchandra Balaji — Plaintiff — Non-applicant.*

Civil Revn. No. 313 of 1945, Decided on 2-9-1946, from order of 2nd Addl. Dist. Judge, Amraoti, D/- 5-4-1945.

(a) Civil P. C. (1908), O. 9, R. 7 —Good cause—It is not same thing as sufficient cause — Illness established by doctor's certificate is good cause.

There is a distinction between 'good cause' required under O. 9, R. 7 and 'sufficient cause' required by O. 9, R. 13. There may be a good cause for the non-appearance though not sufficient cause. The applicant's illness as *prima facie* established by the doctor's certificate is a 'good cause' for setting aside the *ex parte* order, subject to such terms as the Court may think fit to impose. Rejection of such an application on the ground of absence of affidavit in support of applicant's illness is not sound and judicial exercise of discretion vested in Court inasmuch as the doctor's certificate is much better evidence than an affidavit: *Case law referred.* [Para 11]

Annotation.— ('44-Com.) C. P. C., O. 9, R. 7, N. 2.

(b) Civil P. C. (1908), O. 9, R. 13—Scope—Application under O. 9, R. 7 rejected — Court can still set aside ex parte decree.

The Court has jurisdiction under O. 9, R. 13 to set aside an *ex parte* decree notwithstanding the fact that under O. 9, R. 7 it had refused to hear the defendant: 8 Cal. 272, *Followed.* [Para 15]

Annotation:— ('44-Com.) C. P. C., O. 9, R. 9 N. 1; O. 9, R. 7 N. 1.

(c) Civil P. C. (1908), S. 115—Other remedy open —Rule as to non-interference is not rigid.

The rule as to non-interference in revisions when another remedy is open is not rigid. Each case must be considered on its own merits: 33 A. I. R. 1946 Nag. 393, *Rel. on.* [Para 16]

Annotation:—('44-Com.) C. P. C., S. 115, N. 8.

Cases referred:—

1. ('22) 9 A.I.R. 1922 Bom. 345: 70 I. C. 762, Radhabai v. Anant Pandurang.
2. ('34) 56 All. 578 : 21 A. I. R. 1934 All. 163 : 147 I. C. 1186, Man Singh v. Sanghi Dalchand.
3. ('23) 46 Mad. 60 : 10 A. I. R. 1923 Mad. 63 : 68 I. C. 971, Arunachala Ayyar v. Subbaramiah.
4. ('38) I. L. R. (1938) Bom. 829 : 25 A. I. R. 1938 Bom. 431 : 177 I. C. 934, Shamdasani v. Central Bank of India Ltd.
5. ('97) 10 C. P. L. R. 45, Bhaoo Patel v. Naroo Kunbi.
6. ('82) 8 Cal. 272, Ashruffunnissa v. Lebarcau.
7. ('46) I. L. R. (1946) Nag. 586 : 33 A.I.R. 1946 Nag. 393 : 224 I. C. 526, Pragilal v. Khilawan Singh.

V. L. Prabhune — for Applicant.

G. J. Ghate — for Non-applicant.

Order. — This is a revision by the defendant (applicant) from an appellate order upholding the order of the 1st Court refusing to set aside an *ex parte* decree passed against him on 26-10-1944 in Civil Suit No. 265 of 1944. The relevant facts are these :

[2] The first hearing of Civil Suit No. 265 of 1944 was on 11-9-1944 and the summons was served on the defendant (applicant) on 21-5-1944. The defendant was absent at the hearing and the Court deciding to proceed *ex parte* against him fixed the case for *ex parte* evidence on 26-10-1944.

[3] On 18-9 1944 the defendant was granted a certificate by the doctor under whose treatment he then was that the defendant was suffering for the last two months from bleeding piles and being very anaemic on that account was unable

to move about. The defendant resides in the interior of the tahsil some miles away from Daryapur. On 22-9-1944 he applied to the Court for setting aside the *ex parte* order passed against him and produced the doctor's certificate in support of the application. The application was rejected summarily the same day and the order of rejection runs as follows :

"....Application is not supported by affidavit. It does not disclose reason sufficient to set aside *ex parte* order. Defendant was served in last May and with little diligence he could have obtained adjournment. Application is summarily rejected with costs."

[4] On 26-10-1944, *ex parte* evidence of the plaintiff was recorded in the absence of the defendant and *ex parte* decree was passed. The plaintiff had summoned three witnesses for the hearing but he examined none but himself and closed his case.

[5] On 7th November 1944 the defendant filed his application to set aside the *ex parte* decree passed against him supported by an affidavit and the doctor's certificate (the same which was produced before). This application was opposed by the plaintiff (non-applicant). It was dismissed on 20th January 1945 summarily and the operative part of the order runs as under :

"On 22nd September 1944 an application to set aside the *ex parte* proceedings had been filed. The case came up for final disposal on 26th October 1944. No appearance was put on 26th October 1944 and claim was decreed after *ex parte* evidence. The application to set aside the decree is within time. The same is opposed by Mr. Vaidya.

I am not satisfied that defendant exercised vigilance expected of him. He allowed the case to proceed *ex parte* pugnaciously. The application is dismissed as there is lack of *bona fides*."

[6] This order was upheld in appeal and the operative part of the appellate order runs thus :

"The summons was duly served on the defendant appellant on 21st May 1944. The second ground was urged in the previous application dated 22nd September 1941 and was rejected. He has not appealed against that order and so he cannot now say that that order is wrong. His remedy thus in this case is barred by way of application. He could appeal against the *ex parte* decree not the order. The previous application for absence of appearance was not supported by any affidavit for the Court to act upon. Under the added proviso to R. 13 by our High Court, the Court should not set aside the *ex parte* decree if the defendant had sufficient time after service to come and put in his defence. The defendant was served on 21st May 1944 and had 4 months time to come and put in his defence. He could instruct his pleader through some one else as he did for the application dated 22nd September 1944. The lower Court was thus justified in coming to the conclusion that the defendant was guilty of negligence and allowed the *ex parte* order to be passed deliberately."

[7] The plaintiff (non-applicant) is the holder of survey No. 30/1 area 11.35 acres and the defendant is the holder of survey No. 30/2 area 4.22 acres. The plaintiff's case was that in June 1943 the defendant had taken wrongful possession of 14 gunthas with trees out of his field No. 30/1 and that he should be restored to the possession of the same. The claim is such as is either correct or not correct to the defendant's knowledge. If it is correct then I do not see the point in the defendant's spending his money and time in having the *ex parte* order and the *ex parte* decree set aside. If on the other hand it is not correct then I do not understand why he would deliberately allow the plaintiff to have an easy victory by permitting an *ex parte* order or an *ex parte* decree passed against him. The land in dispute is nearly 1/3 of an acre with trees thereon and is not thus negligible.

[8] It is clear from the doctor's certificate, the correctness of which is not disputed, and I have no reason to doubt, that the defendant was ill during the relevant period and was not able to move about. It is not unlikely that he may have expected to recover sufficiently to move about so that he may be able to go to Daryapur to enage and instruct a counsel for defending the suit. In the absence of any oral evidence on record the exact reason why he was not able to send some one to Daryapur on 11th September 1944 with an application praying for adjournment is not known.

[9] The applicant's application under O. 9, R. 7, Civil P. C., was dismissed, as it appears from the order dated 22nd September 1944, on the ground that he failed to show sufficient reason to set aside the *ex parte* order and that he was guilty of want of due diligence in applying for an adjournment. The application for setting aside the *ex parte* decree was rejected merely as a necessary corollary of the order passed on 22nd September 1944. It is thus evident that if the order dated 22nd September 1944 is set aside, the subsequent order dated 20th January 1945 and the appellate order should be set aside.

[10] As already said above, I do not find any motive for the applicant in allowing the *ex parte* order and decree being passed against him and the learned counsel for the non-applicant was not able to suggest any quite satisfactorily. The applicant even assuming that there was to some extent want of diligence on his part in not applying for an adjournment on 11th September 1944, did come to the Court on 22nd September 1944 i.e. long before the date 26th October 1944, for which the case was adjourned. It was quite possible for him, if the Court had permitted him, to put in his defence and to be ready with his evidence on 26th October 1944. The Court did not permit him to put in his defence and it was naturally thought inadvisable to take part in the trial on 26th October 1944 which would deprive him of the opportunity to have the decree passed set aside under O. 9, R. 13, Civil P. C.

[11] The order dated 11-9-1944 was, in my opinion, passed under a total misapprehension of law. The Court misdirected itself into thinking that the order could be set aside only on sufficient cause being shown. The distinction between 'good cause' required under O. 9, R. 7 and 'sufficient cause' required by O. 9, R. 13 was completely overlooked. There may be a good cause for the non-appearance though not a sufficient cause, and, in my opinion, the applicant's illness as *prima facie* established by the doctor's certificate was at any events a 'good cause' for setting aside the *ex parte* order, subject to such terms as the Court may have thought fit to impose The learned Judge was obviously under a mistake in the exercise of jurisdiction and in my opinion the rejection of the defendant's prayer on 11-9 1944 was not also a sound and judicial exercise of discretion vested in him. The learned Judge has not in his order made a reference to the doctor's certificate and failed to see that it was a much better evidence than an affidavit in support of the applicant's illness.

[12] The suit was just in its initial stage. In A. I. R 1922 Bom. 345[1] it is held that if a party appears before the case is actually heard, he has a right to be heard. The provisions of O. 9 are never meant to be penal provisions, and it is only in clear cases of gross negligence and misconduct that a party should be deprived of the opportunity of having a satisfactory disposal of the case which evidently can only be done when both parties have full opportunity of placing their case and their evidence before the Court.

[13] In 56 ALL 578[2] it is observed that in the absence of any clear motive for the defendant to have deliberately absented himself from the Court on the date fixed for hearing of the case, the Court should hold that the defendant made out sufficient cause for his non-appearance on the date fixed for hearing. The rules of procedure should not be so strictly applied as to deny justice to the party unless the Court is satisfied that the party had a clear motive for his non-appearance and he deliberatey remained absent to achieve that motive. This is also the view taken in 46 Mad. 60[3] and I. L. R. (1938) Bom. 829.[4]

[14] On rejection of his application to set aside the *ex parte* order, it was open for the applicant to wait till *ex parte* decree was passed and then to take advantage of the remedy provided by O 9, R. 13, Civil P. C. The applicant is no doubt required at this stage to show 'sufficient cause' and what is a sufficient cause is often held to be a question of fact. The learned Judge did not however proceed regularly in disposing of the application as he did in the summary manner, without giving an opportunity to the parties to adduce evidence. In the present case, the evidence of the applicant and of the doctor would, in my opinion, have been of much value in deciding the application to set aside the *ex parte* decree. The learned Judge had in fact no basis in support of his observations that the case was allowed to proceed *ex parte* pugnaciously and that there was lack of *bona fides* on the applicant's part.

[15] The appellate Court, as also the first Court, have not kept in view the distinction between mere want of required degree of diligence and misconduct involved in the defendant's absenting himself deliberately. It is this which vitiates the order passed against the applicant. The appellate Court has even gone further and observed that the applicant should have appealed against the order dated 22-9-1944 and as he has not appealed he cannot now urge that the order was wrong. According to the learned Judge the remedy under O. 9, R. 13, was barred on account of the rejection of his application to set aside the *ex parte* order. That this is not the correct view of law is clear from the decisions in 10 C. P. L. R. 45[5] following 8 Cal. 272.[6] The learned Judicial Commissioner in that case held that the Court has jurisdiction under S. 108 (O. 9, R. 13) to set aside an *ex parte* decree notwithstanding the fact that under S 101, Civil P. C. (O. 9, R. 7) the Court had refused to hear the defendant.

[16] The learned counsel for the non-applicant supported the appellate order and further urged that this Court cannot and at least should not, interfere in revision as the Courts below have come to a conclusion that no sufficient cause was established by the defendant-applicant and also as the defendant had another remedy open viz., by way of an appeal against the *ex parte* decree, and did not avail himself of the same. I have already observed above that there is in fact no definite and judicial finding of want of sufficient cause and that such a finding has not been reached after due inquiry. The rule as to non-interference in revisions when another remedy is open is not rigid, as observed by Sen J. in I. L. R (1946) Nag. 586.[7] Each case must be considered on merits.

[17] I am not satisfied in this case that the Courts below have applied their judicial mind to the disposal of the applications. It may be that with proper vigilance the defendant-applicant could have avoided the *ex parte* order and consequently the *ex parte* decree being passed against him and for this reason the Court could have duly compensated the plaintiff (non-applicant) and mulcted the defendant-applicant in costs.

[18] I hereby set aside the *ex parte* order and the *ex parte* decree but award no costs to the

applicant in this Court. The applicant would also pay Rs. 25 to the plaintiff (non-applicant) as a condition precedent to his putting in his defence in the first Court.

[19] The revision is allowed without costs. Counsel's fee Rs. 25.

S.C. *Revision allowed.*

A. I. R. (35) 1948 Nagpur 365 *[C. N. 124.]*

SHEVDE J.

Premlal Domaji and others — Defendants — Appellants v. *Nathulal Brijlal and others — Plaintiffs—Respondents.*

Second Appeal No. 199 of 1944, Decided on 31-12-1947, from appellate decree of Addl. Dist. Judge, Balaghat, D/- 16 8-1943.

C. P. Tenancy Act (1 [I] of 1920), S. 89 — Occupancy land allotted to plaintiffs' share on partition — Separate realization of rent by plaintiff—Surrender of occupancy land in favour of plaintiff is valid even as against lambardar.

Where by virtue of a private partition, certain occupancy tenant in a certain patti, is allotted to the share of the plaintiffs and the plaintiffs have been making separate realization of the rent from that tenant, the plaintiffs are the landlords of the occupancy tenant's land and a surrender by a registered deed by the occupancy tenant in favour of the plaintiffs (landlords) is perfectly valid under S. 89 It cannot be challenged by the lambardar of the patti under S. 13 : 11 A. I. R. 1924 Nag. 383. *Foll ; Case law discussed.* [Para 9]

Cases referred :—

1. ('35) 31 N. L. R. Sup. 132 : 23 A. I. R. 1936 Nag. 44 : 161 I. C. 806, Keshco v. Raoji.
2. ('35) 31 N. L. R. Sup. 96 : 23 A. I. R. 1936 Nag. 18 : 159 I. C. 862, Kanhaiya v. Si aram.
3. ('39) I. L. R (1939) Nag. 1 : 25 A. I. R. 1938 Nag. 335 : 177 I C. 6 (F. B.), Asaram v. Ludhesbwar.
4. ('27) 23 N L R. 160 : 15 A. I. R. 1928 Nag. 39 : 106 I. C. 42 , Mt. Bari Bahu v Ganesh Singh.
5. ('27) 14 A I.R. 1927 Nag. 325 : 103 I. C. 818, Murlidhar v. Hus ain Khan.
6. ('41) I. L. R. (1941) Nag. 54 : 28 A. I R. 1941 Nag. 21 : 192 I. C. 472 (F.B.), Gopal v. Shamrao.
7. ('39) 26 A.I.R. 1939 Nag. 287 : 189 I.C. 273, Gangaprasad v. Itwarsingh.
8. ('24) 11 A. I. R. 1924 Nag. 383 : 78 I. C. 134, Khet Singh v. Manmod Singh.

A. Razak — for Appellants.
P. R. Padhye — for Respondents.

Judgment.—This second appeal has been preferred by the defendants against the decree of the learned Additional District Judge, Balaghat, modifying the decree of the Court of the first instance for joint possession in the plaintiffs' favour.

[2] The plaintiffs brought this suit for possession of the land in suit, which originally belonged to one Suku Gond, an occupancy tenant, and who surrendered it to plaintiff 1, Nathulal, by a registered deed of surrender, dated 15th May 1940; that surrender deed is Ex. P-32. It was alleged by the plaintiffs that there was a private partition between their ancestors Dinaji on the one hand and Dinaji's brother Domaji, defendants 1 and 2's father on the other, some time in 1905 A. D., under which the tenants were divided and allotted to the share of each party. The land in suit is situate in patti No. 2 of mouza Catapaili, in the Waraseoni tahsil of the Balaghat district, of which defendant 1, Premlal, is the recorded lambardar. Suku Gond was an occupancy tenant of the land in suit in patti No. 2, and it was alleged by the plaintiffs that this tenant had been allotted to the share of the plaintiffs' ancestor, Dinaji, at the partition mentioned above. It was further alleged that this Suku Gond's brother Pusya Gond had also surrendered his part of the occupancy holding to the plaintiffs by a registered deed of surrender dated 19th May 1931 (*vide* Ex. P 34). The plaintiffs' case was that as they were landlords of the occupancy land in suit, the surrender in their favour was valid under the provisions of S. 89, C. P. Tenancy Act, and that they alone were entitled to the exclusive possession of the land now in dispute. Defendant 1, however, applied to the revenue Court in his capacity as lambardar for setting aside the surrender and for being put in possession of the disputed occupancy land, and that Court, having set aside the surrender, put him in possession. The plaintiffs respondents commenced this suit for a declaration that the decision of the Revenue Court was wrong and for the recovery of possession of the disputed occupancy land. The Court of first instance decreed the plaintiffs' claim for joint possession. The plaintiffs filed an appeal before the Additional District Judge, Balaghat, who modified the decree of the first Court and allowed the plaintiffs' full claim for possession. The defendants have, therefore, preferred this second appeal.

[3] It has been concurrently found by both the lower Courts that there was a partition in or about 1905 or 1906 and that in that partition the tenants of the patti were divided. It has also been found that since then the plaintiffs have been making separate realisations of rents from the tenants, who were allotted to their share at the partition. It is, therefore obvious that this private partition between the parties has been acted upon, since the time of their ancestors, continuously and uninterruptedly, for the last 35 or 36 years. These findings of fact are, therefore, conclusive in second appeal.

[4] It has been contended by the learned counsel, who appeared in support of this appeal, that even on these findings defendant 1, Premlal, is entitled to challenge the validity of the surrender by Suku Gond in favour of plaintiff 1, Nathulal, as he is the recorded lambardar of the patti, in which the land in suit is situate. The main point for determination in this appeal,

therefore, is whether the surrender of the occupancy land in suit by Suku Gond in plaintiffs' favour is valid, under the provisions of S. 89, C. P. Tenancy Act, even as against the lambardar. It has been argued by the learned Advocate on behalf of the appellants, on the authority of the Full Bench ruling in 31 N. L. R. Sup. 132[1] that defendant 1, Premlal, who is the recorded lambardar of patti No. 2 does not cease to be a lambardar when the patti is partitioned, but remains the lambardar, until he is removed under S. 189, C. P. Land Revenue Act. It has, therefore, been urged that although there was a private partition in 1905 or 1906 and although that partition has been consistently acted upon by the parties concerned for the last 35 years, still that partition does not, in any way, stand on a higher footing than an imperfect partition, effected by a revenue Court and that defendant 1 still remains the lambardar of the patti. As lambardar of the patti, defendant 1 alone is competent to take a valid surrender from Suku Gond, even though the latter was the tenant of the plaintiffs. The surrender by Suku Gond in favour of the plaintiffs, Nathulal, is no better than one in favour of a co-sharer. In support of this contention the learned Advocate, who appeared in support of this appeal, has drawn my attention to the decision of Niyogi A. J. C. (as he then was) in the case in 31 N.L.R. Sup. 96[2] which lays down that a surrender by an occupancy tenant to a co-sharer, who is not the lambardar, is a transfer, and the lambardar's only remedy is by an application under S. 13, C. P. Tenancy Act, and not by a suit in the civil Court. It is, therefore, next contended that the surrender in question was rightly set aside by the Revenue Court and the lambardar (i. e., defendant 1) was put into possession of the occupancy land in suit.

[5] The contention of the learned counsel for the appellants is quite all right, so far as it goes, but the principle of law, on which he has relied, is not applicable to the facts of this case. In the present case it has been found as a fact that there was a complete partition between the parties in the year 1905 or 1906 and that by virtue of that partition Suku Gond was the tenant of the plaintiffs to the exclusion of the lambardar or the members of his family, and consequently the plaintiffs were not merely co-sharers, in whose favour the surrender was executed, but they were in fact and in law the landlords of Suku Gond, in whose favour a valid surrender could be made under S. 89, C. P. Tenancy Act.

[6] It has been laid down by the Full Bench in I.L.R. (1939) Nag. 1[3] at p. 3 that a surrender under S. 89, C. P. Tenancy Act, is not a transfer within S. 12 of the Act and as S. 13 of the Act does not apply, the jurisdiction of a civil Court to set it aside is not ousted. The crucial point, on which the decision of the whole case turns, therefore, is whether the surrender in favour of plaintiff 1 as landlord, can be challenged by the lambardar, even though he is admittedly not the landlord. To put briefly, the contest lies between the landlord on the one hand and the lambardar on the other, who is only deemed to be a landlord, under the provisions of S. 188 (2), C. P. Land Revenue Act. I do not think that the two terms, namely, 'landlord' and 'lambardar' are interchangeable or synonymous for all purposes. In the case of a mahal or a patti, which is held jointly by a body of co-proprietors, it can safely be said that it is the lambardar, who is the landlord of the mahal or patti, as the case may be, on behalf of the proprietary body and in that case, it is the lambardar alone, who is competent to take a valid surrender, under S. 89, C. P. Tenancy Act, from a person who is a tenant of the proprietary body as a whole; but in the present case it is no longer disputed that there was a full partition between the parties to this litigation and defendant 1, as lambarbar, had had no concern whatsoever, as landlord, with the tenancy land of Suku Gond and others who were specifically allotted to the share of the plaintiffs. In these circumstances it is certainly inappropriate to hold that the lambardar can be regarded as the landlord of Suku Gond in preference to the plaintiffs who were admittedly the landlords.

[7] It has been held by the Bench of the late Judicial Commissioner's Court in 23 N. L. R. 160[4] that a co-proprietor of a village selling his share to a third party and becoming an occupancy tenant of sir land held by him in severalty is the tenant of his vendee and the vendee is entitled to claim from him the rent of the holding and not the lambardar. The same principle was again laid down by Findlay J. C., in A.I.R. 1927 Nag. 325[5] where the learned Judge has observed as follows:

"Where sir land has been distributed and has been held in severalty, each proprietor is the landlord of the land so held by him. Where co-sharers, holding sir land in severalty sell their share to a stranger and then surrender their ex-proprietary rights to him, the lambardar is not entitled to apply under S. 13 to set aside the transaction and the revenue Court has no jurisdiction to put the lambardar in possession."

[8] It is clear to my mind that it is by virtue of partition amongst the co-sharers in respect of sir land that it comes to be held in severalty and each proprietor becomes the landlord of the land so held by him. Both those cases have been approved of and relied upon by the Full Bench in I. L. R. (1941) Nag. 54.[6] The majority view in that case is:

"When a cosharer who holds sir land in exclusive ownership transfers his share in the village without cultivating rights in the sir land and becomes thereupon an exproprietary tenant of the land, his transferee and not the lambardar of the village is entitled to collect from him the rent of the land."

If the transferee of a proprietary share becomes the landlord of the transferor in respect of sir land held by him in his exclusive possession, there is no valid reason for not extending the same principle to the case of an occupancy land held by a co-proprietor by virtue of a partition. Mr. P. R. Padhye, the learned counsel for the respondents, has relied upon the ruling in the published case, namely, A. I. R. 1939 Nag. 287[7] in support of his contention that the lambardar is not the landlord *vis-a-vis* his co-proprietor. The learned Judges have laid down the following proposition :

"In so far as the lambardar is deemed to be the landlord he is so *vis-a-vis* tenants only in so far as they hold land of him. This does not make the lambardar the landlord *vis-a-vis* his co-proprietors, except in so far as one or more of them may happen to be a tenant of the whole proprietary body and hold land of them."

This proposition of law seems to indicate that the lambardar can claim to be the landlord only in respect of that land, which has been held by a person as a tenant from him and in any case he cannot claim to be the landlord *vis-a-vis* his co-proprietors for all purposes.

[9] I think that the case in A. I. R. 1924 Nag. 383[8] is more in point. It lays down that:

"There is no distinction between a private partition and a partition effected under the Land Revenue Act. If the proprietors elect to partition the village and if they agree that each proprietor shall collect the rents from those tenants whose lands fall within his share, and if the tenants in their turn make attornment, then each proprietor becomes the landlord of his patti within the meaning of the Tenancy Act, and, therefore, if a tenant in one patti surrenders land to the owner of another patti, the surrender is not binding on the proprietor of the first patti who is consequently entitled to possession."

The principle laid down in this case exactly covers the point at issue in the present case. It has been found, as stated above, that by virtue of partition in 1905 or 1906, the occupancy tenant (Suku Gond) was allotted to the share of the first plaintiff, Nathulal. It, therefore, follows that the plaintiff was the landlord of Suku Gond's land and as the surrender by the latter was in favour of the former, i. e., plaintiff-landlord, it was perfectly valid under the provisions of S. 89, C. P. Tenancy Act, and that it could not be challenged by the first defendant-lambardar, under the provisions of S. 13 of the Act. The revenue Court had, in my opinion, no jurisdiction to set it aside and put the first defendant-lambardar in possession of the land in suit.

[10] Section 2 (7), C. P. Tenancy Act 1920, lays down that :

"'Landlord' means the person of whom a tenant holds land, and to whom the tenant is, or but for a contract would be, liable to pay rent for such land."

According to the plain meaning of this section, it is quite clear to my mind that the plaintiff I alone was the landlord of Suku Gond, in respect of the occupancy land in suit, by virtue of the partition made in 1905 or 1906. So far as the lambardar is deemed to be the landlord, he is so *vis-a-vis* his tenant only. It is admitted that Suku Gond never held the occupancy land in suit as a tenant from the lambardar. In these circumstances it is idle to contend that the lambardar should be deemed to be the landlord of Suku Gond's land, within the meaning of S. 89, C. P. Tenancy Act. For the reasons stated above I concur with the first appellate Court in holding that the surrender of the occupancy land by Suku Gond in favour of plaintiff-respondent 1 was a valid surrender, that the revenue Court had no jurisdiction to set it aside under S. 13, C. P. Tenancy Act, and that the civil Court has jurisdiction to restore the plaintiffs-respondents to possession of the land in suit.

[11] The result is that this appeal fails and is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 367 *[C. N. 125.]*

POLLOCK J.

Ambabai w/o Ajodhya Prasad Choute and others—Appellants v. *H. R. Dani — Respondent.*

Misc. Second Appeal No. 136 of 1944, Decided on 10-9-1947, from order of Dist. Judge, Nagpur, D/- 3-4-1944.

(a) Limitation Act (1908), Art. 181 — Article 181 does not apply to applications under the Provincial Insolvency Act : *Case law referred.* [Para 2]

Annotation : ('42-Com.) Lim. Act, Art. 181, N. 22.

(b) Provincial Insolvency Act (1920), S. 4—Title not extinguished by adverse possession — Insolvency Court is not prevented by Art. 181, Limitation Act, from deciding question of title.

Under S. 4, Provincial Insolvency Act, the insolvency Court has power to decide all questions of title. The insolvency Court has no exclusive jurisdiction, and the question can be decided by the regular civil Courts. The question of limitation does not depend on whether the title is decided in the insolvency Court or by the regular civil Courts. If the title has not been extinguished by adverse possession, then the insolvency Court has power to decide the question of title, and Art. 181, Limitation Act, will not prevent it from so deciding. [Para 2]

(c) Transfer of Property Act (1882), S. 41 — Finding that transferee did not act in good faith is finding of fact—Civil P. C. (1908), S. 100.

A finding that transferee did not act in good faith is a finding of fact and must be accepted in second appeal. [Para 5]

Annotation : ('45-Com.) T. P. Act, S. 41, N. 21, Pt. 6.

Cases referred :—

1. ('25) 12 A. I. R. 1925 Mad. 172 : 79 I. C. 443 Ramaswamiah v. Subramania.

2. ('24) 11 A. I. R. 1924 Lah. 553 : 75 I. C. 995, Darvai Singh v. Kunj Lal.
3. ('24) 47 Mad 673 : 11 A. I. R. 1924 Mad. 345 : 79 I. C. 395, Ananthanarayana Ayyar v. Sankara Narayana Ayyar.
4. ('27) 5 Rang. 384 : 14 A. I. R. 1927 Rang. 263 : 104 I. C. 816, Jhan Bahadur Singh v. Bailiff of Dist. Court, Toungoo.
5. ('40) 1940 N. L. J. 505 : 27 A. I. R. 1940 Nag. 414 : I. L. R. (1942) Nag. 377 : 192 I. C. 183, Motilal v. Nathu.
6. ('46) 1946 N. L. J. 597 : 34 A. I. R. 1947 Nag. 76 : I. L. R. (1946) Nag. 937 : 226 I. C. 290, Bhalchandra Gangadhar v. G. B. Palsule.
7. ('16) 38 All. 122 : 3 A. I. R. 1916 All. 36 : 33 I. C. 954, Dujai v. Shiam Lal.

Dr. D. W. Kathaley — for Appellants.

S. R. Mangrulkar — for Respondent.

Judgment. — On 2-4-1930 Damodhar Muley in execution of a decree against Wasudeo Prasad purchased six fields for Rs. 920, which was apparently set off against the decretal claim for Rs. 2000. On 7-7-1930 the sale was confirmed. On 14-12-1931 Wasudeo Prasad applied to be adjudged insolvent, and he was so adjudged on 3 2 1933. In the meantime Muley had executed a sale deed by which he purported to sell the above six fields to Wasudeo Prasad's wife Damayanti Bai for Rs. 1500. Damayanti Bai died at the end of 1932, and on 22-12-1938 and 8 2 1939 Wasudeo's mother Rukhmabai, purporting to act as guardian of Wasudeo Prasad's daughter Shakuntala, executed three sale deeds of these fields in favour of Sadasheo, Ambabai, and the minor sons of Dinanath (Kunjbihari and Shambihari) for ostensible considerations of Rs. 250, Rs. 850 and Rs. 375 respectively. In February 1942 the receiver put in applications under S. 4, Provincial Insolvency Act to be put in possession of these fields. Those applications succeeded in the insolvency Court, and an appeal to the District Judge was dismissed. The transferees have preferred this second appeal.

[2] The first question is one of limitation. The two fields sold to Sadasheo were malik-makbuza fields, which were sold on 22-12-1938. The receiver's application under S. 4, Provincial Insolvency Act, was made on 10-2-1942. The other two sales were of absolute occupancy fields made on 8-2-1939, and the receiver's applications under S. 4 were made on 7 2-1942. It is contended that Art. 181, Limitation Act applies and that the application should have been made within three years from the date of the appointment of the receiver, or at least from the date of the sales. The general view is that this Article does not apply to applications under the Provincial Insolvency Act. That view has been taken in A. I. R. 1925 Mad. 172,[1] A. I. R. 1924 Lah. 553,[2] 47 Mad. 673[3] and 5 Rang. 384.[4] The decisions in 1940 N. L. J. 505[5] and 1946 N. L. J. 597[6] do not support the contrary view, for it was merely remarked there that if Art. 181 applied then the application was still within time. Under S. 4, Provincial Insolvency Act the insolvency Court has power to decide all questions of title. Here the question is one of title. The insolvency Court has no exclusive jurisdiction, and the question could be decided by the regular civil Courts. The question of limitation does not depend, in my opinion, on whether the title is decided in the insolvency Court or by the regular civil Courts. If the title has not been extinguished by adverse possession, then in my opinion the insolvency Court has power to decide the question of title, and Art. 181, Limitation Act will not prevent it from so deciding.

[3] It has been argued that an application under S. 4 might be made after the lapse of many years, but it would fail if the title had been extinguished by adverse possession, just as a suit would fail. It has not been contended here that the title had been extinguished by adverse possession, and therefore I agree with the lower Courts that the applications of the receiver to be put in possession were not barred by limitation.

[4] The lower Courts have held that the sale by Muley ostensibly in favour of Damayantibai was a benami transaction and that the real transferee was her husband Wasudeo Prasad. It has been suggested that the question is a mixed question of law and fact, and I have been referred to the decision in 38 ALL. 122.[7] It is possible that in the peculiar circumstances of that case the question whether the ostensible mortgagee was the real mortgagee was a mixed question of law and fact, though the grounds on which it was so held are not altogether clear. In the present case, however, I think it is clear that the question whether the real transferee was Damayantibai or Muley (Wasudeo Prasad ?) is a pure question of fact. The evidence of Muley shows that Wasudeo Prasad approached him about a resale even before the confirmation of the sale in execution and that he agreed to re-transfer the fields to Wasudeo if he paid Rs 2 000 in full satisfaction of the decretal claim, and that Wasudeo Prasad accordingly paid Rs. 500 at the time and Rs. 1,500 4 months later and t ok a sale deed in the name of his wife Damayantibai because he said that he was heavily indebted. That evidence is corroborated by the non-applicant's witness Sadasheo. It has been suggested that the statement made by Wasudeo Prasad, who died in 1939, is inadmissible in evidence The evidence of Muley and Sadasheo is inadmissible to prove the truth of any statement made by Wasudeo Prasad, but it is admissible to prove that Wasudeo Prasad made such a statement. The burden of proof is no doubt on the receiver to show that the ostensible transferee Damayantibai was not the real

transferee, but all the circumstances of the case leave, I think, no doubt that Wasudeo Prasad was the real transferee, and the concurrent findings of the lower Courts on this point must be accepted.

[5] The third question is whether the transferees are protected by S. 41, T. P. Act. They pleaded that they were *bona fide* transferees for value. They did not specifically plead that they took reasonable care to ascertain that the transferor had power to make the transfer, and there is very little evidence of any such inquiry. Here again there are concurrent findings of the lower Courts that the transferees did not act in good faith, and that finding must be accepted here. The appeal is dismissed with costs.

D. S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 369 *[C. N. 126.]*

GRILLE C. J. AND HIDAYATULLAH J.

Nimba Ganba Ghule—Defendant—Appellant v. *Narayan Paikaji Kale and another—Plaintiffs—Respondents.*

First Appeal No. 81 of 1941, Decided on 14-10-1947, from decree of 2nd Addl. Dis. Judge, Nagpur, D/-15th July 1941.

(a) C. P. Land Revenue Act (2 [II] of 1917), S. 151 —Pre-emptor can come in as early as he likes after bid has been accepted.

Under S. 151 the pre-emptor can come in as early as he likes after the bid has been accepted. He can come in the course of the sale and not merely at the conclusion of the sale. [Para 8]

(b) Civil P. C. (1908), O. 34, R. 1 — Necessary parties — Person claiming paramount interest is not necessary party.

In a mortgage suit the person claiming paramount title is not a necessary party. He has no interest in the mortgage security or in the right of redemption and the only occasion on which a judgment-creditor could rightly be made a party to a mortgage suit is when he is in the position described in S. 91, T. P. Act. [Para 11]

Annotation : ('44-Com.) Civil P. C, O. 34, R. 1, N. 5.

(c) Civil P. C. (1908), O. 21, Rr. 58 and 66 — An application that the sale of the property attached should be notified subject to the applicant's own mortgage, is one falling under O. 21, R. 58 and not under O. 21, R. 66. (Distinction between Rr. 62 and 66, pointed out): *Case law discussed.* [Paras 14 and 17]

Annotation : ('44-Com.) Civil P. C. O. 21, R. 62, N. 1, 2; O. 21, R. 66, N. 11.

(d) Civil P. C. (1908), O. 21, R. 63 —Order rejecting claim without investigation on ground of delay — Suit under R. 63 not filed within one year —Order is conclusive.

A decision dismissing an application under O. 21, R. 58 by a mortgagee as having been made too late is as effective as a decision under R. 62 would have been declaring that the Court was not satisfied as to the existence of the mortgage and if no suit is brought within one year, the mortgagee cannot, either as plaintiff or as defendant assert the right denied by the decision: *Case law referred.* [Paras 12, 17, 19]

Annotation : ('44-Com.) Civil P. C.; O. 21, R. 63, N. 5; O. 21, R. 62 N. 1, Pt. (3).

Cases referred:—

1. ('11) 15 C. W. N. 350 : 9 I. C. 66, Md. Ali Meah v. Kibria.
2. ('41) 28 A. I. R. 1941 Cal. 85 : 193 I. C. 390, Annapurna Dasi v. Bazley Karim.
3. ('43) I. L. R. (1943) All. 580 : 30 A. I. R. 1943 All. 282 : 208 I. C. 3, Imamullah v. Mahomad Idris.
4. ('26) 22 N. L. R. 94 : 13 A. I. R. 1926 Nag. 423 : 97 I. C. 178, Wamandhar v. Kamta Prasad.
5. (30) 26 N. L. R. 136 : 17 A. I. R 1930 Nag. 116 : 123 I. C. 474 (F. B.), Maroti v. Mt. Sonabai.
6. ('39) I. L. R. (1939) Nag. 665 : 26 A. I. R. 1939 Nag. 305 : 185 I. C. 727, Misrilal v. Barik Tursi.
7. ('42) I. L. R. (1942) Nag. 166 : 29 A. I. R. 1942 Nag. 61 : 199 I. C. 564, Ganpati v. Yadao.
8. ('45) I. L. R. (1945) Nag. 571 : 32 A. I. R. 1945 Nag. 257, Govind Balkrishna v. Dhondba.
9. ('37) 16 Pat. 54 : 24 A. I. R. 1937 Pat. 63 : 166 I. C. 463 (F. B.), Sunder Prasad v. Deodhari Singh.
10. ('22) 1 Pat. 159 : 9 A. I. R. 1922 Pat. 408 : 70 I. C. 306, Biswanath Patra v. Lingaraj Patra.
11. ('42) 21 Pat. 300 : 29 A. I. R. 1942 Pat. 406 : 200 I. C. 557, Mt. Anrajo Kuer v. Ramdayal Singh.
12. ('41) 28 A. I. R. 1941 Mad. 77, Co-operative Credit Society, Kaikaran v. Narasimha Rao.
13. ('42) I. L. R. (1942) Mad. 336 : 29 A. I. R. 1942 Mad. 41 : 198 I. C. 197 (F. B.), Cannanore Bank Ltd. v. Madhavi.
14. ('30) 11 Lah. 369 : 16 A. I. R. 1929 Lah. 865 : 120 I. C. 679, Naval Kishore v. Khiyali Ram.
15. ('88) 15 Cal. 521 : 15 I. A. 123 : 5 Sar 172 (P. C.), Sardharilal v. Ambika Parshad.
16. ('39) I. L. R. (1939) 2 Cal. 291 : 26 A. I. R. 1939 Cal. 620 : 185 I. C. 523, Ambica Prasad Sanyal v. Soorajmull Nagarmull.
17. ('39) 26 A. I. R. 1939 All. 657 : 185 I. C. 660, Bhudeo Prasad v. Sri Nath.
18. ('27) 49 All. 903 : 14 A. I. R. 1927 All. 593 : 102 I. C. 792, Debi Das v. Rupchand.
19. ('31) 9 Rang. 367 : 18 A. I. R. 1931 Rang. 310 : 134 I. C. 746, Mg. Aung Myint v. Mg. Tha Hmat.
20. ('32) 28 N. L. R. 166 : 20 A. I. R. 1933 Nag. 81 : 138 I. C. 184, Ramkuar Bai v. Chhitia Bai.

M. R. Bobde and V. V. Kelkar—for Appellant.

C. K. Ghadge—for Respondents.

Grille C. J.—The plaintiff brought a suit for a declaration that the property mentioned in his plaint, namely 0-8-0 village share and sir and khudkast fields in Mouza Kusumbi, was his and that the defendant had no right or title to any interest in this property. The suit was occasioned by the fact that the defendant Nimba was in the process of executing a mortgage decree which he held over these fields and the village share which the plaintiff had already acquired by an auction-purchase in execution of his own decree for money.

[2] The plaintiff's decree is dated 16-10-1929 and is Ex. P-3. In December 1929, as will be seen from Ex. P-2, he attached the property and on 23-7-1930 he put in a sale statement in which the defendant Nimba's mortgage is mentioned but is stated to be of no effect since it was without consideration. The vital document is

Ex. P-10 which is an application by Nimba and the question for decision is whether it is governed by O. 21, R. 58 or O. 21, R. 66 asking that the property in question be put up to sale subject to the encumbrance of his own mortgage. This was rejected on 26-1-1931 as having been made too late : Ex. P-2.

[3] The sale was held on 16-12-1931 and the auction-purchaser was one Arjun who deposited 1/4 of the sale price. In subsequent proceedings the Sub-Divisional Officer acting as Collector made a report on 18-1-1932 (Ex. D-3) stating that the decree-holder Narayan was willing to purchase the property "for the price paid by the purchaser" and recommending that he should be allowed to do so. It is also recorded in the same order sheet that Arjun was withdrawing his claim in respect of the sale. The plaintiff Narayan was in possession of the other half of the village and consequently under S. 151, Land Revenue Act, he was entitled to pre-emption. On 4-3-1932 Arjun was allowed to withdraw the deposit money which he had paid and on 16th April 1932 (Ex. P-5) the civil Court in a considered order allowed Narayan to pre-empt. The sale was confirmed on 19-5-1932 and the sale certificate issued on 24-5-1932. Then for some reason the confirmation was cancelled on 23rd July 1932 (Ex. D-5) but the sale was finally confirmed on 22-12-1933 (Ex. P-6).

[4] After this, in the year 1934, Nimba brought a suit on his own mortgage in respect of this property, against Mahadeo, the mortgagor and the judgment-debtor in the plaintiff's decree of 1929. The mortgage as appears from a copy of the judgment which Nimba obtained was executed in 1928, which would be before the plaintiff brought his suit. Nimba did not join Narayan as a party to the suit contending then that he only joined such persons as had title and that Narayan in spite of his purchase in the previous year had in fact no title to the property. On 30-3-1936 Nimba obtained a judgment in that suit but apparently he did not proceed to execution at once.

[5] It will be seen that after the 0-8-0 share of Mahadeo was sold, which as we know was purchased in the auction sale by the plaintiff, Mahadeo had become the ex-proprietary occupancy tenant of that field. In 1936 the plaintiff brought a suit against Mahadeo for arrears of rent and obtained a decree against him in September 1937 as a result of which Mahadeo was ejected from these fields by the revenue Courts in 1938.

[6] It also appears that during the year 1931 negotiations were going on between Nimba and Mahadeo and it was agreed that Nimba should purchase this share in order to satisfy his (Nimba's) mortgage and also to pay off some decrees outstanding against Mahadeo including that of Narayan. In pursuance of this agreement Mahadeo approached the revenue authorities for permission to sell, in addition to his village share, his cultivating rights in sir, pointing out that he had other property which would enable him to maintain his family, and necessary sanction was accorded towards the end of 1931. Nothing, however, came out of it as no sale deed was executed and it is Nimba's contention that Mahadeo resiled from the agreement. No further action appears to have been taken by Nimba after this, and it is to be noted that the sale of the property to Arjun was not held until December 1931 and the sale was not confirmed in Narayan's favour as a result of his claim to pre-emption until two years later.

[7] The plaintiff succeeded in the lower Court in obtaining the declaration he sought and in appeal by the defendant it is urged that as the suit was one under S. 42, Specific Relief Act, it was the plaintiff's duty to establish his title since the grant of relief was in the discretion of the Court and that he had failed to do so. In the lower Court reliance was placed on the fact that the objection application put in by the defendant during the execution proceedings, which he described as one falling under O. 21, R. 58, was rejected and that as no suit had been brought within twelve months, that order became conclusive against him and that therefore he was not entitled to advance his mortgage against any acquisition by the plaintiff.

[8] In the first place, it is contended that in fact there was no sale to Arjun at all inasmuch as the vital conditions laid down in O. 21 had not been fulfilled. Admittedly, Arjun after depositing 1/4 purchase-money on 16-12-1931 did not pay the balance and it is contended that under the provisions of O. 21, Rr. 85 and 86, as the balance had not been paid by the purchaser within fifteen days, the Court was bound to order a fresh sale. Three cases are cited in support of this proposition, *viz.*, 15 C. W. N. 350,[1] A. I R. 1941 Cal. 85[2] and I. L. R. (1943) ALL. 580.[3] In the first two of these cases, the balance of the purchase-money had not been paid at all and we entirely agree with the decision there that there could be no sale to a person who had not paid the purchase price. In the Allahabad case it was held that the sale was automatically cancelled inasmuch as the purchase-money had been paid sixteen days late. It must be noted of course that in these three cases no question of any rights of pre-emption arose. It is contended that that is immaterial and that S. 151, Land Revenue Act, only gives a right of pre-emption in respect of a sale which had been concluded

and that no claim for pre-emption can take effect until that has been done. That, however, is directly opposed to the language of the section which states that certain persons can claim to take the property at the sum last bid if, *in the course of a sale* of an estate or mahal or share therein, in execution of a decree of a civil Court, the property is knocked down to a stranger. It is perfectly clear that the pre-emptor can come in as early as he likes after the bid has been accepted. He can come in in the course of the sale and not merely at the conclusion of the sale. It is contended, however, that in any case any appearance made by the plaintiff Narayan was more than fifteen days after the property had been knocked down in favour of Arjun and reliance for this is placed on Exhibit D-3, which is an extract from the order-sheets of the revenue officer conducting the sale. The sale was held on 16-12-1931. This order sheet is dated 18-1-1932. It is stated there:

"Decree-holder is willing to purchase the property for the price paid by the purchaser Rs. 1,305 and I recommend that it should be allowed and sale confirmed in his favour."

[9] Now the purchase-money of Rs. 1,305 had been actually paid at the time when Arjun was allowed to withdraw his deposit of 1/4th of this amount. This is clear from the order sheet dated 4-3-1932. But it cannot be argued with certainty that this was the first appearance of the decree-holder on the scene. The fact that he expressed his willingness to purchase is no foundation for the contention that this was his first appearance, and indeed the normal inference to be drawn is that the Court was dealing with an application that had been put in previously. The trial Court held that it has not been established that the decree-holder Narayan was late in making his application for pre-emption and, as we have said, the reasonable inference is that Narayan's application had been put in earlier.

[10] Next it is urged with respect to the same order-sheet, from which we have just quoted the passages above, that the revenue authorities had absolutely no right to substitute one purchaser for another and to make the decree-holder's name appear instead of the auction-purchaser. Moreover, the decree-holder had asked no permission to bid. This is easily answered. The decree-holder did not express his willingness as a decree-holder but as a person entitled to pre-empt under the provisions of S. 151, Land Revenue Act. Moreover, the Court did not grant permission but only recommended that his application should be allowed and the sale confirmed in his favour. Then again it is urged that applications to pre empt are not made to the revenue authorities but only to the civil Courts. There are undoubtedly several authorities for this proposition. But in this case the application for pre-emption was in fact made to the civil Court. A recommendation to the Deputy Commissioner was not made in relation to this application. In Ex. p-5, which is a copy of the order passed by the civil Court, this application under S. 151, Land Revenue Act, has been dealt with and it was laid down therein that on the applicant fulfilling all the conditions binding on the auction-purchaser, he shall be entitled to have the sale of the property confirmed in his favour at the sum for which it was sold and purchased by Arjun. This order is dated 16-4-1932. In the order dated 4-3-1932 Ex. D-3 allowing Arjun to withdraw his deposit money there is an assumption, which in strict law should not have been made, that the sale was going to be confirmed in the name of Narayan and consequently Arjun was allowed to withdraw his money. It was obviously a suggestion that Narayan's application was bound to succeed, and the only thing that could be said against the order of the Collector is that his action as the agent of the civil Court was premature and an example of intelligent anticipation.

[11] The trial Court decreed the plaintiff's suit both because of the failure on the part of the defendant to bring a suit under the provisions of O. 21, R. 63, after the failure of his application under R. 58 and also because Nimba had failed to join the plaintiff in his mortgage suit. In this latter point, which was not strongly pressed before us, we are satisfied that the lower Court is wrong. In a mortgage suit the person claiming paramount title is not a necessary party. He has no interest in the mortgage security or in the right of redemption (*vide* O. 34, R. 1) and the only occasion on which a judgment-creditor could rightly be made a party to a mortgage suit is when he is in the position described in S. 91, T. P. Act.

[12] As for the other reason that the order passed on 26-1-1931 rejecting Nimba's application, filed under Order 21, Rule 58 and not under rule 66, was conclusive against him, we are of opinion that the lower Court is perfectly right and that the appeal must fail. Ever since the decision in 22 N. L. R. 94[4] was overruled by a Full Bench in 26 N. L. R. 135[5] it has been the view of this Court that O. 21, R. 58, contemplates a claim that attached property should be sold subject to a mortgage or lease and that the provisions of R. 63 apply to the order allowing or disallowing such a claim. This view has been upheld by one of us in I. L. R. (1939) Nag. 665,[6] by Niyogi J. in I. L. R. (1942) Nag. 166[7] and by Puranik J. in I. L. R. (1945) Nag. 571[8] where the case-law on the subject is reviewed. The cases which have been cited by the learned counsel for the appel-

lant, and which at first sight seem to support his contention, have been dealt with in I. L. R. (1945) Nag. 571[8] and are shown to have been superseded. For instance, the Full Bench decision in 16 Pat. 54[9] which is based on 1 Pat. 159[10] has been disapproved by the Patna High Court itself in 21 Pat. 300.[11] In the earlier cases it was decided that a usufructuary mortgagee was not entitled to make an application under O. 21, R. 58, at all in respect of an attachment by a third person. This principle in itself was questioned by the Divisional Bench in 16 Pat. 54,[9] who referred the matter to a Full Bench but the decision went against them. That decision is not now approved. Similarly the decision in A. I. R. 1941 Mad. 77[12] which has been urged for our acceptance was overruled in I. L. R. (1942) Mad. 336[13] by a Full Bench. A mortgagee, in the view of both the Madras and Patna High Courts, in opposition to the cases which have been cited on behalf of the appellant, is entitled to approach the executing Court with a request under R. 58.

[13] It is not disputed that an order passed under O. 21, R. 58, in default is as conclusive against the person making the objection as a decision on the merits, and the dictum in 11 Lah. 369[14] which is based on the observations of their Lordships of the Privy Council in 15 Cal. 521[15] has, so far as we know, never been contested.

[14] Not only in our own Court has it been held that an application asking that the proclamation of sale should be notified subject to the applicant's own mortgage, is one falling under R. 58 and not under R. 66. Other High Courts also have held the same view. I. L. R. (1939) 2 Cal. 291[16] is a case exactly parallel. In a single Judge decision of the Allahabad High Court reported in A. I. R. 1939 ALL. 657[17] it was decided that where the application asks for a notification of an encumbrance only, then the matter is not one to be decided under R. 62, read with Rr. 58 and 63, but under R. 66. If, on the other hand, the claim is that the sale is subject to the applicant's mortgage, it was held that the matter would fall under R. 58 and not under R. 66. In 49 ALL. 903[18] the applicability of Rr. 58 and 63 and Art. 11, Limitation Act, was stated in emphatic terms, with which we are in full and respectful agreement. Again, in 9 Rang. 367[19] it was stated that an application by a person that the sale of the property attached should be subject to his mortgage was a claim under R. 58.

[15] The reason for the distinction between Rr. 62 and 66 is clear and has been explained in I. L. R. (1939) Nag. 665[6] where it is said that

"a distinction is made between an express order directing the property to be sold subject to a mortgage and cases where notice of an alleged mortgage is given in the sale proclamation. In the former case a prospective purchaser is told exactly what he is buying; in the latter he takes a chance that the mortgage which is alleged to exist may prove unenforceable either from inherent defects or possibly because it may have been satisfied by the time of the sale . . ."

[16] Order 21, R. 66, sets out what has to be done when a sale by public auction is proclaimed. In sub-r. 2 (c) it is stated that such proclamation must specify as fairly and accurately as possible "any incumbrance to which the property is liable." In sub-r. 2 (e) it is stated that the proclamation must specify every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. It is plain that the existence of a mortgage to be notified would fall under (e) and the request that the sale be proclaimed subject to the applicant's mortgage would come under sub-r. (c). Any investigation into the claims falling under sub-r. (e) falls to be dealt with under sub-r. (4) of R. 66, whereas any claim which would fall under (c) would be dealt with under R. 62. Nothing can be entered in respect of sub-r. (c) unless the Court is satisfied that the property is in fact subject to a mortgage or charge and thinks fit to continue the attachment subject to such mortgage or charge.

[17] Now EX. P-10 from its very wording falls definitely under R. 58 and the decision dismissing the application as having been made too late is as effective as a decision under R. 62 would have been declaring that the Court was not satisfied as to the existence of the mortgage. The application was drawn up by an experienced pleader and bears the heading "Under O. 21, R. 58, Civil P. C. The applicant above-named begs to submit as under," and the final clause runs :

"This act of the decree-holder shall invite needless and unnecessary litigations afterwards and hence it is most humbly prayed that the Court be pleased to order the sale of the property subject to the applicant's mortgage incumbrance."

There could not, on the authorities, be a clearer case of a prayer asking that the matter be decided under the provisions of R. 62 with the result that if the application were successful, the property would be put up to sale subject to the mortgage being a definitely existing incumbrance to which the property would be liable under sub-r. 2 (c) of R. 66.

[18] There remains the argument that in any case Nimba should have been allowed his claim in respect of the occupancy fields, from which Mahadeo had been ejected subsequent to the decree obtained by Nimba on his mortgage suit. The contention is, and 28 N. L. R. 166[20] is cited in support of it, that although the proprietary right in the *sir* lands might have passed to Narayan, nevertheless Nimba was still entitled to enforce his mortgage in respect of the ex-proprietary occupancy holding of which Mahadeo

had become an occupancy tenant. This of course pre-supposes that the mortgage covered cultivating rights in *sir* as well as proprietary and that the sanction of the revenue authorities had been obtained for the mortgaging of those cultivating rights. The mortgage is not on the record and there is no evidence to show that such an extensive and somewhat unusual permission was given. The only mention of this anywhere is in the copy of the application filed by Mahadeo during the year 1931 asking for permission to sell his village share with 48 acres of *sir* land attached to it. It is stated there :

"In the year 1928 the applicant's proprietary share and *sir* fields were mortgaged with Nimbha Patel in lieu of Rs. 7500."

That in itself is not clear whether the cultivating rights were also mortgaged along with the proprietary rights and there is no guarantee that the statement in that application is true. Objection was also taken to the fact that Narayan did not attach in pursuance of his decree the *sir* fields of Mahadeo. It is perfectly clear, however, that Narayan attached the whole village share which included proprietary rights and Mahadeo became an occupancy tenant of these fields from which he was subsequently ejected. Even if the appellant's contentions were established, they would be of no avail in view of the conclusive decision against him passed in 1931 that his mortgage was of no effect.

[19] Finally, we may add that no case has been cited before us for the proposition that an order passed under Rr. 58 and 63 is conclusive (unless a suit is brought within one year) applies only when the person concluded is the plaintiff and not the defendant. We see no reason for holding that the conclusiveness of a decision where the applicant makes use of the summary remedies provided and fails to abide by the conditions thereby imposed should be waived in favour of the defendant against whom a declaratory suit is necessary.

[20] The result is that the appeal fails and is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 373 *[C. N. 127.]*

SHEVDE J.

Rodya Chandu — Defendant 1—Appellant v. *Mt. Saru w/o Tukaram Marathe, Plaintiff and another, Defendant 2 — Respondents.*

Second Appeal No. 531 of 1947, Decided on 30-10-1947, from appellate decree of Addl. Dist. Judge, Basim, D/- 3-7-1947.

(a) Berar Alienated Villages Tenancy Law (1921), S. 48 (1) — Hindu widow succeeding to permanent tenancy of husband — Surrender of tenancy by widow to landlord — No legal necessity or benefit to estate—Reversioner is not bound.

A surrender in favour of the landlord by a Hindu widow succeeding to the permanent tenancy holding as heir to her deceased husband and getting the property as widow's estate, cannot bind the reversioner where it is neither for legal necessity nor for benefit of the estate : 17 A.I.R. 1930 Nag. 65, *Rel. on.* [Para 6]

(b) Berar Alienated Villages Tenancy Law (1921), Ss. 48 (4) and 49 (1) — Transfer in favour of landlord is not covered by S. 48 (4) — Jurisdiction of civil Court is not ousted.

The transfer that is contemplated by the provisions of S. 48 (4) is a transfer in favour of a person othe than the landlord and it is only the transfer in favour of another person which attracts the provisions of S. 49 (1). Hence, a surrender of permanent tenancy holdin by a widow in favour of the landlord under S. 36 does not fall within the purview of S. 48 (4), even assuming that the surrender was in the nature of a transfer. The jurisdiction of the civil Court therefore to entertain a claim to set aside the surrender is not barred under S. 49 (1). [Para 7]

Case referred :—

1. ('30) 26 N.L.R. 1 : 17 A. I. R. 1930 Nag. 65: 123 I.C. 449, Laxman v. Bhulabai.

V. V. Kekre — for Appellant.

Judgment. — This second appeal has been preferred by defendant 1 Rodya, against the decree of the lower appellate Court confirming the decree of the Court of first instance in plaintiff's favour.

[2] It is admitted that the plaint-mentioned survey number 65/1 was held by one Hari as a permament tenant of *mauza* Fulambari Izara, in the Mangrulpir taluq of the Akola district. This Hari died some time in 1938, leaving behind two married daughters by name Limba Bai and Saru, who is now respondent 1 and a widow Bhagi. The survey number was inherited by Mt. Bhagi and she surrendered it to the *izardar* landlord by a registered deed of surrender dated 24th October 1941 ; that deed is EX. D 1. The landlord let it out to defendant 1 now appellant, as a permenant lessee on the same day.

[3] Saru as a reversioner commenced this suit for immediate possession of the survey number, on the ground that the alleged surrender was neither for legal necessity, nor for the benefit of the estate and was not binding on her. She claimed immediate possession of the survey number, because her mother Bhagi re-married soon after the surrender, and the inheritance had opened. She claimed a preferential right of inheritance, as against her sister Limba Bai, on the ground that the latter was provided for, while she herself was not.

[4] The appellant contested the suit on various grounds, but the learned trial Judge overruled the defence and decreed the plaintiff's claim for possession of the plaint-holding and that decree was upheld by the first appellate Court. Defendant 1 has now preferred this second appeal.

[5] The appellant has raised certain points of law, based upon the provisions of Ss. 48 and 49,

Berar Alienated Villages Tenancy Law. So far as other questions are concerned, they are questions of fact and the concurrent findings of the two Courts below thereon are conclusive in second appeal. The points of law raised are absolutely new pleas, which were never raised any time in the lower Courts. In the first instance, it is not open to the appellant to raise these new pleas, for the first time, in second appeal, and thus expose the successful party to the brunt of a new attack, but since they have been raised as points of law, I am inclined to entertain them and point out that there is no force in those contentions.

[6] It has been laid down under S. 48 (1), Berar Alienated Villages Tenancy Law (hereinafter mentioned as the B. A. V. T. Law) that on the death of a permanent tenant, the succession to his holding shall be regulated by the personal law of the deceased. In this litigation the parties are admittedly governed by Hindu law. Hari's widow Bhagi (also called Bhimi) succeeded to the permanent tenancy holding, as heir to her deceased husband, and got the plaint property as widow's estate. It cannot, therefore, be contended that the alleged surrender by Bhagi in favour of the landlord could bind the reversioner, under Hindu law, if it was neither for legal necessity nor for benefit of the estate. It, therefore, follows that the plaintiff, as a reversioner, is entitled to challenge the surrender successfully and claim possession of the holding now in dispute.

[7] It has been contended by the learned counsel for the appellant that the surrender in question amounts to a transfer within the meaning of S. 48 (4) of the B. A. V T. Law and hence the civil Court has no jurisdiction to entertain the plaintiff's claim for setting aside the transfer under S. 49 (1) of the B. A. V. T. Law. I do not think that the surrender in favour of the landlord falls within the purview of S. 48 (4) of the B. A. V. T. Law. It was a surrender by the widow Bhagi in favour of the landlord under S. 36 of the B. A. V. T. Law. Even assuming for the sake of argument that the surrender was in the nature of a transfer still that transfer was undoubtedly in favour of the landlord. The transfer that is contemplated by the provisions of S. 48 (4) of the B A. V. T. Law is a transfer in favour of a person other than the landlord, and it is only the transfer in favour of another person which attracts the provisions of S. 49 (1) of the B. A. V. T. Law. The provisions of S. 49 (1) of the B. A. V. T. Law run thus :

"If a permanent tenant parts with any portion of his right in any land in contravention of S. 48, any such person as would be entitled to inherit his right in the holding in the event of his death without nearer heirs, or, failing such person, the landlord from whom the permanent tenant held the land, may appiy to a Revenue-officer, within two years from the date on which, in pursuance of the transfer the tenant parted with possession of the land, to be placed in possession . . . . ."

It is quite clear to my mind that the remedy, provided for, by the provisions of S. 49 (1) of the B. A. V. T. Law of seeking the aid of Revenue-officer, for setting aside the transfer and to recover possession of the tenancy land relates only to a transfer in favour of a person other than the landlord. Under the said provisions the primary right for setting aside the transfer under S. 48 (4) of the B. A. V. T. Law and claiming possession, vests in the heirs of the transferor, and failing such heirs, the right vests in the landlord. In other words, the right of setting aside the transfer and claiming possession through the medium of the Revenue Courts is conferred upon the heirs and, failing such heirs, on the landlord. Both have been placed on the same footing for the purpose of obtaining the necessary redress. It is, therefore, beyond question that the transfer covered by the provisions of S. 48 (4) of the B. A. V. T. Law cannot be, in the nature of things, a transfer or a surrender in favour of the landlord. Therefore, in my opinion, the surrender by the widow Bhagi in favour of the landlord, not being a transfer, within the meaning of S. 48 (4) of the B. A. V. T. Law, the jurisdiction of the civil Court is not barred at all.

[8] The surrender by the widow Bhagi was an act of alienation on her part without legal necessity or benefit to the estate and consequently it was not binding upon the plaintiff reversioner, on the principles laid down in 26 N. L. R. 1.[1] The decision of both the Courts below decreeing the plaintiff's claim for possession of the plaint field is perfectly correct, and the appeal before me fails and is dismissed summarily without notice to the respondents under O. 41, R. 11, Civil P. C.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 374 *[C. N. 128.]*

POLLOCK J.

Devidas Ganpati and others — Judgment-debtors — Appellants v. *Shree Bala Saheb Sansthan Old Balaji, Basim and others — Decree-holders — Respondents.*

Misc. Appeal No. 163 of 1947, Decided on 12-1-1948, from order of Addl. Dist. Judge, Basim, D/- 16-9-1947.

Civil P. C. (1908), O. 21, R. 2 — R. 2 applies to decree for ejectment.

The words "the decree" in O. 21, R. 2 refer to a decree of any kind. Order 21, R. 2, therefore, applies to a decree for ejectment : 13 A. I. R. 1926 Mad. 749, *Dissent.* ; *Case law referred.* [Para 2]

Annotation: ('44-Com.) Civil P. C., O. 21, R. 2 N. 4.

Cases referred:—

1. ('26) 49 Mad. 716 : 13 A. I. R. 1926 Mad. 749 : 95 I. C. 731, Narayanasami Naidu v. Rangasami Naidu.

2. ('81) 6 Cal. 786, Baba Mohamed v. Webb.
3. ('28) 15 A. I. R. 1928 Cal. 715: 117 I. C. 833, Shaikh Niamat v. Shaikh Jalil.
4. ('22) 46 Bom. 226 : 9 A. I. R. 1922 Bom. 380 : 64 I. C. 490, Gharry v. Gowrya.
5. ('35) 14 Pat. 488 : 22 A. I. R. 1935 Pat. 385 : 155 I. C. 976, Haribar Prasad Narain Singh v. Gopal Saran Narain Singh.
6. ('36) 23 A. I. R. 1936 Lah. 842 : 165 I. C. 358, Shadi v. Ram Ditta.

Y. P. Verma — for Appellants.

Judgment.—The respondents obtained a decree against the appellants to eject them from certain land. When the decree-holders sought to execute the decree the judgment-debtors contended that there had been a subsequent agreement by which the judgment-debtors were to be allowed to continue in possession. The lower Courts held that the judgment-debtors were trying to plead an adjustment that had not been certified and that it was not open to them to do so.

[2] The question is whether O. 21, R. 2, Civil P. C. applies to a decree for ejectment. The rule runs as follows:

"Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court. . ."

The Madras High Court has always taken the view that this rule applies only to a decree under which money is payable: *see* 49 Mad. 716.[1] The contrary view has been taken in 6 Cal. 786,[2] A. I. R. 1928 Cal. 715,[3] 46 Bom. 226,[4] 14 Pat. 488[5] and A. I. R. 1936 Lah. 842[6] As the rule originally stood it ran: 'Where any money payable under a decree is paid out of Court, etc.' The words 'of any kind' appear to have been inserted in order to establish the view taken by the Calcutta High Court as opposed to that of Madras, and with all respect to the decision in 49 Mad. 716,[1] it appears to me that the words 'the decree' refer to a decree of any kind. The lower Court's decision must accordingly be upheld, and the appeal is dismissed without notice to the respondents.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 375 *[C. N. 129.]*

GRILLE C. J. AND HIDAYATULLAH J.

Mt. Raliyatbai w/o Khimjee —Plaintiff—Appellant v. *Kanhaiyalal Birdichand and others—Defendants—Respondents.*

First Appeal No. 60 of 1941, Decided on 1-12-1947, from decree of Addl. Dist. Judge, Khandwa, D/- 15-4-1941.

Civil P. C. (1908), O. 21, R. 63—Suit under, after rejection of claim—Burden of proof — Burden of establishing good faith of transaction on which plaintiff relies is on plaintiff.

When a suit is instituted after the summary rejection of a claim under O. 21, R. 58, the onus of establishing that the transaction on which the suit is based was entered into in good faith lies on the plaintiff : *Case law discussed.* [Paras 6 and 7]

Where the circumstances surrounding the execution of the document from which the plaintiff's title is said to be derived are not free from suspicion the burden of proving that the transaction evidenced by the document was a *bona fide* transaction for valuable consideration lies heavily upon the plaintiff: 30 A. I. R. 1943 Cal. 534, *Foll.* [Para 8]

Annotation.—('44 Com.), Civil P. C., O. 21, R. 63, N. 19.

Cases referred :—

1. ('27) 5 Rang. 852 : 14 A. I. R. 1927 P. C. 237 : 105 I. C. 788 (P. C.), V. E. A. R. M. Firm v. Maung Ba Byin.
2. ('37) 24 A. I. R. 1937 Nag. 9 : 169 I. C. 449, Jagoba v. Anandrao.
3. ('28) 7 Pat. 777 : 15 A. I. R. 1928 Pat. 434 : 112 I. C. 371, Gillu Mal v. Firm Manohar Das Jai Narain.
4. ('29) 8 Pat. 890 : 16 A. I. R. 1929 Pat. 579 : 119 I. C. 74, Mahadeo Missir v. Ramparshad.
5. ('34) 21 A. I. R, 1934 Nag. 253 : 152 I. C. 441, Pandurang v. Tukaram.
6. ('32) 55 Mad. 748 : 19 A. I. R. 1932 Mad. 302 : 137 I. C. 879, Appathurai Chettiar v. Vellayan Chettiar.
7. ('37) I. L. R. (1937) Nag. 291 : 24 A. I. R. 1937 Nag. 1 : 167 I. C. 48, Kasturchand v. Wazir Begum.
8. ('47) 34 A. I. R. 1947 P. C. 98, Annamalai Chettiar v. Ramanathan Chettiar.
9. ('20) 7 A. I. R. 1920 Nag. 93 : 55 I. C. 72, Raghunath v. Nanhu.
10. ('19) 15 N. L. R. 68 : 6 A. I. R. 1919 P. C. 6 : 50 I. C. 264 (P. C.), Ghunsham Das v. Umapershad.
11. ('38) 25 A. I. R, 1938 P. C. 290 : I. L. R. (1939) Kar. P. C. 31 : 178 I. C. 476 (P. C.), Mohammad Ismail v. Hanuman Parshad.
12. ('43) 30 A. I. R. 1943 Cal. 534 : 208 I. C. 411, Zeissen & Co., Ltd. v. Satya Charan.

M. R. Bobde and R. S. Dabir—for Appellant.

V. R. Sen and P. R. Padhye—for Respondents.

Grille C. J.—This is an appeal by an unsuccessful plaintiff who sued for a declaration that a house situated in Khandwa was not liable for attachment and sale in execution of a decree by defendant 1 Seth Kanhaiyalal against the three remaining defendants. In appeal the only respondent is Kanhaiyalal and the decree has proceeded *ex parte* against his judgment-debtors.

[2] Kanhaiyalal, who is the managing partner of the firm Balmukand Hanumanbax of Khandwa, had obtained a decree in Suit No. 818 of 1935 on 16th October 1937 against the three defendants who are brothers and a fourth brother Narshidas, who is now dead, for some Rs. 14,000 and in execution of that decree on 1st February 1938 he attached the house now in dispute. On 12th January 1940, that is to say nearly two years later, the plaintiff-appellant Mt. Raliyatbai launched an objection in the executing Court under the provisions of O. 21, R. 58, Civil P. C. The objection was dismissed on the ground that there had been undue delay, and the suit out of which this appeal arises was filed 5 months later on 30th August 1940.

[3] The plaintiff's contention was that in the year 1933 defendant 2 Jiwandas, who is her son-in-law, and his brothers approached her for a loan of Rs. 8000 in order to pay off a pressing claim by some Bombay creditors who had a charge decree over their house. She advanced the money on the house being mortgaged to her. The mortgage was repayable on 7th December 1938, but shortly before this, as nothing had been paid on the mortgage, she and the mortgagors agreed to refer the matter to arbitration and an award was given by the arbitrator Mr. V. R. Joshi, a pleader of Khandwa, on 10th November 1938 on applications made to him by both parties on the previous 13th October. The award was then filed in the Court of the Additional District Judge, Nimar, who passed a decree in terms of the award whereby the house was to be transferred to her and a sale-deed executed. She contended that the attachment by Kanhaiyalal was subsequent to her mortgage, and the sale, although subsequent to the attachment, was not a private sale but one in pursuance of the order of the Court and therefore the transaction was not hit by S. 64, Civil P. C. The defendant Kanhaiyalal (the other defendants making no appearance) contended that the whole transaction, both of the sale and of the mortgage, was fictitious; that she lent no money in 1933 as she was not in a position to lend any money and the fictitious mortgage was arranged in order to save the property from the hands of Kanhaiyalal who even at that time was a creditor of the four brothers. After the attachment an unnecessary reference to arbitration was made resulting in a decree in a civil Court in order to avoid the effect of S. 64, Civil P. C., and consideration for the sale-deed subsequently executed in May 1939 was not the satisfaction of the mortgage since no mortgage really existed. The trial Court found in the defendant's favour, holding that the plaintiff had failed to establish that the transaction was in good faith and finding that the proceedings were the result of collusion between the plaintiff and her mortgagors with the intention of shielding the property from the long established creditor Kanhaiyalal.

[4] In appeal it was contended that the burden lay not on the plaintiff but on the defendant to establish that the sale-deed consequent on the mortgage and the mortgage were without consideration and that in any case the plaintiff has, by her evidence in opening the case, discharged the necessary primary burden and that the burden shifted to the defendants.

[5] The contention that the burden throughout lay on the defendants is based on the Privy Council decision in 5 Rang. 852,[1] where, according to the headnote, it would appear that their Lordships had laid down that when a suit is instituted under O. 21, R. 63, Civil P. C. and the plaintiff is an ostensible owner of the property under a registered sale-deed the burden to show that the transaction was a fraudulent one lies on the defendant. It is contended that this was followed by Stone C. J. in A. I. R. 1937 Nag. 9,[2] and also in 7 Pat. 777.[3] The brevity of their Lordships' judgment and the further compression in the headnote have led to an erroneous interpretation of their Lordships' view. The matter was fully examined in 8 Pat. 890,[4] where the learned Judges had the advantage of seeing the judgment of the Rangoon High Court appealed from in 5 Rang. 852,[1] and it was shown that it was established—and their Lordships of the Privy Council relied on the fact that it was established— that by far the greater part of the consideration had actually passed and that there was no other evidence in the case. One of the Judges in 8 Pat. 890,[4] was also a member of the Bench which decided 7 Pat. 777,[3] and there is an express recantation in 8 Pat. 890,[4] of the view taken in 7 Pat. 777.[3] The question was also considered by Gruer A. J. C. in A. I. R. 1934 Nag. 253,[5] who found himself in agreement with the Patna view and also that expressed in similar terms in 55 Mad. 748.[6] A. I. R. 1934 Nag. 253[5] was considered by Stone C. J. in A. I. R. 1937 Nag. 9,[2] but the learned Chief Justice held that although in essence Gruer A. J. C.'s view that the burden shifted because the plaintiff had succeeded in proving the passing of consideration was correct he nevertheless preferred to say that he thought that their Lordships of the Privy Council in 5 Rang. 852,[1] held that the burden shifted earlier when the plaintiff proved a duly registered sale deed containing recitals showing consideration. The opinion, however, is actually *obiter* because the learned Chief Justice proceeded to find that there was no difficulty in the case before him since, even on the assumption that the burden of proof lay upon the plaintiff in the matter of proving the passing of consideration the plaintiff had discharged it, and we would note that in I. L. R. (1937) Nag. 291[7] a case decided by a Divisional Bench to which Stone C. J. was a party, three weeks after A. I. R. 1937 Nag. 9[2] the Court took the view that the burden of proof lay on the plaintiff to show that the transaction was for consideration and was a real transaction and that in the event the plaintiff had successfully discharged it.

[6] The learned counsel for the plaintiff-appellant has also contended that in the latest decision of the Privy Council in A. I. R. 1947 P. C. 98[8] the matter has been finally decided in his favour. In our opinion this is not so. What was held was that when the plaintiff had established

by *prima facie* evidence that the consideration for the sale deed in respect of the property in suit had really passed as stated in that deed the burden would be on the objector, that is to say the attaching decree-holder, to repudiate the proposition that the sale was genuine. Their Lordships' judgment does not state that a recital is sufficient, but that proof is necessary on the part of the plaintiff to show that the consideration *as stated in the deed* had really passed, that is to say there must be evidence supporting the recitals in the deed which in themselves are not enough. This in effect was held in this Court as long ago as 1920 by Drake-Brockman J. C. in A.I.R. 1920 Nag. 93.[9] In 15 N. L. R. 68[10] their Lordships of the Privy Council held that when a suit is instituted after the summary rejection of a claim under S. 278, Civil P. C., now O. 21, R. 58, the onus of establishing that the transaction on which the suit is based was entered into in good faith lies on the plaintiff and that decision of their Lordships still holds good, and there is nothing in the Privy Council cases which have been cited on behalf of the appellant which would go to negative that proposition. There is one case which was cited not on behalf of the appellant but by the respondents, A. I. R. 1938 P. C. 290[11] wherein it was stated in passing that:

"Apparently it has been the settled practice of the Indian Courts, when objections to an attachment in execution have been disallowed, and a suit has been filed by the objector under O. 21, R. 63 of the Code, to put the onus of proving the *bona fides* of any transaction upon which the objector relies upon him in his capacity of plaintiff. This is a matter which may possibly require further consideration when the question of onus is really material."

[7] The question was not pursued as in the case before their Lordships the facts were fully established and the inferences from them were clear. That indicates clearly what the law at present is, and we have not been shown any decision which modifies the law, and if this expression of opinion is to be analysed closely it may be considered that the words "the onus of proving the *bona fides* of any transaction upon which the objector relies" may well be considered to be in contradistinction of the necessity of proving the *bona fides* of the particular transaction on which the objector relies. It follows then that the burden of proof was rightly cast upon the plaintiff.

[8] The question then arises whether that burden has been discharged. The plaintiff has succeeded in establishing that the mortgage deed of 1933 was duly executed and registered as was the sale deed of 1939, and it is not in dispute that an award was made on a submission to private arbitration in 1938 and that a decree was passed in terms of the award. No evidence was afforded in respect of the proof of passing of consideration for the mortgage except the statement of Phulchand, one of the attesting witnesses, who stated that the executants admitted to have received consideration. Neither the plaintiff mortgagee nor any of the three surviving mortgagors (Narshidas is dead) has appeared to give evidence, and they would certainly be the best persons to do so. The circumstances were known to them and if the burden of proving the non-passing of consideration were placed on the defendant he would be, as has been observed in several cases, in the difficult position of attempting to prove a negative. There are circumstances attending both the execution of the mortgage and the eventual sale of the house —which latter event is the legal ground for the defendant's attack although it is impossible to consider the question of the passing of consideration for the sale deed without reference to the earlier transaction—which are highly suspicious, and the trial Court has commented on them. In A. I. R. 1943 Cal. 534[12] it was held by a Divisional Bench of the Calcutta High Court that

"in a suit under O. 21, R. 63 where the circumstances surrounding the execution of the document from which the plaintiff's title is said to be derived are not free from suspicion the burden of proving that the transaction evidenced by the document was a *bona fide* transaction for valuable consideration lies heavily upon the plaintiff."

[9] There are such circumstances here, and we agree with the learned Judge of the trial Court that the plaintiff has not succeeded in dissipating them. (Their Lordships after discussing the evidence proceeded.) We hold that there was no consideration by the cancellation of the mortgage as the mortgage in fact had never existed. Admittedly Kanhaiyalal was a creditor even before 1933, and documents have been filed showing that he was pressing for money in 1932. An attempt has been made to save the consequences of an attachment and subsequent sale by this fictitious sale of the house for which we consider the consideration was non-existent as the mortgage of 1933 was equally fictitious.

[10] The result is that the appeal fails and is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 377 *[C. N. 130.]*

POLLOCK AND PADHYE JJ.

Chandiprasad Deokeran — Defendant 2 —Appellant v. *Jugulkishore Dixit and others, Plaintiffs and others, Defendants — Respondents.*

First Appeal No. 69 of 1940, Decided on 16-12-1947, from decree of Sub-Judge, 1st Class, Hoshangabad, D-/ 23-1-1940.

(a) Limitation Act (1908), Art. 60 — 'Banker' meaning of — It does not necessarily mean professional banker — Person acting as banker in relation to particular customer or customers is banker.

The word 'banker' as used in Art. 60 does not necessarily mean a 'professional' banker. It applies equally to a trader who acts as a banker in relation to a particular customer or customers. It is not necessary that the person with whom the amounts are credited should necessarily be a banker in general, or that he should carry on business as a banker exclusively. A man might become a banker or place himself in the position of a banker with regard to a particular customer, and if the dealings between the lender and the borrower are such that the Court is satisfied that it could be said that the borrower was in the position of a banker to the lender, then the money so lent could be considered as a deposit: 4 A. I. R. 1917 Mad. 916 and 13 A. I. R. 1926 Bom. 168, *Rel. on.* [Para 9]

Annotation : ('42-Com.) Lim. Act, Art. 60 N. 3.

(b) Limitation Act (1908), Arts. 60, 57 and 59 — Deposit or loan—Advance of money to another on term that it should be kept till asked for—Transaction is deposit and not loan.

The word 'deposit' has not been used in a technical sense, that is, the return of the goods or money in specie. [Para 12]

Where a Court finds that plaintiff advanced money to another person and the intention of the parties was that that person should keep the money till asked for by the person advancing it, the transaction is a deposit and not a loan, and a suit for recovery of the same would be governed by Art. 60 and not by Art. 57 or Art. 59. [Paras 13, 14]

Annotation: ('42-Com.) Lim. Act, Art. 60 N. 2 Pt. 2.

(c) Civil P. C. (1908), O. 41, R. 22 — Cross-objection against whom may be filed — Cross-objection against co-respondent can be allowed only if it involves questions common to both appellant and co-respondent — Cross-objection solely directed against co-respondent is not maintainable.

The right of the respondent to urge a cross-objection should be limited to his urging it against the appellant and it is only by way of an exception to the general rule that one respondent may urge cross-objections as against other respondents, the exception holding good, among other cases, in those in which the appeal by some of the parties opens out questions, which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents; in other words, only such questions can be raised by way of cross-objections as are common both to the appellant and the co-respondents.

Hence a cross-objection not directed against the appellant solely or against the appellant and co-respondent is not maintainable: *Case law referred.* [Para 21]

Annotation : ('44-Com.) Civil P. C., O. 41, R. 22, N. 14 Pts. 1 to 7.

Cases referred :—

1. ('16) 39 Mad. 1081 : 4 A. I. R. 1917 Mad. 916 : 32 I. C. 965, Subrahmanian Chettiar v. Kadiresan Chettiar.
2. ('26) 13 A. I. R. 1926 Bom. 168 : 93 I. C. 215, Bhimanna Kumaji v. Venichand Fattechand.
3. ('27) 29 Bom. L. R. 427:14 A. I. R. 1927 Bom. 433: 102 I. C. 145, Hirabai v. Dhanjibhai.
4. ('34) 15 Lah. 242 : 21 A. I. R. 1934 Lah. 42 : 151 I. C. 712, Gulab Rai Gujarmal v. Sandhi.
5. ('35) 22 A. I. R. 1935 Mad. 734 : 157 I. C. 274, Murugappa v. Ramanathan.
6. ('36) 17 Lah. 557 : 23 A. I. R. 1936 P. C. 171 : 63 I. A. 279 : 162 I. C. 454 (P.C.), Mahomed Akbar Khan v. Attar Singh.
7. ('44) I. L. R. (1944) Nag. 462:31 A. I. R. 1944 Nag. 101 : 212 I. C. 76, Chandrabhagabai v. Tikubhai.
8. ('40) 27 A. I. R 1940 P. C. 132 : I. L. R. (1940) Kar. P. C. 277 : 189 I. C. 444 (P.C.), Suleman Haji v. Haji Abdulla.
9. ('45) 20 Luck. 45 : 31 A. I. R. 1944 Oudh 130 : 215 I.C. 295, Hari Saran Das v. Rudra Pratap Narain Singh.
10. ('46) 33 A. I. R. 1946 All. 395 : I. L. R. (1946) All. 317, Mahomed Hasan v. Mahomed Hamid Hasan.
11. ('96) 9 C. P. L. R. 62, Asaram Sukal v. Ganpat Singh.
12. ('01) 14 C. P. L. R. 46, Ramratan Harlal v. Hiralal.
13. ('15) 38 Mad. 705 : 2 A. I. R. 1915 Mad 648 : 27 I. C. 323 (F.B.), Munisamy v. Abbu Reddy.
14. ('23) 10 A. I. R. 1923 Lah. 39 : 69 I. C. 330, Chhaju v. Qutab Din.

G. R. Mudholkar — for Appellant.

J. K. Dixit, Respondent No. 1 in person, J. P. Dwivedi (for Nos. 4 and 5) and R. J. Bhave for (Nos. 9 (a) and 9(b)) — for Respondents.

Judgment.—This is a first appeal by Chandiprasad, defendant 2, against whom and other defendants in the suit the plaintiffs' claim is decreed by the trial Court. None of the other defendants has preferred an appeal against the decree but defendants 4, 5 and 6 (who are respondents 8, 9 and 10 in this appeal) have filed a cross-objection praying that as they were not personally liable for the plaintiffs' claim the decree passed against them personally should be set aside.

[2] The plaintiffs' case is that defendant 1, the firm 'Harcharan Ram Gulam' at Itarsi, was a partnership firm of which defendants 2, 3 and Sitaram Rawat were partners and after the death of Sitaram in 1932 defendants 2 to 6 were the partners. This firm carried on business at Itarsi as commission agents and bankers. It used to receive deposits from persons who were on terms of intimacy with the partners. Plaintiff 1, who was one of such persons and who had full trust in the partners of the firm, began depositing his savings with the firm in the name of his deceased brother and brother's son from *sambat* 1979 (1923 A.D.) under condition that deposits should carry interest at 9 P.C.P.A. and the amounts should remain in deposit until the plaintiffs wanted to withdraw them.

[3] On 20-10-1937, when the present suit was filed, Rs. 9948-4-6 (including interest) was the amount in deposit with the defendant-firm. It was alleged that the defendants did not return the deposits in spite of demands from about six months before the institution of the suit, and that the cause of action for the suit accrued on 10-10-1937, the date of last demand.

[4] We are concerned in this appeal only with the defence of defendant 2, the appellant. His main defence was that on 22-10-1934 the defen-

dant-firm was dissolved with the consent of all partners and it was settled that defendants 4 to 6 should take over all assets and liabilities of the firm and absolve defendants 2 and 3 from all liabilities to the creditors of the firm, and that plaintiff 1, who was one of the creditors of the firm, was aware of the fact of dissolution and the terms thereof and accepted defendants 4 to 6 as his sole debtors and took promissory note from them for the amount due from the firm on 22-10 1934. Defendants 2 and 3 were absolved by plaintiffs from liability. Defendant 2 further contended that the transactions between the plaintiffs and defendant-firm were in the nature of loans and not of deposits. The firm used to receive deposits only from family members of defendants 2, 4, 5 and 6 and from no others. After 22-10-1934, defendants 4, 5 and 6 assumed management of the firm as its sole proprietors and they alone were liable to the plaintiffs for such amounts as might be found due to them. In the additional written statement, dated 25-2-1938, he pleaded that the plaintiffs advanced by way of loans to the firm Rs. 11,863-12-3 up to 22-10-1934, and they received repayments amounting to Rs. 11,231-7-3, including repayment of Rs. 3240-8-9 made by Kanhaiyalal after 22-10-1934, with the result that Rs. 632-5-0 only was due to the plaintiffs on 22-10 1934 and the plaintiffs could therefore claim nothing in excess of *damduppat* of that amount, that is, Rs. 1264-10-0. In a further statement, dated 21-3-1938, defendant 2 pleaded that the plaintiffs advanced after 22-10-1934, that is, between 20-2-1935 and 10-12-1935, Rs. 3850; that these were debts borrowed by Kanhaiyalal Rawat, defendant 4, on his own account after the dissolution of the firm; and that defendant 2 was not liable for the same, as Kanhaiyalal Rawat had no authority to borrow loans on behalf of defendants 2 and 3. It was further pleaded that the plaintiffs' claim was wholly, or, at any rate, substantially barred by limitation as the amount due was not acknowledged by a duly authorised agent of the firm at any time within three years of the date of suit. He asserted that in January or February 1935 he started partnership business with Rajaram as his partner at Itarsi and cut off all connections with the defendant firm. The plaintiffs advanced amounts to this new firm.

[5] It is, as stated above, not necessary to take into account the statements of the other defendants. It is merely sufficient to note that defendant 3 supported in general the pleadings of defendant 2 (the appellant); while defendants 4, 5 and 6, contrary to the stand taken by defendants 2 and 3, contended that the partnership was dissolved on 23-1-1932 on the death of their father Sitaram and that they demanded from the surviving partners of the firm, namely defendants 2 and 3, accounts of the dissolved firm. It was only in answer to these demands that on 22-10-1934 defendants 2 and 3 handed over all the account-books of the firm to defendant 4. They did not dispute plaintiffs' claim except for the amount of interest claimed in excess of 6 P. C. P. A. They also contended that they were not personally liable for the plaintiffs' claim.

[6] On these pleadings and on the evidence on record the learned Judge of the lower Court held that the firm was not dissolved either on the death of Sitaram on 23-1-1932 as alleged by defendants 4 to 6, or on 22-10-1934 as alleged by defendants 2 and 3. He also held it not proved that as a term of dissolution defendants 4 to 6 undertook to satisfy all the liabilities of the firm and to absolve defendants 2 and 3 from the same, or that the plaintiffs knew of the alleged dissolution on 22-1 1934 and of the alleged agreement between the partners whereunder defendants 2 and 3 were absolved by defendants 4 to 6 from all liabilities due to the firm and the plaintiffs accepted defendants 4 to 6 as their sole debtors and took promissory notes from them for the amounts due. The lower Court held that under S. 45, Partnership Act, the partners continued to be liable to third persons notwithstanding the alleged dissolution of the firm until public notice was given of the dissolution and that private knowledge or notice, not in compliance with S. 72 of the Act, did not absolve other partners from liability in connection with transactions done in the name of the firm. The learned Judge held on issue No. 6 that the amounts credited by the plaintiffs with defendant 1 were by way of deposits and that no question of limitation therefore arose as the suit was governed by Art. 60, Limitation Act. Defendants 2 and 3 were also held liable for the amounts received from the plaintiffs after 22-10-1934 as Kanhaiyalal received the same as the managing partner of the firm and not in his individual capacity. The Central Provinces Moneylenders Act did not apply to deposits and the plaintiffs were therefore entitled to claim interest at 9 P. C. P. A. as agreed. As a result of all these findings the plaintiffs' claim was decreed in full against the property of the defendant-firm in the hands of the receiver and also against partners, defendants 2 to 6 personally.

[7] The first question argued before us by the learned counsel for the appellant was whether the amounts in suit were advanced as loans or were deposits, in other words, whether the plaintiffs' suit was governed by Art. 57 or Art. 59 or by Art. 60, Limitation Act. Art. 60, as it stands now after the amendment of 1929, applies to money deposited under an agreement that it shall be

payable on demand, including money of a customer in the hands of his banker so payable. In paras. 1 and 2 of the plaint it was definitely alleged that the defendant-firm carried on business as bankers at Itarsi and it used to receive deposits from persons who were on terms of intimacy with the families of its partners. In para. 1 (a) of the written statement of defendant 2, dated 15-12 1937, Chandiprasad (the appellant) admitted para. 1 of the plaint, and as regards para. 2 (a) he pleaded that the firm did receive deposits but only from the family members of defendants 2, 4, 5 and 6 and from no others.

[8] On 21-9-1938 the plaintiffs served interrogatories to be answered by defendant 2, and interrogatory No. 4 was 'Was the firm carrying on business of bankers and commission agents at Itarsi ?' Defendant 2 replied on 20-10-1938 as under:

"The firm was carrying on business of commission agents and *bankers* at Itarsi. The firm used to borrow money and give loans. It did not do the business of taking deposits excepting from the relatives of its partners."

The fact remains that it was admitted that the firm was carrying on business as bankers at Itarsi. When examined as a witness on 12-1-1940 Chandiprasad for the first time stated that the firm carried on *adat* business and never kept any deposits of anybody. In our view the fact that the defendant-firm was carrying on the business of a banker must be taken as admitted under O. 8, R. 5, Civil P. C., and it is no longer open to defendant 2 to deny this fact.

[9] The word 'banker' as used in Art. 60, Limitation Act, does not necessarily mean a 'professional' banker. It applies equally, as held in 39 Mad. 1081,[1] to a trader who acts as a banker in relation to a particular customer or customers. Similarly, in A. I. R. 1926 Bom. 168,[2] it was held that under Art. 60, Limitation Act, it is not necessary that the person with whom the amounts are credited should necessarily be a banker in general, or that he should carry on business as a banker exclusively. A man might become a banker or place himself in the position of a banker with regard to a particular customer, and if the dealings between the lender and the borrower are such that the Court is satisfied that it could be said that the borrower was in the position of a banker to the lender, then the money so lent could be considered as a deposit. These observations apply with full force to the present case. This case is cited with approval in 29 Bom. L. R. 427,[3] which is noted by the learned Judge of the lower Court in para. 27 of his judgment, and on the facts in that case, which were very similar to the facts in the present case, the learned Judge held that that was not a case of loans to the firm but that it fell within Art. 60, Limitation Act, being moneys of a customer in the hands of a banker payable on demand.

[10] In 15 Lah. 242[4] the plaintiff credited certain sums of money with the defendants, a firm of bankers. He withdrew amounts and made further deposits and accounts were made occasionally and balances were struck. It was held that the transactions in question commenced and continued to the end as between 'customer' and 'banker' and that Art. 60, Limitation Act, applied and not Art. 57. It was also held on those facts that the amounts credited were by way of deposits and the agreement to pay on demand, though not express, was implied from the course of dealings between the parties or the other circumstances of the case.

[11] In A. I. R. 1935 Mad. 734[5] where money was deposited with a Nattukottai Chetty and there was no evidence as to the terms upon which the transaction was entered into Stone J. held that there was a presumption that the Chetty was in the position of a banker and the person transacting with him was in a position of a customer and that the account was on the demand basis.

[12] The word 'deposit' is not defined in the Limitation Act and it does not appear that that word has been used in a technical sense, that is the return of the goods or money *in specie*. Such a meaning would be contrary to the ordinary usage of the language. Therefore, Art. 60 should be deemed to apply to a case where one man places money in the hands of another on the term that an equivalent sum has to be paid back on demand.

[13] In 17 Lab. 557[6] their Lordships of the Privy Council observed that the terms 'loan' and 'deposit' are not mutually exclusive. A deposit with a banker does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction, which is perhaps the most obvious, is that a deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositor would therefore seem to be a normal condition of the obligation of the depositee to repay. The decision in I. L. R. (1944) Nag. 462[7] is also to the same effect. In A. I. R. 1940 P. C. 132[8] their Lordships of the Privy Council reiterated their observations in 17 Lah. 557.[6] The result of all these decisions is that where a Court finds that plaintiff advanced money to another person and the intention of the parties was that that person should keep the money till asked for by the person advancing it, the transaction is a deposit and not a loan. (After discussing the oral

evidence with regard to deposits made by plaintiffs their Lordships agreed with the conclusion of the lower Court that the amounts credited by the plaintiffs were by way of deposit. The judgment then proceeds thus):

[14] Plaintiff 1 was originally a resident of Itarsi and he was in 1923 practising as a pleader at Hoshangabad. He had amounts credited in the Central Bank, Hoshangabad, as appears from Ex. P-5. He gradually withdrew those amounts and credited them with the defendant-firm. He also credited his subsequent savings with the firm and from time to time withdrew some amounts as required by him. He was on intimate terms with the partners and particularly with Sitaram, and he was also a legal adviser of the defendant-firm. It is not proved that the firm ever executed documents in favour of the plaintiffs or that it passed from time to time acknowledgments in order to keep the amounts within limitation. On several occasions plaintiff 1 himself, or somebody on his behalf, appears to have gone to Itarsi to credit amounts or to withdraw them. There is no occasion from 1923 to 1934 when the specific amount that was alleged to have been borrowed by defendant 1 was returned to the plaintiffs. Borrowing of a loan postulates that the borrower had an immediate necessity to borrow. The defendants could have established this fact from their account-books. These account-books have not however been produced; nor is any oral evidence adduced to prove that even on a single occasion the partners went to the plaintiffs to request them for an advance of a loan. The learned counsel for the appellant has no doubt contended that the course of dealings between the parties, as reflected in the *khata* of the plaintiffs, Ex. P-8, show that repayments were voluntary and not because of any demand by the plaintiffs. There is nothing on record to support this. It, however, appears from these extracts, Ex. P-8, pp. 157-A to 157-C of the paper book, that on many occasions amounts were credited by the hand of the plaintiffs or their clerk Murlidhar and the amounts withdrawn were also received personally by them, and this clearly indicates that it was a *khata* of deposits and withdrawals and not of debts and repayments. It does not appear that the defendant-firm which is said to be carrying on business on a large scale (*vide* 3 D. W. 1 and 3 D. W. 4) would stand in need of borrowing a petty amount such as Rs. 100 received by the defendant-firm on 11-2-1927. These are circumstances which support the plaintiffs' plea that the transactions between the parties were transactions of deposits and not of loans. If it was merely a case of loan it is difficult to believe that plaintiff 1, who was one of the leading legal practitioners at Hoshangabad, would not insist on defendants executing any document or acknowledgment and would allow his valuable claim to be barred by time. We, therefore, agree with the lower Court in holding that the amounts credited with the defendant-firm from time to time were by way of deposits and that the plaintiffs' suit is governed by Art. 60, Limitation Act.

[15] The next question that was argued was whether the partnership was dissolved on 22-10-1934 on which date, according to the appellant, defendants 2 to 6 were partners of the defendant firm. (After discussing the documentary as well as the oral evidence their Lordships came to the following conclusion:) We therefore confirm the finding of the lower Court that the alleged dissolution of the firm (defendant 1) on 22-10-1934 has not been proved.

[16] In view of the above finding, it is not at all necessary to go into the other questions, namely, the knowledge of the plaintiffs regarding the alleged dissolution of the firm and the acceptance of Kanhaiyalal by the plaintiff as his sole debtor in place of all the partners. The learned Judge of the lower Court has considered both these aspects. On issue 5, the learned Judge has discussed the oral evidence and held, disbelieving the evidence of the defendants and Kashiram (2 D. W. 3) and Amarchand (3 D. W. 5), that the plaintiffs were informed, or that they had knowledge, of the alleged dissolution of the firm, and we have hardly anything to add to the verdict of the learned Judge on this evidence. We further agree with the learned Judge that this issue does not in fact arise as there is no plea by the defendants that they gave any public notice as required by S. 45, Partnership Act.

[17] There is also no reliable evidence that the plaintiffs absolved defendants 2 and 3 from their liability to return the outstanding amounts due from the firm (defendant 1). No sound reason has been given why the plaintiffs should choose to act against their interests in doing so. The learned Judge of the lower Court has not accepted this part of the defendants' case and we entirely agree with him.

[18] In conclusion, we hold that there was no dissolution of the firm (defendant 1) and that in spite of the dissolution, if any, the partners defendants 2 to 6 continued to be liable to the plaintiffs.

[19] It has already been found above that what took place on 22-10-1934 was merely a change in the management of the firm, that is, Kanhaiyalal became the managing partner in place of Chandiprasad. After 22-10-1934 the plaintiffs deposited from time to time Rs. 3850 with the firm and withdrew Rs. 3240-8-0. Kanhai-

yalal, as 4 to 6 D. W. 1, deposed that during the time of his management the plaintiffs deposited a few items and he utilized those deposits for meeting pressing demands of other creditors. He deposed that he received those deposits and allowed withdrawals to the plaintiffs in his capacity as the manager of the firm. It is indeed strange that while the defendant-appellant wants to take advantage of the withdrawals or the alleged repayments to the extent of Rs. 3240-8-0, he denies liability for the deposits to the extent of Rs. 3850. If this part of the defence were accepted, the plaintiffs' claim would be reduced at the most by Rs. 609-8-0. In our view the transactions are binding on the defendants, that is the deposits as well as withdrawals after 22-10-1934.

[20] The learned counsel for the appellant did not press the question about reduction of interest; in fact, he abandoned it with the result that on the date of suit Rs. 9948-4-6 was due by defendants 1 to 6 to the plaintiffs and the learned Judge of the lower Court decreed the plaintiffs' claim correctly. We uphold that decree and dismiss the appeal with costs.

[21] As to the cross-objection by defendants 4, 5 and 6, it may be noted that it is directed solely against the plaintiffs who are co-respondents in the appeal. No relief is claimed against the appellant, namely, Chandiprasad, and, in fact, he is not in any way interested in the relief which is actually claimed in the cross-objection. The question, therefore, arises whether such a cross-objection can be entertained under O. 41, R. 22, Civil P. C.

[22] It has been held by the High Courts of Allahabad, Bombay, Calcutta, Patna and the Judicial Commissioner's, Court of the Central Provinces that the right of the respondent to urge a cross-objection should be limited to his urging it against the appellant and that it is only by way of an exception to the general rule that one respondent may urge cross-objections as against other respondents, the exception holding good, among other cases, in those in which the appeal by some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents; in other words, only such questions can be raised by way of cross-objections as are common both to the appellant and the co-respondents. The point has been discussed fully in the A. I. R. Commentaries on the Code of Civil Procedure Vol. III, pp. 3077-3078, and the relevant decisions of different High Courts are also noted therein. The question has been discussed also at length in 20 Luck. 45[9] and A. I. R. 1946 ALL. 395.[10] In 20 Luck. 45[9] it is held :

"Where a cross-objection which has been filed has nothing to do whatever with the appeal of the appellant but is directed solely against the other respondents it cannot be entertained."

In A. I. R. 1946 ALL. 395[10] the Divisional Bench of that High Court held :

"As a general rule a respondent can file a cross-objection only against an appellant and it is only in exceptional cases where the decree proceeds on a common ground or the interest of the appellant is intermixed with that of the respondent that a respondent is allowed to urge a cross-objection against a co-respondent."

The same view was taken by the Judicial Commissioner's Court in cases reported in 9 C.P. L. R. 62[11] and 14 C. P. L. R. 46.[12] It is no doubt true that the Madras High Court and also the Lahore High Court have taken a different view on this point. The Madras view is mainly based on a Full Bench case reported in 38 Mad. 705[13] in which the opinion is based on the practice which appears to have prevailed in that Court for a long time. The view in A. I. R. 1923 Lah. 39[14] is based on the Full Bench decision of the Madras High Court in 38 Mad. 705[13] already discussed. In view of preponderance of authority in favour of the non-maintainability of cross-objections not directed against the appellant either solely or against the appellant and co-respondent, we hold that the cross-objection filed by defendants 4, 5 and 6 is not maintainable and we accordingly dismiss it with costs.

K.S. *Appeal and cross-objection dismissed.*

A. I. R. (35) 1948 Nagpur 382 *[C. N. 131.]*

GRILLE C. J. AND SEN J.

Vishwanath Narayan and another — *Defendants— Appellants* v. *Mt. Deokabai* — *Plaintiff—Respondent.*

Letters Patent Appeal No. 11 of 1941, Decided on 26-2-1946, from appellate decree of Gruer J., D/- 7-11-1940, in S. A. No. 108 of 1938.

(a) Contract Act (1872), Ss. 65 and 2 (j) — 'Becomes void' — Meaning of — Contract of sale ceasing to be enforceable by reason of law of limitation — Contract does not become void within S. 65 — Vendee cannot claim refund of consideration.

A contract becomes void when it ceases to be enforceable by reason of some substantive law and not by reason of some procedural regulation such as the law of limitation. Thus where a vendee of land who has not been given possession under the contract of sale and against whom an order under S. 145 (6), Criminal P. C., has been passed fails to sue for possession of the land within 3 years as required by Art. 47, Limitation Act, the contract of sale does not become void within the meaning of S. 65, Contract Aet, so as to entitle him to recover the consideration of the sale deed from the vendor : 26 A. I. R. 1939 P. C. 110, *Foll.*

[Paras 15 and 16]

Annotation : ('46-Man.) Contract Act, S. 2 (j) N. 1; S. 65, N. 4.

(b) Transfer of Property Act (1882), S. 55 (2) — Clause includes implied covenants for title and for quiet enjoyment but not covenant to deliver possession.

Under S. 55 (2) there is not only an implied covenant for title but also a covenant for quiet enjoyment: 19 A. I. R. 1932 Nag. 5 (F. B.) and 21 A. I. R. 1934 Nag. 16, *Rel. on.*

The covenant for quiet enjoyment does not include a covenant to deliver possession. Hence where possession is not delivered to vendee under a sale deed no question of breach of covenant for quiet enjoyment can arise in such a case. [Paras 20 and 22]

Annotation : ('45-Com.) T. P. Act, S. 55, N. 9, Pts. 25 and 26.

(c) Limitation Act (1908), S. 28 and Arts. 47 and 116 — Possession not given to vendee under sale deed—Subsequent order under S. 145 (6), Criminal P. C. against vendee — Suit by vendee for possession filed after 3 years from order —Suit dismissed as barred by Art. 47 — Subsequent suit by vendee after 6 years from sale deed for compensation for failure to deliver possession held barred—Vendee's right to recover possession is also lost.

A vendee under a sale deed dated 26-6-1929 was not given possession of the land sold. In subsequent proceedings under S. 145, Criminal P. C., an order under S. 145 (6) of that Code was passed against the vendee on 3-11-1930. The vendee sued for possession of the property in 1934 but it was dismissed as barred by time. The vendee thereupon brought a suit for refund of the consideration on 26th September 1936.

Held (1) that the cause of action for enforcement of the statutory obligation under S. 55 (1) (*f*) to deliver possession arose on the date of the sale and as the suit was filed more than 6 years from the date of the sale the claim for enforcement of that statutory obligation or for compensation for breach thereof was barred by limitation.

(2) that the plaintiff would have been entitled to sue for possession on the basis of title within 12 years from the sale but as there was an order under S. 145 (6), Criminal P. C. against the plaintiff he was bound to sue for possession within 3 years and as he failed to do so his right to recover possession was lost. The dismissal of his previous suit for possession did not furnish any cause of action to the plaintiff and he was not entitled to claim any compensation for his failure to obtain possession of the property sold to him.

[Paras 23, 24, 26]

Annotation : ('42-Com.) Lim. Act, Art. 47, N. 2; Pt. 2; N. 10, Pt. 1; Art. 116, N. 16.

Cases referred:

1. ('23) 45 All. 179 : 9 A. I. R. 1922 P. C. 403 : 26 O. C. 223 : 50 I. A. 69 : 71 I. C. 629 (P. C.), Harnath Kuar v. Indar Bahadur Singh.
2. ('39) 1939 Rang. L. R. 358 : 26 A. I. R. 1939 P. C. 110 : 66 I. A. 198:181 I. C. 1 (P. C.), Mahanth Singh v. U Ba Yi.
3. ('32) 28 N. L. R. 31 : 19 A. I. R. 1932 Nag. 5 : 136 I. C. 225 (F. B.), Kashirao v. Zabu.
4. ('34) 30 N. L. R. 138 : 21 A. I. R. 1934 Nag. 16 : 148 I. C. 480, Ambadas v. Wamanrao.
5. ('01) 25 Bom. 593, Ardesir v. Vajesing.
6. ('02) 26 Bom. 750, Tulsiram v. Murlidhar.

V. L. Prabhune and V. D. Kale—for Appellants.
T. L. Shevde—for Respondent.

Judgment.—This is a Letters Patent appeal by the defendants against the judgment dated 7-11-1940 passed by Gruer J. in Second Appeal No. 108 of 1938.

[2] The case out of which this appeal arises has a chequered history. The claim of the plaintiff was decreed by the trial Court, set aside in first appeal and was again decreed in second appeal.

[3] The relevant facts in the case are as follows: Appellant 1, Vishwanath is the son of appellant 2, Narayan. Vishwanath was the owner of survey No. 142/3 of Mauza Surji alias Peth Mohommad Nagar, Taluq Daryapur which was inherited by him from his mother. His title to the property was not disputed before us. Vishwanath sold the field to Sampatlal, the plaintiff, on 26-6-1929 for Rs. 1000 (Ex. P-3). The sale was one with a condition of repurchase : the vendee was to reconvey the property to Vishwanath if he paid Rs. 1000 to him on 31-1-1930.

[4] On 13-7-1929 Vishwanath executed a deed of relinquishment (Ex. P-4) in favour of his father Narayan under which he relinquished his rights in his property inclusive of the plot in dispute. There was however no formal deed of transfer conveying the property or the field in dispute to Narayan. Under S. 48, T. P. Act, the title of the plaintiff derived under a prior sale deed prevailed over the title of defendant 2 which was based on the relinquishment which was later in point of time.

[5] There were proceedings under S. 145, Criminal P. C., against Narayan, defendant 2 and Sampatlal, the plaintiff (Misc. Criminal Case No. 21 of 1930). The Sub-Divisional Magistrate, Ellichpur, held that Narayan was all along in possession of the plot in dispute and passed an order in his favour on 3-11-1930 under S. 145 (6), Criminal P. C., forbidding all disturbance till he was evicted in due course of law by a civil Court (Ex. P-1). Under Art. 47, Limitation Act, Sampatlal was bound to sue for possession within three years from 3-11-1930 the date of the order passed by the Sub-Divisional Magistrate against him under S. 145 (6), Criminal P. C. This was however not done.

[6] Sampatlal filed Civil Suit No. 70A of 1934 against Narayan in the Court of the Additional Subordinate Judge, 2nd Class, Daryapur, for possession of the plot and mesne profits for three years. This suit was dismissed as barred by limitation on 21-9-1934: (Exhibit P-2). Thereupon the plaintiff filed Civil Suit No. 130 A of 1936 on 26-9-1936 against Vishwanath and his father in the Court of the 2nd Class, Subordinate Judge, Daryapur, and claimed a decree for Rs. 1000 against them. In para. 2 of the plaint he stated that he had a charge under S. 55 (6) (b), T. P. Act, on the property in suit for Rs. 1000, the amount of consideration paid by him. In the alternative he pleaded in para. 3 that the deed dated 29-6-1929 was a mortgage by conditional sale and that the plaintiff was entitled to a decree for foreclosure of the property. In para. 4 he stated that defendant 1 was liable for the

claim of Rs. 1000 either by way of damages or for failure of consideration because his title was found to be defective and the plaintiff's possession was obstructed. On these allegations he claimed reliefs in the alternative: (1) for a decree for Rs. 1000 in enforcement of the charge under S. 55 (6) (b), T. P. Act, or (2) for a decree for foreclosure in case the amount was not paid, or (3) for a decree for Rs 1000 against defendant 1 if the reliefs (1) and (2) were not granted. The defendants filed separate written statements and denied the claim. It is not necessary for the purpose of the decision of this appeal to set out their defence.

[7] The Court of the Subordinate Judge, Second Class, Daryapur, passed a decree on 30 4-1937 for Rs. 1000 with interest at 6 p.c.p.a. from 29-6-1939 till realisation. The Court of the Additional District Judge, Daryapur, in Civil Appeal No. 21-A of 1937 by the decree dated 30-11-1937 allowed the appeal and dismissed the plaintiff's suit. This decree was set aside and the decree of the trial Court was restored by Gruer J. in Second Appeal No. 108 of 1938 on 7-11-1940. It is against this decree that the present appeal has been filed. During the pendency of this appeal, Sampatlal died and his daughter, Deokabai, has been brought on the record as his legal representative.

[8] The decision of Gruer J. was based on the view that a fresh cause of action accrued in favour of the plaintiff on 21-9-1934 when his suit for possession was dismissed, that on that date the contract for sale became void and that the plaintiff was entitled to recover under S. 65, Contract Act Rs. 1000, the consideration of the sale, as the suit was filed within three years from that date.

[9] The question for decision in this appeal is whether the view is correct.

[10] The decision of the appeal turns on the interpretation of S. 65, Contract Act, which is reproduced below:

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

[10a] The claim of the plaintiff was not based on this section but if on the facts found the section applied Gruer J. was justified in granting relief to the plaintiff even though he had not made that a ground for his claim. The point raised before us is that the section had no application to the case and we have to decide whether this contention is sound.

[11] Reference may be made to a few clauses of S. 2, Contract Act:

* * *

(g) An agreement not enforceable by law is said to be void:

(h) An agreement enforceable by law is a contract:

* * *

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable."

[12] Section 65, Contract Act, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable: *vide* 45 ALL. 179[1] at p. 184.

[13] In 1939 Rang. L. R. 358[2] at p. 370 their Lordships of the Judicial Committee observed:

"The solution is, in their Lordships' view, to be found in the wording of S. 2 (j) itself. Not every unenforceable contract is declared void, but only those unenforceable *by law*, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal, such as a contract with an alien enemy, would be avoided by S. 2 (g), and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by S. 2 (j). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void."

[14] If the above decision had been placed before Gruer J. he would not have reached the conclusion he did.

[15] The contract in favour of the plaintiff became unenforceable not by reason of any substantive law but by reason of the rule of limitation because the plaintiff did not sue for possession within three years under Art. 47, Limitation Act, as he was bound to do, as an order against him had been passed under S. 145 (6), Criminal P. C.

[16] Applying the principle enunciated by the Privy Council in the case cited above, we hold that the contract in favour of the plaintiff did not become unenforceable by law, and did not become void within the meaning of S. 65, Contract Act, which had thus no application and the plaintiff was not entitled to recover the consideration of the sale deed simply because his suit for possession was dismissed as barred by limitation.

[17] The learned counsel for the respondent however contended that there was a failure of consideration on 21-9-1934 when his suit for possession was dismissed, that the plaintiff was entitled to a refund of the consideration with interest and that his claim was within limitation. Two questions arise out of this contention: (i) whether the plaintiff had any cause of action and (ii) whether the claim was within limitation.

[18] In the sale deed dated 26-6-1929 there is no express covenant either for title or for quiet enjoyment. There is a recital in the deed that the property had not been transferred and that there was a contract of indemnity to the effect that if the vendee were to lose the property by reason of a prior transfer, the vendor would be

liable to the vendee to make good his loss. The property had not been transferred by the vendor prior to the sale deed. There was thus no breach of that covenant and the plaintiff was not entitled to claim any damages on that account.

[19] In English law the usual covenants for title are: for right to convey; for quiet enjoyment; for freedom from incumbrances; and for further assurance: *vide* Halsbury's Laws of England (Hailsham Edn.) vol. 29, para. 662, p. 455; 28 N. L. R. 31[3] at p. 40.

[20] Under S. 55 (2), T. P. Act, there is an implied covenant for title. This covenant for title has been interpreted to mean a covenant for quiet enjoyment also: *vide* 28 N. L. R. 31;[3] 30 N. L. R. 138.[4]

[21] The plaintiff based his cause of action on two grounds (i) that the title of his vendor, Vishwanath, was found defective and (ii) that the possession of the plaintiff was disturbed. The first ground is obviously not tenable, as the suit of the plaintiff for possession was dismissed on the ground of limitation and not on the ground that he or his vendor had no title. The owner of the plot in suit was Vishwanath and he had the right to convey it to the plaintiff. The title of the vendor to convey was not disputed before us, and that being the position, there was no breach of the covenant for title and the plaintiff was not entitled to claim any damages on that account.

[22] The covenant for quiet enjoyment does not include a covenant to deliver possession. In this case possession had not been delivered to the plaintiff under the sale deed dated 26-6-1929 and there was no subsequent disturbance of his possession after it had been delivered. To such a case covenant for quiet enjoyment is not applicable: 25 Bom. 593,[5] 26 Bom. 750.[6] The grounds which the plaintiff urged as the basis of his claim were thus not tenable.

[23] Under S. 55 (1) (f), T. P. Act, the vendor was bound to give, on being so required, the vendee or such person as he directs, such possession of the property as its nature admits. The vendee never asked Vishwanath, the vendor, to deliver possession of the property to him. The cause of action for enforcement of that statutory duty arose on 26-6-1929 the date of the sale and the plaintiff should have sued to enforce that statutory obligation within six years from that date. As the suit was filed on 26-9-1936 more than six years after the sale, the claim for enforcement of that statutory obligation or for compensation for breach thereof was barred by limitation.

[24] The plaintiff would have been entitled to sue for possession on the basis of his title within 12 years from the date of his sale but as there was an order under S. 145 (6), Criminal P. C. against the plaintiff, he was bound to sue for possession within three years, and as he failed to do so he lost the right to recover possession of the field sold to him.

[25] The decisions in 28 N. L. R. 31[3] and 30 N. L. R. 138[4] are not applicable as in each of those cases the cause of action was based on dispossession subsequent to the sale and it was held that there was a failure of consideration and that limitation ran from the date of dispossession. That is not the case here as there was no delivery of possession at all.

[26] The plaintiff had a good title but he lost it as he did not enforce it within three years. The dismissal of his previous suit for possession did not furnish any cause of action to the plaintiff and he was not entitled to claim any compensation for his failure to obtain possession of the property sold to him.

[27] The appeal succeeds, the decree appealed against is set aside and the plaintiff's suit is dismissed. The circumstances of the case leave no room for doubt that the defendants who are father and son have been acting in collusion in order to deprive the plaintiff of his claim. The parties to bear costs in all the Courts as incurred.

K.S. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 385 *[C. N. 132.]*

SHEVDE J.

Chintaman Laxman v. *Ramgopal Raghunathdas and others.*

Misc. Appeal No. 273 of 1945, Decided on 23-9-1947, from order of Dist. Judge, Wardha, D/- 18-6-1945.

(a) Provincial Insolvency Act (1920), S. 75—Order setting aside adjudication — No second appeal lies — It may be treated as revision.

Under S. 75, no second appeal lies against an order setting aside an adjudication. Under proviso to the section however, the appeal may be treated as a revision petition. [Para 5]

(b) Provincial Insolvency Act (1920), S. 9 (1) (c)—Three months' period is not period of limitation but a condition precedent — Delay in filing petition cannot be condoned under Ss. 5 and 14, Limitation Act — S. 78 (1) contemplates application — S. 9 (1) (c) contemplates "petition" and not application — Provincial Insolvency Act (1920), S. 78 (1)—Limitation Act (1908), Ss. 5 and 14.

The period of three months, prescribed under section 9 (1) (c) is not a period of limitation but is a condition precedent to the filing of the insolvency petition itself. The insolvency petition is after all based upon some act of insolvency, on the part of the debtors, and it is that act of insolvency which has been committed within three months before the presentation of the petition, which alone can serve as a valid basis for the insolvency petition and no other: 25 A. I. R. 1938 Mad. 898; 22 A. I. R. 1935 Mad. 857 (F. B.) and 26 A. I. R. 1939 Cal. 313, *Rel. on;* 29 A. I. R. 1942 All. 429 (F. B.), *Dissent.* [Para 8]

As the period of three months has not been prescribed as the period of limitation, it follows, as a matter of inevitable corollary, that the provisions of Ss. 5 and 14, Limitation Act, cannot come into play and the delay in

filing the insolvency petition in the proper Court cannot be condoned. [Para 9]

Moreover, the provisions of S. 78 (1) relate to applications and not to petitions. Section 9 (1) contemplates a "petition" and not an "application." There is no doubt that a distinction has been made between a "petition" and an "application" in the Provincial Insolvency Act : 29 A. I. R. 1942 All. 429 (F. B.), *Rel. on.* [Para 9]

Annotation : ('42-Com) Lim. Act, S. 5 N. 4 Pt. 10.

(c) Provincial Insolvency Act (1920), S. 35 — Adjudication based on transfer as act of insolvency — No notice to transferee — Order of adjudication is not conclusive against him—He can apply to set it aside — Provincial Insolvency Act (1920), Ss. 27 and 75.

The order of adjudication is conclusive proof that any legal character which it confers or takes away accrued or ceased as stated in the order. The order is not conclusive proof of anything more than that the insolvent has been so adjudged. A judgment in rem is conclusive only as regards status but not as regards the grounds on which the order is based.

Where the order of adjudication based upon a certain transfer as an act of insolvency is passed without notice to the transferee, the order is not conclusive against him and he as transferee cannot be considered as person "aggrieved" by the order of adjudication within the meaning of S. 75 and therefore simply because he does not appeal against the order and get it set aside, he cannot be regarded as bound by it. Consequently the transferee is entitled to apply for the annulment of adjudication : 34 A.I.R. 1947 Nag. 161 (F. B.), *Foll.* [Para 10]

Cases referred:—

1. ('43) I. L. R. (1943) All. 84 : 29 A. I. R. 1942 All. 429: 204 I. C. 1 (F. B.), Raja Pande v. Sheopujan Pande.
2. ('39) I. L. R. (1939) Mad. 24 : 25 A. I. R. 1938 Mad. 898 : 178 I. C. 737, Kumarappa v. Chidambaram.
3. ('35) 58 Mad. 794 : 22 A. I. R. 1935 Mad. 857 : 158 I. C. 1 (F. B.), Chenchuramana v. Arunachalam.
4. ('39) I. L. R. (1939) 1 Cal. 425 : 26 A.I.R. 1939 Cal. 313 : 182 I. C. 701, Muradan Sardar v. Secy. of State.
5. ('47) I L R (1947) Nag. 85: 34 A I R 1947 Nag. 161: 230 I. C. 195 (F. B.), D. G. Sahasrabudhe v. Kilachand Deochand & Co., Bombay.

D. B. Padhye — for Appellant.

R. Kaushalendra Rao, W. K. Sheorey and M. W. Puranik — for Respondents.

Judgment. — This appeal has been filed by the creditor Chintaman against the order of Mr. H. C. Sen, District Judge, Wardha, who having affirmed the order of the Insolvency Court, set aside the order of adjudication.

[2] The facts of this case briefly are these. Mt. Johra Bai and her husband Sk. Nasir were declared insolvents on the application of the appellant Chintaman. This application was first presented in the Court of the Subordinate Judge, First Class, Wardha, on 13-1-1941, but it was returned to the appellant for presentation to the proper Court on 20-1-1941. Accordingly it was represented in the Court of the First Subordinate Judge, Second Class, Wardha, the same day. It was on the strength of the appellant's application, filed under S. 9, Provincial Insolvency Act, that the debtors were adjudicated insolvents. This was in June 1941. Thereafter the creditor Chintaman put in an application under S. 53, Provincial Insolvency Act, for annulment of the transfer, made by the debtors in favour of the respondents. The said transfer was annulled after enquiry by the Bankruptcy Court, and the order of annulment was upheld both by the first appellate Court as well as by this Court. It is pertinent to note at this stage that the order of adjudication was founded upon this transfer, viz., sale-deed, dated 14-10-1940, which was challenged as an act of bankruptcy on the part of the debtors.

[3] Some time later, the transferees (respondents before me) filed an application under S. 35, Provincial Insolvency Act, for the annulment of the order of adjudication, on the ground that the act of insolvency, on which the creditor's petition was grounded had not occurred within three months before the presentation of the petition, as required by the mandatory provisions of S. 9 (1) (c), Provincial Insolvency Act. It was contended by the respondents that the creditor's petition could be deemed to have been effectively presented, under S. 9 of the Act, only on 20-1-1941, on which day it was actually filed in the proper Court, which was beyond three months from the date of the transfer, dated 14-10-1940, which grounded the act of insolvency, on the part of the debtors. The creditor on the other hand contended that he was entitled to the benefit of Ss. 5 and 14, Limitation Act, under the provisions of S. 78 (1), Provincial Insolvency Act, and he was, therefore, entitled to deduct the period that was occupied by the proceedings in the Court of the Subordinate Judge, First Class, Wardha, before whom the petition was lodged on 13-1-1941 within three months.

[4] The Insolvency Court held that the provisions of Ss. 5 and 14, Limitation Act, were not applicable, and annulled the order of adjudication, on the ground that it was without jurisdiction. The creditor preferred an appeal to the District Court, Wardha, which affirmed the order of the first Court and dismissed the appeal. The creditor has now come up in miscellaneous (second) appeal.

[5] The learned advocate for the respondents has raised a preliminary objection that this appeal is incompetent, since there is no provision for second appeal under S. 75, Provincial Insolvency Act, I think that his contention is correct. But, however, I am inclined to entertain this appeal as a revision petition, under the proviso to S. 75, Provincial Insolvency Act, and shall decide on that basis.

[6] The main points for determination in this appeal are :

i. Whether the creditor is entitled to the benefit of Ss. 5 and 14, Limitation Act, under

the provisions of S. 78, Provincial Insolvency Act, and

ii. Whether the order of adjudication on which the subsequent annulment proceedings were founded is conclusive against the transferees so that they cannot apply for its annulment."

[7] *Point 1* : There is no doubt a judicial conflict of opinion, on the question, as to whether the provisions of S. 9 (1) (c), Provincial Insolvency Act, prescribe the period of three months as a period of limitation; or whether the said provisions lay down a condition precedent to the filing of the petition by the creditor. The Full Bench case of the Allahabad High Court reported in I. L. R. (1943) ALL. 84[1] no doubt lays down that the period of three months referred to in S. 9 (1) (c), Provincial Insolvency Act, is a period of limitation. It has, however, been observed in that case, that though a period of limitation is in one sense a condition precedent to the enforcing of rights and remedies in a Court of law, yet it does not cease to be a period of limitation. On the other hand, we have got a string of cases of other High Courts, which have taken a contrary view. In I. L. R. (1939) Mad. 24[2] their Lordships have held that the period of three months, fixed by S. 9 (1) (c), Provincial Insolvency Act, is not a period of limitation, but constitutes a condition to an adjudication, and consequently, where the alleged act of insolvency had taken place more than three months prior to the presentation of the petition, it could not be set up as a ground for adjudication. They have also held that S. 35, Provincial Insolvency Act, empowers a Judge sitting in insolvency to annul an adjudication, when it is clear that, on the materials before the Court, at the time the order of adjudication was passed, it had no jurisdiction to pass the order. The section leaves the Court no discretion in the matter. This view was followed by the same High Court in a later Full Bench case reported in 58 Mad. 794[3] at p. 798. Beasley C. J. observed as follows :

"On the other hand, I am of the view that S. 9 (1) (c) is a condition precedent to the filing of the petition, that is to say, the petitioning creditor must, on the day when he presents his petition, have in view some act of insolvency which the debtor has committed within the preceding three months. He has to see on that date, and on that only, what acts of insolvency are available to him; and he cannot make use of any act of insolvency which has been committed outside the period of three months, as that ceased to be an act of insolvency."

A similar view has also been taken by the Calcutta High Court in I.L.R. (1939) 1 Cal. 425.[4]

[8] Apart from the cases cited above, I think that the provisions of S. 9 (1) (c), Provincial Insolvency Act, are absolutely clear on the point. These provisions are :

"9 (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless —

(a) .....

(b) ....., and

(c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition."

It is quite obvious from these provisions that the creditor has no right even to present an insolvency petition, unless the act of insolvency, on which the petition is grounded, has occurred within three months before the presentation of the petition. These provisions are absolutely clear and emphatic and they lay down certain conditions, on which the creditor may file his insolvency petition. This is borne out also by the marginal note to S. 9, Provincial Insolvency Act. The period of three months, prescribed under S. 9 (1) (c) is not a period of limitation but is a condition precedent to the filing of the insolvency petition itself. The insolvency petition is after all based upon some act of insolvency, on the part of the debtors, and it is that act of insolvency, which has been committed within three months before the presentation of the petition, which alone can serve as a valid basis for the insolvency petition and no other.

[9] As the period of three months has not been prescribed as the period of limitation, it follows, as a matter of inevitable corollary, that the provisions of Ss. 5 and 14, Limitation Act, cannot come into play. It has been contended by the learned counsel, appearing in support of this appeal, that under S. 78 (1), Provincial Insolvency Act, it has been laid down that the provisions of Ss. 5 and 12, Limitation Act, 1908, shall apply to appeals and applications under the Act; and it is, therefore, argued that the provisions of S. 5 of the Act must be extended to the facts of this case, for the purpose of condoning the delay in filing the insolvency petition in the proper Court. I have already held that the case cannot attract the provisions of the Limitation Act, as S. 9 (1) (c), Provincial Insolvency Act, does not lay down a period of limitation, but lays down an essential prerequisite for the filing of the insolvency petition. But there is another reason for holding that the provisions of S. 78 (1) of the Act are inapplicable. These provisions relate to applications and not to petitions. Section 9 (1) contemplates a "petition" and not an "application." There is no doubt that a distinction has been made between a "petition" and an "application" in the Provincial Insolvency Act. Their Lordships of the Allahabad High Court in a Full Bench case reported in I. L. R. (1943) ALL. 84,[1] have discussed this question as to whether the petition for insolvency is not an "application" within the

meaning of that clause. At p. 90 Iqbal Ahmad, C. J. has observed as follows:

"Sections 6 to 28 are under the sub-heading 'Acts of Insolvency,' 'Petition' or 'Order of adjudication,' and Ss. 52 to 54 are preceded by the sub-heading 'Effect of insolvency on antecedent transaction.' The words 'apply' or 'application' have, on the other hand, been used in relation to applications for protection order, for order of discharge, for annulment of adjudication, for reversal of the decisions of a receiver and for other kindred matters. I conclude from this that the Legislature has used the word 'petition' in the Act with reference to matters relating to acts of insolvency, and the word 'application' has been used with respect to motions other than those that have direct reference to acts of insolvency. It follows that petition for insolvency either under S. 9 or S. 13 of the Act is not an 'application'."

I, therefore, agree with the lower Courts in holding that the creditor-appellant was not entitled to exclude the period of time from 14th January 1941 to 20th January 1941, under the provisions of S. 5 or S. 14, Limitation Act, and that the order adjudicating the debtors insolvents, passed on 30th June 1941, by the Bankruptcy Court was illegal and *ultra vires*.

[10] The other point raised by Mr. D. B. Padhye on behalf of the creditor-appellant has been concluded by the Full Bench ruling of this Court, reported in I. L. R. (1947) Nag. 85.[6] Their Lordships have observed:

"An order of adjudication in an insolvency case is admissible to prove the legal character of the debtor as an insolvent but is inadmissible as against third parties to prove that the act on the basis of which the order was passed was an act of insolvency."

Pollock J. has observed as under:

"The order of adjudication, under that section, is conclusive proof that any legal character which it confers or takes away accrued or ceased as stated in the order. It does not, however, appear to me that the order is conclusive proof of anything more than that the insolvent has been so adjudged. It seems to me that a judgment in rem is conclusive only as regards status but not as regards the grounds on which the order is based."

It is admitted that the order of adjudication was passed by the Bankruptcy Court, without notice to the transferees. It is, therefore, futile to argue that the rights of the transferees could be concluded by any order that was passed in their absence and behind their back. The respondents as transferees could not, therefore, be regarded as persons "aggrieved" by the order of adjudication within the meaning of S. 75, Provincial Insolvency Act, and it is idle to contend that they are bound by the order of adjudication, simply for the reason, that they failed to appeal against the order of adjudication and get it set aside, before the annulment proceedings were set on foot.

[11] For the foregoing reasons I affirm the order of the lower appellate Court and dismiss this appeal with costs. Pleader's fee Rs. 25.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 388 *[C. N. 133.]*

PADHYE J.

Bhagirath Kishorilal Paliwal—Judgment-debtor—Appellant v. *Madhaorao Gangadharrao Chitnavis—Decree-holder—Respondent.*

Misc. Second Appeal No. 236 of 1946, Decided on 25-7-1947, from order of District Judge, Nagpur, D/- 27-8-1946.

(a) **C. P. and Berar Money-lenders Act (13 [XIII] of 1934), S. 11—Judgment-debtor held, on facts not entitled to instalments under S. 11.**

The debt was borrowed more than 12 years before the date of the application for instalments under S. 11 and in spite of the decree being passed on 16th February 1940 nothing was paid till 30th March 1944. Though the decree-holder gave sufficient concessions to the judgment-debtor for payment by easy instalments he did not care to pay even a single instalment in time and defaulted the first two instalments. The last three payments were made to avoid the coercive process:

Held **that the circumstances did not speak of the bona fides of the judgment-debtor entitling him to the concession of instalments provided for under S. 11.**

[Para 9]

(b) Civil P. C. (1908), S. 47 and O. 23, R. 3—Adjustment decree granting concession to judgment-debtor to pay by instalments—Failure by judgment-debtor to pay instalments regularly—Executing Court cannot give relief against exigibility clause.

Adjustment decrees are always based on a contract between the parties and no Court has power to interfere with the terms of the contract except to the extent permitted by law. Therefore a Court cannot go behind the compromise decree except when there is any term which is either against law or which offends against public policy. **[Para 11]**

Where the adjusted decree grants a concession to the judgment-debtor to pay the decretal amount by instalments and provides that on default the whole amount shall become exigible, the judgment-debtor can take advantage of the adjusted decree only if he carries out his obligation as per terms of that decree. If he fails to pay any of the instalments the Court has no power to relieve him from the exigibility clause: 21 A. I. R. 1934 Bom. 370 and 28 A. I. R. 1941 Sind 196, *Rel. on.*

[Para 13]

Annotation: ('44-Com.) C. P. C., S. 47, N. 79; O. 23, R. 3, N. 27.

Cases referred :—

1. ('34) 58 Bom. 610 : 21 A. I. R. 1934 Bom. 370 : 152 I. C. 575, Burjorji Shapurji v. Madhavlal Jesingbhai.

2. ('41) I. L. R. (1941) Kar. 389: 28 A. I. R. 1941 Sind 196 : 198 I. C. 174, Shamsuddin v. Firm Shivji Premji.

P. P. Deo — for Appellant.

A. V. Khare — for Respondent.

Judgment.—This is a miscellaneous (second) appeal by the judgment-debtor arising out of Execution Case No. 87B of 1939 decided on 16th February 1940. The appellant borrowed from the respondent a loan in 1934. As he failed to repay the same he was sued in 1939 and a decree for Rs. 4428-3-0 was obtained against him on 16th February 1940. Even after the passing of the decree the appellant failed to pay anything until 22nd November 1943. On that date adjustment of the aforesaid decree was recorded where-

by as per agreement between the parties the decree was made payable in eight instalments with interest at 3 per cent. per annum and the judgment-debtor's property was charged. It was also provided that in default of any two instal. ments the whole of the decretal amount would become exigible.

[2] The judgment-debtor made the following payments towards the decree :

Rs. 250 on 30th March 1944 (towards the instalment of Rs. 500 due on 31st March 1944)

Rs. 950 on 25th January 1946 (nothing was paid towards the second instalment which fell due on 31st March 1945)

Rs. 600 on 1st April 1946.
Rs. 581 on 28th March 1947.

It is clear from the aforesaid dates and the amounts paid that the first two instalments due on 31st March 1944 and 31st March 1945 were defaulted by the judgment-debtor, the first partially and the second fully. It was said that in July 1945 that is after the actual amount had become exigible according to the terms of the adjusted decree, the judgment-debtor offered a payment of Rs. 500, but the decree-holder refused the same; subsequent three payments were made in Court.

[3] On 15th January 1946, the judgment-debtor put in an application which purported to be one under O. 21, R. 2 and S. 148, Civil P. C. The judgment-debtor stated in that application that he could not pay the instalments on proper dates on account of his illness and the illness of his daughter. He stated that he intends to satisfy the entire decretal amount but he is not in a position to pay the same at once. He prayed that time for payment be extended as set forth above and the amount paid be adjusted accordingly.

[4] The application was opposed by the decree-holder who contended that according to the exigibility clause he was entitled to realize the entire decretal amount at once, and that the judgment-debtor was not entitled to any more concession.

[5] The executing Court allowed the judgment-debtor's application on the authority of S. 151, Civil P. C. It directed that the decree-holder be paid the amount in deposit, that the amount be adjusted as per terms of the adjustment order dated 22-11-43 and that the payments be made according to the instalments as fixed by that order. In short, the Court cured all the defaults and ordered waiver of the exigibility clause.

[6] The decree-holder appealed to the lower appellate Court and it set aside the order of the executing Court. It held that S. 151, Civil P. C., was wrongly invoked and that on the undisputed facts the judgment-debtor had disentitled himself to the concessions shown to him by the adjustment decree. The judgment-debtor has therefore filed this miscellaneous appeal.

[7] The main argument of the learned counsel for the appellant was that the judgment-debtor's application dated 25-1-46 should have been treated as one under S. 11, C. P. Money-lenders Act, and exercising discretion under that section, the Court should have made the decretal amount payable in such number of instalments as were already fixed by the adjustment decree, or with such variations as the Court may have thought fit. The learned counsel did not support the order of the first Court based on S. 151, Civil P. C.

[8] It is quite clear to my mind that the application dated 25-1-46 was never meant to be one under S. 11, C. P. Money-lenders Act, and was not also pressed as such. If it was so pressed, several questions might have arisen, viz., whether S. 11, C. P. Money-lenders Act, applied to a decree based on a compromise or only to a decree according to the adjudication by a Court, and further whether the circumstances within the meaning of that section meant financial circumstances or other circumstances as well. These questions were not considered by the Court below as they were not raised and the application was never considered as one under S. 11, C. P. Money-lenders Act. I cannot therefore permit the judgment-debtor to treat the application dated 25-1-46 as one under S. 11, C. P. Money-lenders Act.

[9] On the facts and circumstances of this case, no Court would have exercised its discretion in granting instalments under S. 11, C. P. Money-lenders Act. The debt was borrowed more than 12 years before and in spite of the decree being passed on 16th February 1940 nothing appears to have been paid till 30th March 1944. Though the decree-holder gave sufficient concessions to the judgment-debtor for payment by easy instalments he did not care to pay even a single instalment in time and defaulted the first two instalments as stated above. The last three payments were, I think, made to avoid the coercive process. These are not the circumstances which speak of the *bona fides* of the judgment-debtor entitling him to the concessions provided for under S. 11, C. P. Money-lenders Act. Even on merits therefore I would (not?) allow the application under S. 11 of the Act.

[10] It was next urged that even apart from S. 11, C. P. Money-lenders Act, the executing Court should have interfered and relieved the judgment-debtor of the exigibility clause taking into consideration the hard circumstances he had to pass through. In my opinion, neither the

circumstances of the case nor the law permitted the executing Court to do so and I am in complete agreement with the lower appellate Court that the first Court was entirely wrong in invoking S. 151, Civil P. C.

[11] Adjustment decrees are always based on a contract between the parties and no Court has power to interfere with the terms of the contract except to the extent permitted by law. It is therefore that a Court cannot go behind the compromise decree except when there is any term which is either against law or which offends against public policy.

[12] The adjusted decree in the present case is what can be termed a concession decree. It was based on a contract between the parties which was entered into in order to give concessions to the judgment-debtor. Such a decree cannot be interfered with by the executing Court and it cannot substitute a new contract for a contract agreed to between the parties and incorporated in the adjustment decree.

[13] A Division Bench of the Bombay High Court observed very aptly in 58 Bom. 610[1] at page 617 thus :

"The law on the subject is not, I think, open to any serious question. If there is an agreement to pay a sum of money by a particular date with a condition that if the money is not paid on that date a larger sum shall be paid, that condition is in the nature of a penalty against which a Court of Equity can grant relief and award to the party seeking payment only such damage as he has suffered by the non-performance of the contract. But if, on the other hand, there is an agreement to pay a particular sum followed by a condition allowing to the debtor a concession, for example, the payment of a lesser sum, or payment by instalments, by a particular date or dates, then the party seeking to take advantage of that concession must carry out strictly the conditions on which it was granted, and there is no power in the Court to relieve him from the obligation of so doing."

These observations were cited with approval in a later case reported in I. L. R. (1941) Kar. 389[2] at page 392. I am in respectful agreement with these observations and therefore hold that in the present case the adjusted decree was a concession decree; concession was given for the satisfaction of the decree in eight instalments. The judgment-debtor could take advantage of it only if he carried out his obligation as per terms of that decree. If, on the other hand, he failed to do it, as the present judgment-debtor has failed, the Court has no power to relieve him from the terms of the adjusted decree.

[14] It is not argued before me that there was any penal clause in the adjusted decree. This appeal is therefore entirely without any substance and the judgment-debtor cannot be helped either in law or in equity. The appeal is therefore dismissed with costs.

G.N. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 390 *[C. N. 134.]*

PADHYE J.

Chaturbhujlal Kanhayalal and another — Plaintiffs—Applicants v. *Girdharilal Kanhayalal—Defendant —Non-Applicant.*

Civil Revn. No. 101 of 1946, Decided on 6-3-1947, from decree of Civil Judge, 2nd Class, Malkapur, D/- 18-1-1946.

Contract Act (1872), S. 69—Co-judgment-debtors — Liability, joint and several — One undertaking to satisfy whole decree by agreement inter se, but failing — Others paying decretal amount —Suit for re-imbursement, if lies.

A person who wants to invoke S. 69, Contract Act, need not necessarily be a person who is interested according to a judicial test; it is sufficient if the payment is made under an honest belief that his interest requires that the payment should be made. A person bound by law to pay is always a person interested in payment. So a person who under a decree is compelled to pay money which his co-judgment-debtor is ultimately liable to pay can surely recover the amount paid by him. [Para 10]

A decree was passed against three brothers under which they were jointly and severally liable for the entire decretal amount. One of the judgment-debtors *G* by an agreement *inter se* had undertaken the responsibility to satisfy the entire decree. On his failure, the property of others was attached in execution. *G* applied to the Relief Court and the decretal amount was scaled down and made payable by annual instalments of Rs. 59. As the other judgment-debtors were still liable under the decree they also applied to the Relief Court and the decretal debt was scaled down and made payable by annual instalments of Rs. 220-4-0. They were under the scheme required to pay the first instalment. They sued *G* for the recovery of this amount :

Held (1) that the plaintiffs' claim for re-imbursement fell within the scope of S. 69 and they had a right to sue *G* for recovery of Rs. 220-4-0 which they paid towards a decree which he had undertaken to satisfy : 5 A. I. R. 1918 Cal. 446; 24 A. I. R. 1937 Nag. 152; 25 A. I. R. 1938 Nag. 459 and 32 A. I. R. 1945 Nag. 179, *Rel. on*; 14 W. R. 458, *Ref.* [Paras 9, 10]

(2) that the liability of *G* was not limited only to Rs. 59-0-0 per annum. *G* was liable to pay the decretal amount. The concessions which were given to him under the scheme were only as against the creditor (decree-holder) but they were of no avail as against the plaintiffs who were not parties to the scheme in the debt relief proceedings. [Para 11]

Annotation:—('46-Man.) Contract Act, S. 69, N. 10.

Cases referred:—

1. ('18) 45 Cal. 691 : 5 A. I. R. 1918 Cal. 446 : 42 I. C. 30, Sarafat Ali v. Issar Ali.
2. ('37) 24 A. I. R. 1937 Nag. 152 : I. L. R. (1940) Nag. 437 : 169 I. C. 298, Vishram v. Pannalal.
3. ('39) I. L. R. (1939) Nag. 246: 25 A. I. R. 1938 Nag. 459: 178 I. C. 485, Mt. Mulabai v. Balakdas Bhagwat Prashad.
4. ('45) I. L. R. (1945) Nag. 247 : 32 A. I. R. 1945 Nag. 179, Bhagirathibai v. Digambar.
5. ('70) 14 W. R. 458 : 6 Beng. L. R. 633, Troyluckho Nath Roy v. Kashee Nath Roy.

V. L. Prabhune —for Applicants.

N. B. Chandukar —for Non-Applicant.

Order. — The parties to this revision are brothers. They constituted a joint Hindu family until a few years before the death of their father

in 1916. Even though a bulk of the joint family property was then divided between them, the money-lending business and some other immovable property mostly forming the assets of that business was left undivided. This property was however partitioned between the brothers as per partition deed dated 15-6-1937 (Ex. P-3.) At this partition the non-applicant, Girdharilal, was allotted to his share the entire money-lending business and some immovable property, total value of the property so allotted was estimated at Rs. 23,383-4-0. As incidental to the money-lending business a decree was passed against all the brothers in Civil Suit No. 94 of 1931 and the liability to satisfy this decree was undertaken exclusively by the non-applicant.

[2] The decree-holder in the decree passed in Civil Suit No. 94 of 1931 had sued out execution against all the brothers on 4-3-1936 and had attached property, which at the partition of 1937 was allotted to the shares of the applicants. The non-applicant had undertaken to get this property released from attachment by satisfying the decree. He did not however satisfy the decree and the property of the applicants is still under attachment.

[3] The non-applicant Girdharilal, applied to the Relief Court for scaling down the decretal debts and for framing a scheme making it payable by instalments. In this case (Revenue Case No. 129 of 1941) a scheme was actually framed and the decretal amount which was scaled down to Rs. 2059-10-0 was made payable by annual instalments of Rs. 59-0-0.

[4] As the applicants (the co-judgment-debtors) were still liable under the decree and their property was under attachment, they too applied for the scaling down of the decretal debt and for framing a scheme. In Revenue Case No. 153 of 1942 the Relief Court framed the scheme and the decretal debt as scaled down was made payable by annual instalment of Rs. 220-4-0. Under the scheme, the applicants were required to pay Rs. 220-4-0 as first instalment and they therefore sued the non-applicant for recovery of that amount.

[5] The learned Judge of the lower Court dismissed the suit mainly on the ground that the applicants were exonerated from their liability under the decree, and that no coercive processes were taken out by the decree-holder against them and therefore their actions in applying to the Debt Relief Court and in paying the instalment were voluntary. It is on this ground that the learned Judge of the lower Court held that the applicants had no right to claim re-imbursement from the non-applicant. It was further held that as the liability of the non-applicant under the scheme framed in his case was only to pay Rs. 59-0-0 p. a. the applicants were at the most liable to pay Rs. 59-0-0 and not more.

[6] In my view the learned Judge entirely failed to comprehend correct legal position and his judgment is therefore not according to law.

[7] The Judge of the lower Court started with a fundamental misconception that the applicants were completely exonerated from liability. All the three judgments-debtors were jointly and severally liable to the decree-holder for the entire decretal amount and that liability stood unaffected by any agreement between the judgment-debtors *inter se*. The scheme framed on the application of the non-applicant did not moreover affect the liability of the other judgment-debtors and the decree-holder's right to proceed against any one of them and to realize the entire decretal amount. Under the Relief Act the debtor means only the applicant and not his co-debtors. The applicants had thus a decree outstanding against them and a perpetual danger of the decree-holder proceeding to sell their property which was already under attachment. They were therefore the persons interested in seeing that the decretal debt was satisfied and their property was released from attachment. They were equally interested in protecting themselves against the execution of the decree against them by applying to the Relief Court so that in the event of the decree-holder proceeding against them they as agriculturists, should have the advantage of the scaling down of debts and of the payment of decretal debt by instalments.

[8] In the present case the applicants were obliged to take recourse to the Relief Court as a result of failure on the non-applicant's part to satisfy the decree and to have the attached property released. But I do not see how any point can be gained against the applicants even if the application was purely voluntary. Every man has a right to act in his own interest and the applicants were within their rights to do so. It is difficult to understand the learned Judge's view that the applicants should have waited till coersive processes were actually issued against them.

[9] It is difficult to imagine a stronger case for re-imbursement than of the plaintiffs-applicants who as judgment-debtors under an enforceable decree were not only interested but were also legally liable and compellable to pay. The claim for re-imbursement would certainly fall within the scope of S. 69 when by an agreement *inter se* one of the judgment-debtors was liable exclusively to satisfy the decree. In 45 Cal. 691[1] it is held that such a claim would fall both under Ss. 69 and 70, Contract Act.

[10] A person bound by law to pay is always a person interested in payment though the converse may not necessarily be true. So a person

who under a decree is compelled to pay money which his co-judgment-debtor is ultimately liable to pay can surely recover the amount paid by him : *vide* A. I. R. 1937 Nag. 152.[2] It was held in I. L. R. (1939) Nag. 246[3] that a person can invoke S. 69, Contract Act, if he was interested in making the payment notwithstanding that he was also legally liable to pay. In I. L. R. (1945) Nag. 247[4] Puranik J. held, and I respectfully agree with him, that a person who wants to invoke S. 69, Contract Act, need not necessarily be a person who is interested according to a judicial test; it is sufficient if the payment is made under an honest belief that his interest requires that the payment should be made. In 14 W. R. 458[5] at pp. 460-461 even a debtor who satisfied a common liability was held entitled to sue his co-debtor for re-imbursement even though no suit for the realization of the debt was filed by the creditor. It is needless to discuss the law any further, as in my view, it is beyond doubt that the applicants had a right to sue the non-applicant for recovery of Rs. 220-4-0 which they paid towards a decree which the non-applicant had undertaken to satisfy.

[11] There is equally no force in the observations of the lower Court that the liability of the non-applicant was limited only to Rs. 59-0-0 per annum. The non-applicant was liable to pay the decretal amount. The concessions which are given to him under the scheme are only as against the creditor (decree-holder) but they are of no avail as against the applicants who are not parties to the scheme though they were unnecessarily shown as parties in the relief proceedings.

[12] The decision of the lower Court is clearly wrong and is opposed to law. The applicants' claim should have been decreed.

[13] The learned counsel for the applicants urged that in the event of the claim being decreed against the non-applicant the amount should be made payable by annual instalments of Rs. 59-0-0 or by easy instalments. There are no *bona fides* in the non-applicant's favour. He undertook to satisfy this decree in 1937 and that too on consideration received. The applicants made a payment of Rs. 220-4-0 on 14-4-1942, i. e. nearly 5 years ago. The non-applicant has not paid a pie to the applicants and has on the other hand involved the applicants in a costly litigation. He had already had sufficient time to discharge his liability and is not entitled to any more concessions.

[14] In the result, the revision is allowed and the claim of the plaintiffs-applicants is decreed with costs in both the Courts. Counsel's fee in this Court Rs. 30-0-0.

S. C. *Revision allowed.*

A. I. R. (35) 1948 Nagpur 392 *[C. N. 135.]*

BOSE AND SEN JJ.

Ganpatrao Nagoba Gandli — Insolvent — Applicant v. *A. V. Zinzarde, Advocate — — Receiver — Non-Applicant.*

Civil Revn. No. 515 of 1946, Decided on 22-1-1948, from order of Dist. Judge, Nagpur, D/- 21-10-1946.

(a) Civil P. C. (1908), S. 60 (1) (c) — Whether house falls within S. 60 (1) (c), is question of fact.

The question whether the house falls within the provisions of S. 60 (1) (c) is really one of fact: 25 A. I. R. 1938 Nag. 366, *Ref.* [Para 8]

Annotation: — ('44-Com.), Civil P. C., Ss. 100, 101 N. 36 and 37.

(b) Civil P. C. (1908), S. 60 (1) (c) — Protection can be waived — Property held did not fall under S. 60 (1) (c) and even if it fell, protection was waived — Provincial Insolvency Act (1920), S. 28 (5).

Section 60 (1) (c) does not impose an absolute prohibition on sale of property. The protection conferred by the section is for the benefit of the agriculturist and can be waived by him.

Where a family consisting of father and son was carrying on a money-lending business and both the father and the son were declared insolvents and the question arose whether the house which was described as money-lending shop and in which the family were allowed to reside, was exempt under S. 60 (1) (c), from sale by the Receiver in insolvency:

Held that from facts that the insolvents (1) had already mortgaged it, (2) laid no claim to it at the date of the vesting, (3) applied for permission to reside either there or elsewhere, (4) allowed the Receiver to spend money over its repairs and pay the nazul rent for 18 years, (5) actually petitioned the Receiver to put in fresh tiles and make a good job of the retiling, (6) omitted to include this item in their petition relating to the sir lands for which they claimed exemption from vesting, (7) omitted to claim it in the annulment proceedings relating to the mortgage upon the house and permitted the Receiver to spend time, energy and money in reclaiming it for the estate and (8) included the 'shop' in the list of assets, it was evident that they could not have regarded this as property falling under S. 60 (1) (c) and so could not themselves have been using the house for agricultural purposes as such. [Para 13]

Held further that even if it were regarded as falling under S. 60 (1) (c), the above facts showed that the insolvents had waived the protection afforded to them by the section. The house was regarded by all concerned as having vested in the Receiver and it was not claimed by the insolvent as property which was exempt: 25 A. I. R. 1938 Nag. 544 and 11 A. I. R. 1924 All. 328 (F. B.), *Rel. on.* [Para 14]

Annotation :— ('44-Com.), Civil P. C., S. 60 N. 10 & 24.

(c) Provincial Insolvency Act (1920), S. 59 — Receiver to realize property with all convenient speed.

It is the duty of the Receiver to realize the property of the debtor with all convenient speed. It would be most inconvenient and unjust if neither the creditors nor the Receiver knew for 18 years exactly what the insolvent's estate consisted of. These are matters to be taken up and settled "as speedily as possible." [Para 14]

Cases referred:—

1. ('38) I. L. R. (1938) Nag. 461 : 25 A. I. R. 1938 Nag. 366 : 179 I. C. 688, Gowardhandas v. Mohanlal.

2. ('38) 1938 N. L. J. 445 : 25 A. I. R. 1938 Nag. 544: 180 I. C. 690, Ramdhin v. Sheodutt Rai.
3. ('24) 46 All. 489: 11 A. I. R. 1924 All. 328: 84 I. C. 749 (F. B.), Mubarak Hussain v. Ahmad.

M. R. Bobde and K. G. Chendkey—for Applicant.

A. V. Zinzarde (in person) and S. A. Zinzarde — for Non-Applicant.

Bose J. — The only question in revision is whether the house now in question vested in the Receiver when either the applicant Ganpatrao or his father Nagoba were declared insolvent. The applicant contends that it did not because it is exempt under S. 28 (5), Provincial Insolvency Act, read with S. 60 (1) (c), Civil P. C. The lower Court holds it vested.

[2] The applicant's father Nagoba was declared insolvent on 17-4-1926 and the applicant on 28-3-1927. A number of petitions were presented against them. Nagoba admitted acts of insolvency but the son contested hence the difference in the dates of adjudication. When the petitions were made Nagoba and his son both put in written statements on 22-2-1926. Nagoba stated that he and his son had, among other things, a money-lending shop at Nagpur and asked the Court to make arrangements for the maintenance and residence of his family and himself. In the list of property he mentioned a shop at Nagpur. The applicant said in his statement that the information given by his father in his statement regarding their ancestral property and dues and family business was correct, but he contended that debts incurred by his father were not binding on him and so he should not be declared insolvent.

[3] The Court passed the following order on these applications on 27-4-1926:

"An order for the residence and subsistence allowance of the insolvent, his son Ganpat Rao and the members of their family has been prayed for. The family will be allowed to occupy the house which they are occupying at present, until further orders, but they shall always, whenever necessary, allow the Receiver access to their house for seeing and taking possession of the moveables which may be contained therein. The insolvent and his son shall make over every property to the Receiver without the least delay."

[4] It is evident that the Receiver thereupon took possession of the house because the accounts and other documents show that he executed the annual repairs and turned the tiles every year and purchased new tiles. When we say took 'possession' we do not mean "occupation" because of course that remained with Nagoba and his son in accordance with the Court's order. But he took over what is regarded as "possession" in the eye of the law.

[5] Exhibit N. A.-1 are the accounts. They show repairs and so forth from 28-7 1927 down to 7-6-1945, that is to say, for a period of 18 years. Exhibits N. A. 2 to N. A. 13, N. A. 15 to N. A. 17 and N. A. 19 to N. A. 40 are receipts stretching from 1929 to 1945 regarding the same matter. Exhibits N. A. 41 to N. A. 49 show that the nazul rent for the site was paid by the Receiver from 1938 to 1945. Then, what is even more important, is that Nagoba himself wrote to the Receiver at times and requested him to make proper arrangements about turning the tiles and putting in new ones. His letters are Exs. N. A. 14 and N. A. 18. These are written in the years 1936 and 1937. It is evident from these that the Receiver did take over this item of property and manage it, without objection from either of the insolvents. The applicant says he never consented, but the point is that he himself admitted in his statement that his father was the manager of the family and he never objected even after his father's death. He permitted the Receiver to exercise acts of management and spend money over the house. It is true the municipal taxes were paid by the insolvents but that does not mean much in the face of these other facts because, after all, the insolvents were residing in the bungalow and getting the benefit of municipal amenities.

[6] Sixteen and a half years after Nagoba's insolvency, namely in November 1942, the Receiver proposed to sell the house now in dispute and the applicant then claimed it was exempt being a house occupied by an agriculturist, namely himself.

[7] The Insolvency Court rejected this contention on 14-11-1942 and so did the District Judge on appeal. A second appeal followed and this Court remanded the case on 10-11-1944. After remand both the lower Courts have again found against the insolvent. Hence this revision.

[8] Now the question whether the house falls within the provisions of S. 60 (1) (c) is really one of fact in this case. There is no longer any difficulty about the law. That was settled in I. L. R. (1938) Nag. 461.[1]

[9] We agree with the learned counsel for the receiver that the crucial date is the date of the adjudication. That is the date on which the property either vests or does not vest in the receiver, and once it has vested no subsequent conduct of the insolvent can alter this fact. We also follow and uphold the decision in 1938 N.L.J. 445[2] given by one of us (Bose J.) to the effect that the protection conferred by S. 60 (1) (c) is for the benefit of the agriculturist and can be waived by him. It was also held in that case, following the Allahabad Full Bench in 46 ALL. 489[3] and decisions in Bombay, Calcutta and Patna, that when an agriculturist mortgages a house which would otherwise be protected by S. 60 (1) (c) the house can be sold in execution. The Calcutta and Patna view was also adopted to the effect that when an agriculturist mortgages such a

house he must be taken to have waived the privilege. It is to be observed that the section does not impose an absolute prohibition on sale but merely states that the property shall not be *liable* to such attachment and sale.

[10] The relevance of these decisions here is that this house was mortgaged by the insolvents and was under mortgage at the dates of both adjudications. The Receiver instituted proceedings to have the mortgage annulled and after protracted proceedings succeeded. The fact of mortgage in itself indicated that the privilege had been waived and as the mortgage was still in being at the dates of adjudications the property vested in the Receiver. But that apart, neither the insolvents, nor the mortgagees appear to have raised the objection that the property did not vest in the Receiver. On the contrary the insolvents lay by and permitted the receiver to proceed and ultimately to succeed. As against this is the fact that the insolvents did object to the Receiver taking over the *sir* land which the insolvents claimed became their own proprietary occupancy holding by reason of the vesting.

[11] All this reasoning would apply even if there was no doubt about the applicability of S. 60 (1) (c) on the merits — that is to say even if it were beyond dispute that the house was occupied by an agriculturist *as such*. But on the facts there is considerable doubt.

[12] The family was a money-lending family and though it had some agricultural land the bulk of it was let out. The home cultivation did not require more than 8 pairs of bullocks. The original estate consisted of 120 acres at Paungaon, about 5 to 6 miles outside Nagpur, and some 188 acres at Pullar and Sheloti which are some distance from Nagpur. On 20-3-1925 they purchased the village of Bharatwada for rupees 65,000. This was less than four months from the date when the creditors petitioned for their insolvency. (The petition was presented on 12-6-1925). Within 3 months, namely on 12-6-1925, they mortgaged this village and practically all their transferable property for a lac of rupees. Of that, this village formed the principal item. This was the mortgage which was later annulled.

[13] It can be conceded that after the insolvency the insolvents were agriculturists because the fields were all they had left. Everything else vested in the Receiver. But on the date of the petition it is doubtful whether it could be said that they occupied the house in dispute, which they themselves styled as a money-lending shop, for agricultural purposes as such. Whether they did so or not was a matter which they themselves knew best. If then they (1) had already mortgaged it, (2) laid no claim to it at the date of the vesting, (3) applied for permission to reside either there or elsewhere, (4) allowed the Receiver to spend money over its repairs and pay the nazul rent for 18 years, (5) actually petitioned the Receiver to put in fresh tiles and make a good job of the retiling, (6) omitted to include this item in their petition relating to the sir lands for which they claimed exemption, (7) omitted to claim it in the annulment proceedings relating to the mortgage and permitted the Receiver to spend time, energy and money in reclaiming it for the estate and (8) included the 'shop' in the list of assets, it is evident that they could not have regarded this as property falling under S. 60 (1) (c) and so could not themselves have been using the house for agricultural purposes as such.

[14] There is still another consideration which weighs with us. Section 59, Insolvency Act, prescribes that

"the receiver, shall, *with all convenient speed*, realise the property of the debtor."

Ghosh quotes Ringwood in his Provincial Insolvency Act, Edn. 11, p. 625 and points out that it is the receiver's duty to take over all the bankrupt's property "*as soon as possible.*" So also in Halsbury's Laws of England (Hailsham Edition) p. 250, para. 324, Edn. 2 it is said that:

"It is the duty of the trustee *as soon as possible* to take possession of the deeds etc."

and at p. 388, para. 524 (Realisation of estate)

"The estate must be realised *as speedily as possible*, and if possible distributed when realised in a single dividend."

As we have shown, this urgency is also reflected in the Provincial Insolvency Act. It would be most inconvenient and unjust if neither the creditors nor the receiver knew for 18 years exactly what the insolvent's estate consisted of. These are matters to be taken up and settled "as speedily as possible." We have no doubt that this house was regarded by all concerned as having vested in the Receiver and that it was not claimed by the insolvent as property which was exempt. The "shop" which was listed by Nagoba himself was situate in this building and no attempt was made to separate the "shop" from the rest of the premises.

[15] For all these reasons we confirm the decision of the lower Court and hold that this house was not occupied by an agriculturist as such and that it was not necessary for the enjoyment of the agricultural portion of the insolvent's original estate. The application fails and is dismissed with costs. Counsel's fee Rs. 100.

R.G.D. *Revision dismissed.*

A. I. R. (35) 1948 Nagpur 395 *[C. N. 136.]*

PADHYE J.

N. S. Hadas — Appellant v. *Banwarilal Shankarlal—Respondent.*

Second Appeal No. 162 of 1947, Decided on 11-4-1947, from appellate decree of 3rd Addl. Dist. Judge, Nagpur, D/-10-2-1947.

Limitation Act (1908), S. 12 (1)—Time requisite for obtaining copies—Application for copies defective in information — Information subsequently supplied—Time from date of application to date of supplying information, when can be excluded—Nagpur High Court Rules, R. 532.

No time could be excluded as time requisite for obtaining copies if that time was lost on account of the mistake on the part of the applicant but this cannot be said when with reasonable diligence on the part of the Copying Department which under the High Court Rules it is expected to exercise, the delay could have been avoided. In such cases final cause for the delay is non-exercise of reasonable diligence on the part of the Copying Department, and for that reason therefore time wasted on that account should be excluded under S. 12 (1), Limitation Act. This is the object of the amended R. 532 of the Nagpur High Court Rules, and particularly the distinction that is made therein between the mistakes which could be discovered immediately and those which could not be discovered immediately.

[Para 9]

On 7-8-1946, the appellant applied for certified copies of the judgment and decree with the intention of filing an appeal. The appellant was told to appear on 15-8-1946 but he actually appeared on 16-8-1946. On this date he was told that the information supplied by him in the application was insufficient and he supplied the information immediately. The original omission on the part of the applicant was material in that the number of the case and the date of disposal were not given. The question was whether the period between August 7 and August 15 could be excluded as time requisite for obtaining copies:

Held that the case was one where in spite of the omission on the part of the applicant for copies, the mistake could have been discovered by Copying Department immediately on presentation of the application and could have been set right by bringing it to the notice of the applicant. Hence the time from the 7th August to 15th August was the time requisite for obtaining the copies and should be excluded from computation of limitation under S. 12 (1), Limitation Act.

[Paras 7,9]

Annotation:—('42 Com.) Lim. Act, S. 12 N.12.

Case referred:—

1. ('40) I. L. R. (1940) Nag. 312 : 25 A. I. R. 1938 Nag. 287 : 177 I. C. 538, Mt. Hira Bai v. Indrabahadur Singh.

S. P. Kotval—for Appellant.
R. S. Dabir—for Respondent.

Judgment.—The only question which at this stage is to be considered is whether the appeal No. 11-A of 1947 presented in the Court of Mr. S. C. Rai, 3rd Additional District Judge, Nagpur, on 1-11-1946 was within limitation.

[2] This is to be considered independently of S. 5, Limitation Act, as the learned counsel for the appellant made it quite clear that he was not relying on that section and was not praying for extension of time, as according to him, his appeal as presented on 1-11-1946 was well within limitation.

[3] The judgment and decree appealed against in the lower appellate Court was dated 25-7-1946. On 7-8-1946 the appellant through his counsel's clerk applied for certified copies of the judgment and decree obviously with the intention of filing an appeal. The appellant was told to appear on 15-8-1946 but he actually appeared on 16-8-1946. On this date he was told that the information supplied by him in the application was insufficient and he supplied the information immediately. After a few days with which we are not concerned, the appellant was told to appear on 14-10-1946 for receiving the copies. He however actually appeared on 16-10-1946 and the copies were delivered to him. As already stated above, these copies were utilised for filing an appeal in the lower appellate Court on 1-11-1946. It may be mentioned here that the decree was actually signed on 27-7-1946, though according to O. 20, R. 7, Civil P. C. the decree shall bear date the day on which the judgment was pronounced. The difference between the date of the judgment and the date of the decree is inconsequential in the present case.

[4] According to the appellant, the time requisite for obtaining certified copies under S. 12 (1), Limitation Act, was 69 days and he filed the appeal on the 99th day that means on the last, i. e., the 30th day, and his appeal was within limitation. Of course, this is based on the assumption that the entire period from 7-8-1946 to 14-10-1946, both days inclusive, is time requisite for obtaining certified copies. It is not disputed by the appellant that the application filed by him through the clerk of his counsel Mr. Sathe was incomplete inasmuch as it did not give the case number and the date of disposal of the civil suit. Undoubtedly these were material particulars to be given in an application as in the absence of these details the record could not be traced. It is however contended that this mistake was one which could have been discovered by the Copying Department immediately the application was presented, and it was the duty of the Copying Department to bring that mistake to the notice of the appellant so that he could have supplied that information as he actually did on 16-8-1946 immediately it was brought to his notice. It was contended that the omission to give the number of the suit and the date of disposal were purely accidental and that the appellant could not be penalized for such accidental omission on the part of his counsel's clerk, he having done everything in his power to obtain the copies with a view to file an appeal. I have already stated above that I am not considering the application under S. 5, Limitation Act, and

the only question with which I am concerned here is whether the period from 7-8-1946 to 15-8-1946 should be taken as time requisite for obtaining certified copies and that because a certain omission which could have been discovered and brought to the notice of the appellant immediately was not discovered by the Copying Department and consequently the copying work could not be started till that information was supplied on 16-8-1946.

[5] In I. L. R. 1940 Nag. 312[1] which was decided on the strength of the old rules, as they then existed, it was laid down that time during which copying is stopped for want of funds due to miscalculation in the office and not to absence of *bona fides* and where there is no delay in supplying the extra charges when demanded should be excluded under S. 12, Limitation Act, as time requisite to obtain a copy of a decree. The principle underlying this decision is that where the delay is due to the Copying Department that time should be excluded as time requisite for obtaining copies under S. 12 (1), Limitation Act, but it is not so when the delay is due to the negligence of the appellant. This case however does not consider the position which may arise and which did arise in the present case, where the delay was due to something which the appellant failed to do but which could have been avoided if the Copying Department had done what it was expected to do.

[6] The rules on the subject of grant of certified copies have undergone a radical change and they have in fact been amended from time to time. Under the rules as they existed under notification No. 1989 1206-V, dated 30th October 1924, R. 25 stood as under:

"On receiving an application presented by hand the Head Copyist shall forthwith fix and intimate to the applicant a date within seven working days of the presentation on which he should attend to ascertain whether the copy is ready or whether any further advance was required."

The rule as it stood did not impose upon the Copying Department any duty to check the application for copies immediately to find out if there were any omission and to get them corrected by the applicant for copies. Of course, there were other rules according to which where such omissions were detected in due course, the information was given to the applicant personally or through post and the information required were supplied. According to R. 532, framed and published under notification No. 7781, dated 13th December 1937, the position is somewhat different. That rule runs thus:

"Under no circumstances shall a copy be carried beyond the number of sheets for which charges of copying have been deposited. Whenever copying cannot be taken in hand for want of funds or correct information, the head copyist shall report the matter to the Clerk of Court and shall also inform the applicant when he attends, or send an intimation by a service postcard to the applicant who has asked for the copy to be supplied by post."

This rule was however later on substituted by the new Rule No. 532 which is in fact material for the purpose of this appeal. The relevant portion of that rule runs thus:

"When an application is made by post and it is discovered that copying cannot be taken in hand for want of funds or correct information, a notice shall be posted to the applicant on the day the defect is discovered, with a direction to send the money or the information.

When the defect mentioned in sub-r. (2) above is discovered in an application presented in person, the applicant shall be informed verbally at once if it is discovered on presentation, and if after presentation, then on the next day fixed for him to appear. If he does not appear on the day fixed, notice shall be posted to him that day to the address, if any, given under R. 520."

Sub-rule (3) of this rule therefore contemplates two kinds of defects, (i) that which could be discovered immediately on the presentation of the application itself and (ii) that which could not be discovered then but could be discovered later on. In respect of the first kind of defect, the rule lays down that the copying department should inform verbally the applicant of the defect and get it corrected then and there. In respect of the defects which are discovered subsequently the applicant should be informed of the same on the date fixed for his appearance, or if he does not appear on that date, the notice should be posted to him to the address given under R. 520.

[6] The important question that arises is whether the defect is of the former class namely one which could be discovered immediately on presentation of the application and if this mistake was still not discovered by the Copying Department and was not brought to the notice of the applicant immediately, whether the days between the date of the presentation of the application and the date on which the defect was shown to the applicant at a later stage should be excluded as days requisite for obtaining copies. Here it cannot be disputed that the original omission was on the part of the applicant in so far as he did not give some particulars, *i. e.* the case number and the date of disposal. This was however a defect which could be discovered immediately on presentation of the application if the officer receiving the application only looked into the application. If under the rule he is expected to look into the application and to discover such defects as could be discovered immediately, it was a failure on his part not to discover that mistake and to bring it to the notice of the applicant. If he had done his part, as he was expected to do under the

amended rule, no time could have been lost and the application would have been perfectly in order from the very time of its presentation.

[7] The sole question therefore is whether it is the duty of the officer receiving the application to go through it immediately on receipt and to find out whether necessary particulars are given in that application. It is true that all mistakes would not be detected by him immediately, for instance, if a wrong number of a case is given or a wrong date of disposal is given or a wrong name of the Court is given, and those mistakes would come to light only after a report from the record room. But there are however certain mistakes which are on the face of the application detected immediately, for instance, the one in the present case or supposing rather than giving 1946 as the date of disposal the applicant were to write in the application 1956, surely the officer would at once detect the mistake on going through the application and get it corrected. The present case, therefore, is a case in my view, where in spite of the omission on the part of the applicant for copies the mistake could have been discovered by the Copying Department immediately on presentation of the application and could have been set right by bringing it to the notice of the applicant.

[8] Sen J. in Misc. Second Appeal No. 90 of 1943 decided on 29th November 1944, pointed out that I. L. R. (1940) Nag. 312,[1] was a decision based on the old table. It is on account of that decision changes have been effected in the new table and there are new number of columns. The learned Judge thereafter referred also to the amended rule already stated above and observed, and with those observations I fully associate myself, that the former rules cast the almost impossible burden on the applicant and did not throw any responsibility on the office. This was changed by reason of the decision in I. L. R. (1940) Nag. 312.[1]

[9] In my view, no time could be excluded as time requisite for obtaining copies if that time was lost on account of the mistake on the part of the applicant, but this cannot be said when with reasonable diligence on the part of the Copying Department which under the rules it is expected to exercise, that delay could have been avoided. In such cases final cause for the delay is non-exercise of reasonable diligence on the part of the Copying Department, and for that reason therefore time wasted on that account should be excluded under S. 12 (1), Limitation Act. This is how I understand the object of the amended rule and particularly the distinction that is made therein between the mistakes which could be discovered immediately and those which could not be discovered immediately. It is in this light that I hold that the time from 7th August 1946 to 15th August 1946 is the time requisite for obtaining the copies and should be excluded from computation of limitation under S. 12 (1), Limitation Act.

[10] In conclusion I set aside the order of the lower appellate Court dismissing the appeal as barred by time and remand the case to the lower Court for being heard and disposed of on merits. Costs would abide the result.

S.C. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 397 *[C. N. 137.]*

BOSE J.

Bhalchandra Trimbak Deshpande—Defendant — Appellant v. *Dattatraya Jaikrishna Deshpande—Plaintiff —Respondent.*

Second Appeal No. 693 of 1943, Decided on 23-12-1947, from appellate decree of Dist. Judge, Amraoti, D/- 26-7-1943.

Limitation Act (1908), Arts. 62, 120 and 131—Applicability —Suit for recovery of plaintiff's share of lawajama — No dispute as to plaintiff's right to share but only with regard to amount payable to him—Article 62 or Art. 120 applies and not Art. 131.

The plaintiff brought a suit for recovery of his share of *lawajama* which the defendant had received each year from Government for and on behalf of himself and other sharers in the grant. The plaintiffs' right to share or the extent thereof was not denied but the extent of the amount payable to plaintiff was disputed.

Held that the suit must be regarded as one for money had and received to the plaintiff's use to the extent of the plaintiff's share and therefore it was governed by Art. 62 or Art. 120 and not by Art. 131 : *Case law referred.* [Paras 3, 5]

Annotation:— ('42-Com.) Lim. Act, Art. 62 N. 9; Art. 120 N. 14; Art. 131 N. 3.

Cases referred:—

1. ('28) 11 N. L. J. 62 : 109 I. C. 85, Nazarali v. Akaji.
2. ('15) 38 Mad. 916 : 1 A.I.R. 1914 Mad. 377: 23 I.C. 806 (F. B.), Zamorin of Calicut v. Achutha Menon.
3. ('31) 55 Bom. 193 : 18 A.I.R. 1931 Bom. 189 : 131 I. C. 465, Janardan Trimbak v. Dinkar Hari.
4. ('37) I. L. R. (1937) All. 140 : 24 A. I. R. 1937 All. 57 : 166 I. C. 823, Hidayat Ullah v. Gokul Chand.
5. ('26) 5 Pat. 249 : 13 A.I.R. 1926 Pat. 205 : 94 I. C. 826, Baidyanathjiu v. Har Dutt Tewari.
6. ('12) 34 All. 246 : 14 I. C. 505, Lachmi Narain v. Turab-un-nissa.

V. L. Prabhune—for Appellant.

P. R. Padhye—for Respondent.

Judgment.— Limitation is the only question involved in the appeal.

[2] The suit is for arrears of *lawajama* payable to the plaintiff by the defendant. The plaintiff's right to his share is not denied nor is the extent of his share in question. The plaint itself makes that plain. What the plaintiff says is that the amount due on the basis of these facts is a certain figure. The defendant says that it is considerably less because the defendant is entitled to certain deductions.

[3] Both the lower Courts have applied Art. 131, Limitation Act, and have held the whole of

the claim to be within time. This, in my opinion, is wrong. I consider that either Art. 62, or Art. 120 will apply but not Art. 131.

[4] Article 131 applies when the suit is to enforce a right. Here the right is not denied but only the extent of the amount payable under that right. It is similar to a suit by a cosharer against the *lambardar* when there is no dispute about the right or the extent of the share but only as regards the amount payable because of deductions which are claimed by one side and denied by the other.

[5] The defendant received a certain sum of money each year from Government for and on behalf of himself and the other sharers in the grant. That accordingly is money had and received to the plaintiff's use to the extent of the plaintiff's share and either Art. 62 or Art. 120 will apply.

[6] In 11 N.L.J. 62[1] on which the lower Courts have relied the right was denied and not merely the amount payable. That case is therefore not in point. As regards the Madras Full Bench in 38 Mad. 916[2] I prefer the opinion of Tyabji J. in his referring order to that of the Full Bench and Ayling J. to the extent that Art. 131 is inappropriate. The view of the Full Bench has not been accepted in other High Courts and Bombay, Allahabad and Patna apply Art. 62 : *see* 55 Bom. 193;[3] I.L.R. (1937) ALL. 140[4] at p. 146; 5 Pat. 249[5] and 34 ALL. 246.[6]

[7] I need not decide here whether Art. 120 applies or Art. 62, because the appellant has confined his claim in appeal to Rs. 458-8-0 and whichever Article applies the reduction in the decree will be covered by that figure.

[8] The appeal is allowed with costs in this Court and in the lower appellate Court. The decrees of the lower Courts are modified by reducing the claim dismissed by Rs. 458-8-0. The plaintiff will get proportionate costs in the first Court.

K.S. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 398 *[C. N. 138.]*

POLLOCK AND SHEVDE JJ.

Govindram Hardattarai — Defendant — Appellant v. *Sheoprasad Sagarmal — Plaintiff — Respondent.*

First Appeal No. 92 of 1942, Decided on 28-8-1947, from decree of Additional District Judge, Wardha, D/- 23-9-1942.

(a) Will — Testator appointing wahiwatdars to protect property during his son's minority and not directing them to perform specifically duties of executor — Estate does not vest in wahiwatdars.

Where a testator has appointed certain persons as wahiwatdars to protect his estate during the minority of his son and has not directed them to perform specifically the duties of an executor or to administer the estate, the estate cannot be said to have vested in the wahiwatdars (executors) and the testator's son can bring a suit for partition in respect of that estate : 20 Mad. 467 and 33 Cal. 657, *Ref.* [Para 4]

(b) Hindu law — Adoption — Formal act of taking in adoption can be delegated by adoptive father.

If the adoptive father has reached the decision to adopt and the contract of gift and acceptance is concluded between the principals competent to give and take, then the adoptive father, if unable through illness or otherwise to perform the formal act of taking in adoption, can delegate the performance of that act to a suitable person such as his wife. [Para 5]

(c) Hindu law — Adoption — Custom — Agarwals from Marwad — Widow can adopt without husband's permission — She can adopt her husband's younger brother.

Among Agarwals from Marwad there is a custom which permits a widow to adopt without her husband's permission. There is also a custom among them which permits a widow to adopt her husband's younger brother. There is nothing unreasonable in such a custom particularly amongst a caste such as Agarwals from Marwad, that regards adoption as a purely secular affair. [Paras 6, 7, 8]

Cases referred :—

1. ('97) 20 Mad. 467, Seshamma v. Chennappa.
2. ('06) 33 Cal. 657, Gopal Dass v. Budree Dass.
3. ('34) 30 N. L. R. 62 : 21 A. I. R. 1934 Nag. 1 : 150 I. C. 1007, Mt. Chunnibai v. Girdhari Lal.
4. ('25) 21 N. L. R. 50 : 12 A. I. R. 1925 P. C. 118:52 Cal. 482 : 52 I. A. 231 : 87 I. C. 357 (P. C.), Dhanraj v. Sonibai.
5. ('73) 10 Bom. H. C. R. 241, Bhagwandas Tejmal v. Rajmal.
6. ('75-77) 1 All. 688: 5 I. A. 87: 3 Sar. 807 : 3 Suther. 529 (P. C.), Sheo Singh Rai v. Dakho.
7. ('25) 49 Bom. 615 : 12 A. I. R. 1925 Bom. 399 : 89 I. C. 197, Shripad Dattatraya v. Vithal Vasudeoshet.

D. T. Mangalmurti, R. A. Mande and R. G. Siras — for Appellant.

M. R. Bobde, M. D. Khandekar and M. W. Puranik — for Respondent.

Judgment. — The defendant-appellant Govindram and his uncle Bissesarlal formed at one time a joint Hindu family owning a considerable estate. They separated in estate in 1934, and between 2nd July and 23rd September in that year much of the joint property was divided between them, though some was left undivided for the time being. On 20th January 1910 Bissesarlal adopted as a son Shriram, the natural son of his first cousin Sagarmal. On 28th November 1923, Shriram died, and on 23rd November 1924 his widow Badamibai adopted to her husband as a son the plaintiff-respondent Sheoprasad, who also is the natural son of Sagarmal and the younger brother of his adoptive father Shriram. On 23rd September 1934, when the partitioning of the estate ceased, Bissesarlal made a will (Ex. P-331) in which after making some provision for Badamibai for her lifetime he left the residue of his estate to Sheoprasad. Bissesarlal died on 23rd October 1934. All these facts are admitted, except that the validity of the two adoptions is denied.

[2] On 16th September 1937, Sheoprasad, then a minor, represented by his adoptive mother Badamibai as his next friend, brought the present suit for partition and possession of a half share in the property that remained undivided at the partition between Govindram and Bissesarlal in 1934. In 1940, after Sheoprasad had come of age, he was shown as a major, and his next friend, Badamibai was struck off. Sheoprasad based his claim to Bissesarlal's estate on the will (EX.P-331) if the adoptions were held invalid, or as the surviving coparcener if they were held valid. That claim succeeded in the lower Court, and against that decision Govindram has preferred this appeal.

[3] It is admitted in this Court that if the adoptions are held invalid the plaintiff is entitled to the estate of Bissessarlal under the will (EX. P-331), but it is contended that by that will the estate vested in the executors, who have not yet applied for probate, and that therefore Sheoprasad is not competent to bring this suit. The will contains the following directions :

"Sheoprasad is a minor. Until he attains majority, he should be brought up by his adoptive mother Mt. Badami Bai. But she being a lady, the property, dealings and shop cannot be managed by her well. I am, therefore, appointing my next heirs mentioned below to act as *wahiwatdars* (executors) until Sheoprasad attains majority."

and then follow five names. The will goes on:

"The *wadiwatdars* (executors) mentioned above should manage the property on my death."

[4] It appears to us that in this case, as in 20 Mad. 467[1] and 33 Cal. 657,[2] the persons described as *wahiwatdars* or executors were not directed to perform specifically the duties of an executor or to administer the estate but were appointed to protect the property during Sheoprasad's minority, and that therefore the estate did not vest in them, and that it is open to Sheoprasad to bring this suit. If the two adoptions therefore are held invalid Sheoprasad is entitled to succeed on the strength of the will.

[5] It is not now disputed that Bissessarlal arranged with his cousin Sagarmal that he (Bissessarlal) should adopt Sagarmal's son Shriram as a son at Bilaspur, where a family wedding was to take place. Bissessarlal's branch of the family lives in Wardha, while Sagarmal's branch lives in Bilaspur. Bissessarlal, however, owing to illness was unable to go to Bilaspur and he directed his wife Tulsabai to take Shriram in adoption on his behalf. This is not now disputed. It is, however, contended that during Bissessarlal's lifetime no one except Bissessarlal could perform the actual ceremony of taking in adoption. The question whether the performance of the formal act of physical delivery may be delegated by the natural parents was considered at length by the Judicial Commissioner's Court in 30 N. L. R. 62,[3] and the conclusion reached was that the performance of the formal act of physical delivery may be delegated by his parents to suitable persons, but not the power or decision to give away the boy in adoption. With that decision we respectfully agree, and we can see no reason why similarly the formal act of taking in adoption should not be delegated to a suitable person by the adoptive father after he has reached the decision to adopt. As Sir Hari Singh Gour puts it in his Hindu Code, quoted at p. 69 of the above case :

"...If the contract of gift and acceptance is concluded between the principals competent to give and take, and either of them is through illness or otherwise unable to perform the only indispensable ceremony of corporal giving and taking or of the Datta Homa, if necessary, its performance may be delegated to be performed by the wife, or another son on the part of the giver and any relation, such as the uncle of the receiver."

In our opinion, therefore, Shriram was validly adopted as a son of Bissessarlal in 1910.

[6] The validity of the adoption of Sheoprasad in 1924 is challenged on two grounds, (1) that Badamibai had no authority from her husband to adopt, and (2) that she could not validly adopt her husband's younger brother. The family, which is a family of Agarwals from Marwad, is governed by the Benares School of Hindu Law modified, according to the plaintiff's pleadings, by certain customs recognized and followed amongst Agarwals in Lachmangarh State in Marwad, and there is a considerable body of evidence to show that amongst them a widow can adopt a son without her husband's permission and that it is permissible to adopt a husband's younger brother. On the question whether Badamibai had authority from her husband to adopt Sheoprasad, there is the evidence of Badamibai herself (P. W. 19) and the family cook, Narsingh Das (P. W. 10), who are corroborated to a certain extent by Zabarmal (P. W. 16), Sagarmal's wife Jadaobai (P. W. 27) and Sagarmal's brother Gurumukhrai (P. W. 33). There was never any protest against the adoption, and on the death of Bissessarlal the defendant Govindram made a present to the plaintiff Sheoprasad. Govindram did not oppose Sheoprasad's application to have his name mutated in certain property and to obtain a succession certificate to recover certain debts after the death of Bissessarlal. In the will Bissessarlal described Sheoprasad as his adoptive grandson. We agree with the lower Court that in these circumstances there is no adequate reason for disbelieving the evidence of Badamibai and Narsinghdas that Badamibai had her husband's permission to adopt Sheoprasad.

[7] In support of the plaintiff's contention

that no authority is required, there is the evidence of Hariram (P. W. 1), who quoted an instance of such an adoption in 1923 in his own family, Hanumanbux (P. W. 8), Nagarmal (P. W. 12), Jamanlal (P. W. 17), Gowardhandas (P. W. 20), Hariram (P. W. 22), Shriniwas (P. W. 23) a pundit of Lachmangarh, Sheokarandas (P. W. 25), Kanhaiyalal (P. W. 26), Govindram (P. W. 31), and Rameshwarlal (P. W. 34). There is practically no rebutting evidence. In 21 N. L. R. 50[4] their Lordships of the Judicial Committee re-affirmed their previous statement in 10 Bom. H. C. R. 241[5] that Agarwals generally adhere to Jainism and do not believe that a son, either by birth or adoption, confers spiritual benefit on the father, and that there appears to be no difference in the rules relating to adoption between the various sub-sects of Agarwalas. In 1 ALL. 688[6] they held that in Delhi and other towns in the North-Western Provinces among the sect of Jains known Saraogi Agarwalas a sonless widow has a right to adopt without permission from her husband or consent of his kinsmen. Lala Chiranjilal Agarwal in an article entitled. 'Adoption among Marwari Agarwals', which appears at p. 80 of the journal in A. I. R. 1937 Journal has considered this question, and come to the conclusion that amongst Agarwals and other trading Vaishnawa communities adoption is a purely secular affair, that no ceremony is necessary except the tying of a turban on the head of the adoptee, that there is no effective difference between Vaishnawas and Jains, that a widow of a separated brother can make a valid adoption without any authority from her husband or his kinsmen, and that a brother can be validly adopted. He states in conclusion :

"In Rajputana and among Agarwals who have migrated and are residing outside, the custom is so common that it has never been challenged."

We agree with the lower Court that a custom that permits a widow amongst these Agarwals to adopt without her husband's permission has been proved.

[8] Assuming that under the ordinary Hindu law, it is not permissible for a widow to adopt her husband's younger brother, though a contrary view has been taken in 49 Bom. 615,[7] there is ample evidence in this case to show that such a custom exists amongst these Agarwals. Evidence has been given of a large number of examples, and though the evidence of some of these examples is somewhat slender others have been clearly established. Hariram (P. W. 1) says that he was adopted by the widow of his elder brother, and we see no reason to doubt this statement. Two examples have been given in the family of the parties to this suit. Harnarayan, the uncle of Bissesarlal and Sagarmal, had Jankilal and Jorimal amongst other sons, and after the death of Jankilal his widow adopted Jorimal. On this point we have the evidence of Ghisulal (P. W. 3), Hariram (P. W. 22) and Gurumukhrai (P. W. 33). The other example in this family is the defendant's own sister Laxmibai, who adopted her husband's younger brother Bajrang. On this point we have the evidence of Rukhmanand (P.W. 2) and Govindram (P.W. 31). The defendant Govindram (D.W. 1) himself professes ignorance of whom his sister had adopted. We have therefore no hesitation in accepting this story that she adopted her husband's younger brother. Another example was given by Ghisulal (P. W. 3), who attended the adoption by Laduram's widow Chandribai of her husband's younger brother Chhotelal; this was corroborated by Gowardhandas (P. W. 20), uncle of Chandribai. Kisanlal (P. W. 7) said that his uncle's widow Sukhdeobai adopted her husband's younger brother Bhuramal, though this is perhaps not clearly established. Shriniwas (P. W. 23), a pundit from Lachmangarh, quoted four examples, and we see no reason why he should be disbelieved. On the question of the adoption by Murlidhar Ganeriwala of his younger brother Laxminiwas, he was corroborated by Hariram (P. W. 22). Other examples have been given by Hariram (P.W. 22) and his son Motilal (P.W. 24), Sheokaran Das (P. W. 25), Kanhaiyalal (P.W. 26), whose brother's widow Jankibai adopted him, Jagat Narain (P. W. 32), who quoted four examples, and Rameshwarlal (P. W. 34). We consider that the custom has been conclusively established. It has been suggested that the custom should be rejected as unreasonable, but we see nothing unreasonable in such a custom, particularly amongst a caste that regards adoption as a purely secular affair.

[9] That concludes the appeal except as regards three minor items of accounting. The first item relates to a deposit made by Tulsabai. The accounts show that Rs. 1454-9-6 was due to her and that Rs. 1354-9-8 was paid on 21-9-1934. It is suggested that there was a mistake in the accounts and that the whole deposit was repaid, but there is no evidence of any mistake or of full repayment, and we agree with the lower Court that the defendant is therefore liable to pay Rs. 50 on this account to the plaintiff.

[10] The second item relates to certain premia paid for an insurance policy on the life of Govindram, the defendant. It is admitted that this insurance was for the benefit of Govindram himself and not for the benefit of the joint family, and we therefore agree with the lower Court that the plaintiff is entitled to get half the amount paid as premia up to the time of the partition.

[11] The third item relates to Rs. 1898-1-6 claimed by the defendant as his half share of the value of certain ornaments in gold given to Bissesarlal for the plaintiff's bride. This was a counter-claim to a claim made by the plaintiff. On an objection by the defendant the plaintiff had to pay *ad valorem* court-fees on the amount that he claimed on this account, and it is clear that the defendant should have paid *ad valorem* court-fees on his counter-claim. As he failed to do so it was properly rejected.

[12] For the above reasons the appeal fails and is dismissed with costs.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 401 [C. N. 139.]

POLLOCK AND HIDAYATULLAH JJ.

Gulabrao Vithoba and others—Defendants—Appellants v. *Shamrao Jagoba, Plaintiff and others, Defendants—Respondents.*

First Appeal No. 116 of 1940, Decided on 12-12-1947, from decree of Dist. Judge, Chhindwara, D/- 7-9-1940.

Limitation Act (1908), Art. 83 — Sale of part of immovable property — Purchase-money kept with vendee to pay off existing mortgage — Failure to pay—Suit for damages—Limitation runs from date of loss to vendor — Loss occurs either when final foreclosure decree is passed or when vendor loses his possession.

The covenant by the vendee of a part of mortgaged property to pay off the incumbrance on the property out of the purchase-money, is nothing more than a contract of indemnity. The damages to which the vendor is entitled on a breach of that contract must be measured by the loss that he has suffered, and limitation will run from the date when the loss was suffered. It may be that it would be open to the purchaser to sue for breach of contract before he has actually suffered loss, but where loss has actually been suffered, that gives rise to a cause of action : 31 All. 583 (P. C.); 26 Cal. 241 ; 20 A.I.R. 1933 Mad. 424;20 A.I.R. 1933 All. 386; 13 A.I.R. 1926 Nag. 429 and 22 A I.R. 1935 Nag. 135, *Rel. on*; 18 A.I.R. 1931 All. 754 and 34 All. 429, *Ref.* [Para 10]

Where the vendee does not pay off the encumbrance, and the final foreclosure decree is passed, the loss occurs either when the final decree for foreclosure is passed by which the vendor loses title in the property or when he actually loses possession : 25 A. I. R. 1938 Pat. 275, *Ref.*; 26 Cal. 241 ; 20 A. I. R. 1933 All. 386 ; 18 A.I.R. 1926 Nag. 429 and 20 A.I.R. 1933 Mad. 424, *Rel. on.* [Para 11]

Annotation : ('41-Com.) Limitation Act, Art. 83, N. 12.

(b) Civil P. C. (1908), O. 1, R. 9 — Mortgage by five brothers jointly — Sale of part of property — Purchase-money kept with vendee to pay off mortgagee — On failure, final foreclosure decree passed and property lost to brothers— One brother filing suit against vendee for damages — Other brothers except one made parties— Previous partition between brothers proved—Suit held maintainable — Plaintiff held entitled only to 1/5th share in loss as compensation.

Five brothers, forming a joint family, had mortgaged properties *A* and *B*. They sold subsequently property *A*. The vendee agreed to pay off the mortgages on *A* and *B* out of the purchase-money. The vendee, however, failed to do so and the properties were lost to the brothers by the passing of a final foreclosure decree. One of the brothers sued the vendee for damages. The other brothers except one were made defendants. It was established that before the suit there had been a complete partition between the brothers, the plaintiff thus being entitled only to the 1/5th share in the properties :

Held that the suit was not bad on the ground that one of the brothers was not impleaded. The plaintiff was entitled to 1/5th share of the loss suffered, as compensation. [Para 12]

Annotation : ('44-Com.) Civil P. C., O. 1, R. 1, N. 7.

Cases referred :—

1. ('34) 30 N. L. R. 265 : 20 A. I. R. 1933 Nag. 171 : 144 I. C. 326, Gadiram v. Punamchand.
2. ('09) 31 All. 583 : 26 I. A. 203 : 3 I. C. 793 (P. C.), Izzatun-nisa Begam v. Partab Singh.
3. ('31) 18 A.I.R. 1931 All. 754 : 53 All. 946 : 133 I.C. 604, Shiam Lal v. Abdul Salam.
4. ('12) 34 All. 429 : 14 I. C. 244, Raghubar Rai v. Jai Raj.
5. ('99) 26 Cal. 241, Kumar Nath Bhuttacharjee v. Nobo Kumar Bhuttacharjee.
6. ('33) 56 Mad. 724 : 20 A. I. R. 1933 Mad. 424 : 144 I.C. 550, Navamani Nadar v. Vedamanicka Nadar.
7. ('33) 55 All. 490 : 20 A.I.R. 1933 All. 386 : 143 I.C. 821, Onkar Singh v. Kashi Prasad.
8. ('26) 13 A.I.R. 1926 Nag. 429: 97 I.C. 185, Vinayakrao v. Shripatrao.
9. ('35) 31 N. L. R. 235 : 22 A.I.R. 1935 Nag. 135: 157 I.C. 587, Mohanlal v. Motilal.
10. ('38) 25 A. I. R. 1938 Pat. 275 : 17 Pat. 338 : 176 I.C. 269, Keshwar Sao v. Guni Singh.

D. T. Mangalmoorti — for Appellants.

M. R. Bobde and P. R. Padhye — for Respondent 1.

Judgment.— On 23rd June 1921 the plaintiff Shamrao and his four brothers executed two mortgages, Ex. D-1 in favour of Ghudulal for Rs. 2256 and Ex. D-2 in favour of Sheoratan for Rs. 2500. In each deed the mortgaged property consisted of a two-anna village share and two absolute occupancy fields, Survey Nos. 20 and 65, in *mauza* Mogra in the Chhindwara district. Sheoratan brought Civil Suit No. 137 of 1925 to enforce his mortgage (Ex. D-2), and a preliminary decree was passed on 20th October 1925 declaring that the property would be foreclosed in default of payment of Rs. 6251-13-0 by 20th April 1926. As a result of a family partition between Ghudulal and Sheoratan some time in 1925—the exact date is unknown—the mortgagee rights in Ex. D-1 were assigned to Sheoratan. In the meantime on 28th April 1925 Shamrao and his brothers executed an agreement (Ex. D-4) to sell Survey No. 20 to Gadiram, who has since died and is now represented by his sons, the first four defendants, for Rs. 13,500, and admitted the receipt of Rs. 5000 paid as earnest money. Notice of this proposed sale was given to Sheoratan, who was the lambardar of the village, and he applied to a revenue officer to fix the value of the field. The Deputy Commissioner fixed the value at Rs. 11,088 on 8th April 1926 and an appeal by Sheoratan to the Commissioner failed. Sheoratan then abandoned his claim to pre-empt.

[2] On 1st July 1926 Shamrao and his brothers executed a sale-deed (Ex. D-3) by which they sold Survey No. 20 to Gadiram for Rs. 13,500 which according to the recitals in the deed, was made up of Rs. 7351 which was retained by Gadiram, Rs. 4853-13 0 which the vendors said that they had already received, and three items of Rs. 475, Rs. 516-9-0 and Rs. 303-10-0, totalling Rs. 1295-3-0, which were admittedly paid by Gadiram some time in 1925 in settlement of three decrees that had been passed against the vendors. The main question in dispute in this case is whether this sum of Rs. 7351 was retained by Gadiram in order to pay off both the mortgages, as Shamrao contends, or only the debt due on Ex. D 2 for which the preliminary decree for Rs. 6251-13-0 had been passed, as the sons of Gadiram contend. The recital in the deed is as follows:

'This field is subject to mortgage along with other property and a foreclosure decree of Sheoratan ... has been passed against us, and it is also subject to one more mortgage. It is necessary to make payment thereof. The amount of the decree No. 137 of 1925 ... is Rs. 6251-13 0, and the amount due under the mortgage deed, in respect of which no suit has been brought, comes to Rs. 5,000 including interest. If we do not pay this debt there is apprehension of getting the entire ancestral property under mortgage dated 23-6-1921 ruined. Hence in order to save other property, we hereby, after selling the abovementioned field to the said Gadiram, keep Rs. 7,351 with the purchaser by way of amanat (deposit). The purchaser may pay that amount directly to Sheoratan . . . or may deposit the same in the Court."

[3] On 24-4-1926 Sheoratan applied for a final decree in Civil Suit No. 137 of 1925: *vide* Ex. D 9. On 20 4-1926 Shamrao and his brothers had applied for an extension of time for payment, and on 25-9-1926 one month's time was given to them to find security for payment of interest. On 20-10-1926 they produced Gadiram as a surety, and he undertook to give security for the value of the crops which it was agreed was Rs. 1000. The Court directed as follows:

"I allow interest at Re. 1 p. c. p. m. till the date that now will be fixed for payment, i. e. 20-3-1926. The total amount comes to Rs. 1,000 plus Rs. 687-8-0 interest from 23-4-1926 to 20-3-1927, total Rs. 1,687-8-0.'

On 30-10-1926 Shamrao and his brothers paid Rs. 3000, which was admittedly received from Gadiram, and were granted an extension of four months. Interest apparently was to be paid as already agreed. Subsequently Gadiram paid further sums of Rs. 2445-14-0 on 1-3-1927, rupees 326-11-0 on 7-3-1927, and finally Rs. 115 and Rs. 23-8-0 costs on 2-7-1927 in full satisfaction of the claim : *vide* Exs. D-9, D-10, and D-11.

[4] Subsequently Sheoratan brought Civil Suit No. 4 of 1929 on 13-4-1929 to enforce the other mortgage, Ex. D-1, in which suit Gadiram also was impleaded as a defendant. On 25-1-1930 Sheoratan obtained a preliminary decree directing foreclosure in default of payment of apparently Rs. 11,416-11-6, but an appeal by Gadiram to the Judicial Commissioner's Court was allowed on 12-1-1933, as reported in 30 N. L. R. 265 *vide* Ex. D-15. It was held that as Gadiram had paid off the mortgage, Ex. D-2, he was entitled to use that mortgage (Ex. D-2) as a shield against the mortgage in the suit (Ex. D-1), though both mortgages were in fact executed and registered on the same day, and that he was therefore entitled to retain survey No. 20 without redeeming the mortgage Ex. D-1. A final decree for foreclosure against Shamrao and his brothers, Ex. P-10, was passed on 20-7-1934, and on 17 9-1934, and on 17-9-1934 possession of the other mortgaged property was delivered to Punamchand, son of Sheoratan, Sheoratan having died meanwhile : *vide* Ex. P-3. Gadiram thus retained possession of survey No. 20 without paying off the mortgage Ex. D-1, and Shamrao and his brothers lost the entire mortgaged property in spite of their attempts to save some of it by the sale of survey No. 20.

[5] Gadiram died on 29-2-1936. On 17-7-1937 Shamrao sent a telegraphic notice (Ex. D-17) to Vithoba, son of Gadiram, defendant 1, demanding the return of Rs. 7351 within 24 hours, and on 19-7-1937 he filed an application to sue *in forma pauperis* for the recovery of this amount from the sons of Gadiram, defendants 1, 2, 3, 4. As Shamrao's brothers had refused to join him in bringing the suit he impleaded his three surviving brothers as defendants 5, 6, 7. The result of his failure to implead the legal representative of his other brother, Narayan, will be considered later. The application to sue *in forma pauperis* was eventually allowed, and an amended plaint was filed on 11-3 1940. There were further amendments on 15-6-1940.

[6] The lower Court held that out of the money retained by Gadiram Rs. 2951 was retained to pay off the balance due on the preliminary decree after the payment of Rs. 3900 on 30-10 1926 and Rs. 5000 to pay off the other mortgage (Ex. D 1), and that the plaintiff was entitled to a refund of Rs. 5000 with interest at 3 per cent. per annum from 1-7-1926. Against that decision the sons of Gadiram have preferred this appeal.

[7] The sale deed, Ex. D-3, was registered on 1-11-1926. When it was executed on 1-7 1926 no application had been made for a final decree, and there was no agreement in existence to pay interest on the preliminary decree for rupees 6251-13-0. It is therefore difficult to see why the purchaser should have been allowed to retain Rs. 7351 if he were to pay off only the preliminary decree for Rs. 6251-13-0. The appellants' explanation of this is that it was intended to

apply for an extension of time, that it was expected that there would be no difficulty in obtaining an extension on an agreement to pay interest, and that this sum of Rs. 7351 included Rs. 1100 interest at the contract rate of Rs. 1-8-0 per cent. per mensem for one year from 20-4-1926, by which time it was hoped that the question of pre-emption would be settled. The exact amount would be Rs. 1125-5-0, but it is said that Rs. 1100 was taken as a round figure.

[8] Shamrao, the plaintiff-respondent, on the other hand, contends that the figures in the sale deed were altered after the payment of Rs. 3900 on 30-10-1926, which was two days before the registration. This left Rs. 2351-13-0 payable on the preliminary decree, and this combined with Rs. 5000 calculated as due on the other mortgage, Ex. D 1, made up the sum of Rs. 7351. There have been a considerable number of alterations in Ex. D 3, not all apparently at the same time. It appears to us from a scrutiny of that document that, apart from the figure of Rs. 13,500, which was throughout fixed as the consideration, the other figures were not filled in at the time of writing. As first written the deed showed that Rs. 12,204-13-0 was to be retained by the purchaser and Rs. 7351 was admitted as having been received. There could never have been any admission that Rs. 7351 had been received, and there obviously was some mistake because this would make the total consideration over rupees 20,000 and the stamp that was actually purchased, Rs. 210, was a stamp for such an amount.

[9] The question whether Gadiram undertook to pay off both mortgage debts or only one depends largely on whether he paid Rs. 5000 in cash on 28-4-1925. (Their Lordships considered the evidence in this respect and continued.) We, therefore, agree with the lower Court and accept Shamrao's evidence that Rs. 5000 was not paid in cash on 28-4-1925.

[10] If Rs. 5000 was not paid in cash in advance, then clearly Rs. 7351 was retained in order to pay off both the mortgages and Gadiram failed to fulfil his obligation. The question then is what the vendors can claim as damages for this failure. The lower Court has held that they are entitled to the refund of Rs. 5000, which was retained by the purchaser to pay off the mortgage Ex. D-1, and interest thereon, but admittedly as a result of the purchaser's failure to fulfil his obligation the vendors lost property worth Rs. 1000. There was no promise by Gadiram to pay Rs. 5000 to his purchasers. He undertook, as we have held, to retain that money and use it to pay off the two mortgages, which he failed to do, and as a result of his failure his vendors lost certain property worth Rs. 1000. Gadiram's covenant with his vendors to pay off this encumbrance was nothing more than a contract of indemnity, as was held in 31 ALL. 583,[2] and it appears to us that the damages to which his vendors are entitled on a breach of that contract must be measured by the loss that they have suffered, and that limitation will run from the date when the loss was suffered. It may be that it would have been open to the purchasers to sue for breach of contract before they had actually suffered loss, as was held in A.I.R. 1931 ALL. 754[3] and 34 ALL. 429;[4] but where loss has actually been suffered, that, in our opinion, gives rise to a cause of action. In support of this proposition there are the decisions in 26 Cal. 241,[5] 56 Mad. 724,[6] 55 ALL. 490[7] where the decision in 34 ALL. 429[4] was not approved, A.I.R. 1926 Nag. 429[8] and 31 N. L. R. 235.[9]

[11] The question, however, remains whether the loss was suffered when the suit on the mortgage was filed or when the final decree for foreclosure was passed or when possession was actually taken in execution of the final decree. In A. I. R. 1938 Pat. 275[10] it was held that limitation runs from the date of the filing of the suit to enforce the mortgage, but after that date the mortgage debt might have been paid off, and we agree with the view taken in 26 Cal. 241,[5] 55 ALL. 490[7] and A. I. R. 1926 Nag. 429[8] that limitation in such a case would run from the date of payment. In 56 Mad. 724[6] it was held that the loss occurred when the property was sold. In the present case it seems to us that the loss clearly occurred either when the final decree for foreclosure was passed by which the plaintiff lost his title in the property or when he actually lost possession, and whichever of these dates is held as the starting point for limitation the present suit is within time.

[12] The last question is whether the plaintiff alone is entitled to sue, and if so, whether he is entitled to recover the entire amount of the compensation or only 1/5th share of it. One of his brothers, Narayan, died some time between 25-1-1930 when civil suit No. 4 of 1929 was decided and 12-1-1933 when the appeal in that suit (First Appeal No. 108 of 1930) was decided in the Judicial Commissioner's Court. The plaintiff stated that his surviving brothers had refused to join him in this suit and he therefore impleaded them as defendants. According to his own evidence elicited in cross-examination there was a complete partition between him and his four brothers while Narayan was still alive and thereafter the plaintiff had a 1/5th separate undivided share in the property that was subsequently foreclosed and lost by the failure of Gadiram to pay off the mortgage Ex. D 1. He is, therefore, in our opinion, entitled to compensation for the loss of his separate share, and he is entitled to

sue for that compensation without joining his brothers as co-plaintiffs. He is therefore entitled to 1/5th share of Rs. 1000 i.e. Rs. 200, as compensation for the loss that he has suffered, and in order that he may be restored to the position in which he would have been if he had not suffered that loss he must be allowed interest on that amount from the date when he lost possession. In the plaint as originally drafted he claimed interest at 3 per cent. per annum, but subsequently he claimed 10 per cent. We think that he should be allowed interest at 6 per cent. per annum on Rs. 200 from 17-9-1934 up to the date of suit, during the suit, and thereafter till realization. Costs both here and below will be in proportion to success and failure.

R.G.D. *Order accordingly.*

A. I. R. (35) 1948 Nagpur 404 *[C. N. 140.]*

BOSE J.

Mohamad Alimullakhan Mohamed Nurullakhan — Plaintiff — Appellant v. *Maruti Janu — Defendant — Respondent.*

Second Appeal No. 282 of 1943, Decided on 3-1-1947, from appellate decree of 2nd Addl. District Judge, Buldana, D/- 18-12-1943.

(a) Berar Land Revenue Code (1928), S. 72 (1) — Tenant paying higher rent than assessment for period of years through ignorance of his rights — No protection under S. 72 (1).

Where a tenant has not been paying a uniform rent and has also been paying considerably more than the assessment over a period of years without protest, he cannot claim the status of an ante-alienation tenant. The fact that he has paid the enhanced rate through ignorance of his rights, does not matter : 27 A. I. R. 1940 Nag. 209, *Rel. on.* [Paras 12 & 13]

(b) Berar Land Revenue Code (1928), S. 73— Registered kabuliyat executed by tenant in 1919 without objection—Kabuliyat indicating surrender of tenancy and fresh tenancy—Kabuliyat acted upon for period of years — Tenancy held commenced in 1919 and tenant was not tenant of antiquity.

The tenant and his predecessors had been holding from at least 1867. But there was nothing on the record to show that they came on the land for the first time in that year. There was also a registered kabuliat executed by the tanant without objection in 1919, indicating that there was a surrender of the tenancy, whatever its nature, and a fresh tenancy. The kabuliyat was acted on for a period of years:

Held, that it was established that the tenancy commenced in 1919 and therefore the tenant was not a tenant of antiquity, and the Court could not go behind the document of 1919 and guess at what might have been the position at that date : 14 A. I. R. 1927 P. C. 102; 31 A. I. R. 1944 Lah. 9 and 31 A.I.R. 1944 Bom. 210, *Rel. on.* [Para 20]

(c) Registration Act (1908), S. 2 (7) — Registered kabuliyat — Evidentiary value as proof of oral agricultural lease.

Although a registered kabuliyat executed by a tenant cannot of itself operate as a lease, yet it may be given in evidence of an oral agricultural lease : 15 A. I. R. 1928 Nag. 153, *Ref.* [Para 16]

Annotation : ('45-Com.) Registration Act, S. 2 (7), N. 1.

Cases referred :—

1. ('40) I. L. R. (1940) Nag. 388: 27 A. I. R. 1940 Nag. 209 : 190 I. C. 319, Hidayat v. Ramchandra.
2. ('28) 15 A. I. R. 1928 Nag. 153 : 111 I. C. 488, Deolia v. Janardhan Shrinivas.
3. ('27) 8 Lah. 573 : 14 A. I. R. 1927 P. C. 102 : 54 I. A. 178 : 101 I. C. 355 (P. C.), Dhanna Mal v. Motisagar.
4. ('44) 31 A. I. R. 1944 Lah. 9 : 211 I. C. 366, Mahomed Yusuf v. Abdul Khaliq.
5. ('44) 31 A. I. R. 1944 Bom. 210, Bhikaji Vishnu v. Ramchandra Krishna.

R. S. Dabir — for Appellant.

K. B. Tare and K. V. Brahma — for Respondent.

Judgment.—This is a plaintiff's appeal.

[2] The plaintiff is the jahagirdar of the village in which the land in suit is situate. The defendant is his tenant. The plaintiff seeks to evict the defendant on the ground that the defendant is an annual tenant who has not paid his rent for 10 years, namely, from 1930-31 to 1939-40 inclusive. The notice required by S. 74 (2), Berar Land Revenue Code, has been given.

[3] The defendant claims that he is an ante-alienation tenant and is entitled to the protection granted to him under S. 72 of the Code. In the alternative, he claims that he is a tenant of antiquity under S. 73. Both the lower Courts hold that the defendant is an ante-alienation tenant.

[4] Under S. 72 (1) an ante-alienation tenant is a tenant who has personally or through his predecessors in title held land continuously in an alienated village from a period prior to the alienation or from the year 1875. We do not know the year of the alienation in this case, and accordingly that clause can be left out of consideration. We are, therefore, concerned solely with the year 1875. It has been held as a fact that the defendant has been holding continuously through his predecessors-in-title and himself from before 1875. That finding is not challenged, and indeed cannot be. Therefore, that condition of S. 72 is fulfilled.

[5] The second condition laid down by S. 72 is that the tenant should have held for the period specified above "on a rent equal in amount to the fair assessment." Both the lower Courts have found that the defendant has not so held. They find that the defendant has been paying a higher rent than the assessed rent over a period of years. But according to them, this was done through ignorance and not because the defendant accepted the position of an annual tenant. This finding, so far as the latter part of it is concerned, cannot be accepted.

[6] Section 72 confers a special and privileged status which can only be claimed by those who have in fact been paying the assessed rent over

the requisite period. If they have not, then it does not matter whether they have been paying an enhanced rate in ignorance of their rights or not because if they had raised the question at the time the jahagirdar might have been in a position to eject them. Consequently, if they choose to attorn afresh and continue to hold under the new attornment over a period of years—here from 1919 down to 1931—without protest, then they cannot, after a lapse of nearly 12 years, be permitted to go behind their attornment. In any event the condition is that they must be proved to have been paying the fair assessment. In the absence of that, they cannot claim the special privilege which S. 72 (1) confers.

[7] Of course, a question of fraud would be another matter. But unilateral mistake cannot avoid a contract nor, in my opinion, can it operate against the jahagirdar under S. 72. It is to be observed that there was no pleading of mistake, and certainly not of a mutual mistake. The defendant's plea was that the enhanced rent was taken by fraud, but no details of the fraud are given, except the one fact that an enhanced rate was taken without letting the defendant's ancestors know of it. Even if these facts be accepted as true it would make no difference. The fact that a demand is made and that the demand on the face of it is for something more than the defendant has been paying would not indicate fraud. But that apart, there is no proof that the defendant's ancestors did not know they were paying an enhanced rate, and it seems to be unlikely that that should have been the case. There being no fraud, the lower Court's finding that the enhanced rate was paid due to the unilateral mistake of the tenant's predecessors would not operate to give the defendant protection under S. 72.

[8] Such evidence as there is on the record disclosed the following facts. Exhibit P 8 shows that the total claimed from the tenant, and presumably paid, for the 22 acres 15 gunthas of survey No. 68 from the year 1879-80 down to 1882-83 was Rs. 13-11-6. In the next three years this was reduced by one rupee. It was reduced to Rs. 12-11-6. Then from 1887-88 down to 1897-98 the rent, together with the cesses, was restored to the original figure of Rs. 13-11 6.

[9] From here we come to Ex. P-9. That shows that from 1898-99 down to 1915 16 the amount was as before, Rs. 13-11 6. Next comes Ex. P-10. That shows that in the year 1916-17 the demand was increased by the jahagirdar by Rs. 21 and that the total was brought up to Rs. 35-6-6. In the next year, 1917-18, the demand was Rs. 35-10-9. Then in the following year, 1917-16 (1918-19?) the demand was again raised by rupee one and brought up to Rs. 36-9 3.

[10] This appears to have occasioned some dispute between the *jahagirdar* and the tenants because we have Ex. P-6 (*a kabuliyat*) executed by the tenants in favour of the *jahagirdar* dated 11-4-1919 under which the tenants agreed to pay Rs. 36-9-3 every year. This document has been attacked, accordingly I will not rely on it at this stage. There is enough foundation for the finding of fact by the two lower Courts that from 1919-20 an enhanced rate was paid, apart from this document.

[11] Exhibit P-7 shows that from 1919-20 down to 1923-24 Rs. 36-9-3 was claimed. Then from 1924-25 to 1925-26 Rs. 38-7-3, was claimed. Next, from 1926-27 down to 1930-31 Rs. 39-7 was claimed According to the findings, these sums were paid. After that the tenants refused to pay.

[12] Exhibit P-1 is an extract from the record-of-rights, and it shows that the assessed rent was only Rs. 13-11-0 which is also what we find from Exs. P-8 and P-9. They show the amount assessed from 1887 down to 1915-16. Exhibit P 1 also shows that the amount paid was Rs. 24. Therefore, it is abundantly clear that the tenants have not been paying a uniform rate, also that they have been paying considerably more than the assessment over a period of years. That being the case, and no question of fraud arising or having been proved, or having been found, it is impossible to uphold the finding of the lower Courts that the status of an ante-alienation tenant has been established.

[13] It was held by Grille J. (as he then was) in I. L. R. (1940) Nag. 388[1] that before a tenant can claim the protection which S. 72 affords he must prove that he has been paying as rent to the landlord the exact amount of assessment over the requisite period of years and neither less nor more. In the face of that decision the conclusion of the two lower Courts regarding this matter cannot be accepted.

[14] That leaves at large the alternative case of a tenancy of antiquity. Under S. 73 a tenant is deemed to be one of antiquity where

"by reason of the antiquity of a tenancy . . . no satisfactory evidence of its commencement and of its period is forthcoming."

There are other conditions too, but we need not concern ourselves with those. The explanation states:

"Antiquity does not mean absolute antiquity, but means antiquity in reference to the difficulty of securing evidence."

[15] The evidence here, and the documents, show that the defendant and his predecessors have been holding from at least 1867. There is nothing on the present record to show that they came on the land for the first time in that year, nor is there any evidence of the commencement of the period of that tenancy forthcoming in this

case. Accordingly, if that was all, the conditions of S. 73 would be fulfilled.

[16] But it is not all because the commencement of the tenure is known. Exhibit P 6, the *kabuliyat*, executed by the tenants, indicates that there was a surrender of the tenancy, whatever its nature, in the year 1919 and a fresh tenancy on the terms disclosed in Ex. P-6. It is argued that Ex. P-6 cannot of itself operate as a lease because a lease has to be executed by the lessor, and this is only a *kabuliyat*. Therefore, according to Kinkhede A. J. C. in A. I. R. 1928 Nag. 153[2] at p. 156 this cannot operate as a lease. That was conceded, but it was said that Ex. P-6 does not purport to be a lease. It is a *kabuliyat*. But it does show that there was an oral lease. Therefore, there being no prohibition regarding an oral lease, because S. 117, T. P. Act, excludes the provisions of S. 107 from agricultural leases, the oral lease can be proved and the proof is to be found in Ex. P-6 In my opinion, this contention is well founded.

[17] Exhibit P 6 is registered. It discloses an undertaking by the tenants to hold on certain terms. It is clear there must have been a corresponding agreement by the landlord, and that agreement would constitute the lease. There is also evidence to that effect. Such a lease did not require registration because it could be oral, and in those days it was not necessary for the lessor and the lessee both to sign the document. The amendment in the law regarding this did not come into effect till 1929. Therefore, in the year 1919 it was permissible for a valid lease to be made by an oral agreement on the landlord's side and the execution of a registered *kabuliyat* on the side of the tenant. That being so, there was undoubtedly a fresh lease in 1919.

[18] Had the tenants objected in 1919 to the execution of such a document the position might have been different. It might be that they could have proved that they were tenants of antiquity holding under the corresponding provisions of the Berar Land Revenue Code then in existence. On the other hand, it may be that the landlord had at that date evidence in his possession regarding the commencement of the tenure and regarding its period. It may be that the period had expired in 1919, and accordingly a fresh document was necessary. If that was the case then clearly the old document would have been destroyed, and this alone left.

[19] Alternatively it may be that the document having been executed in 1919, and no objection having been taken to it over this long period of years. the landlord allowed the evidence which he then had in his possession to be destroyed or to disappear. Therefore, the mere fact that on the material we now have before us it appears that the defendant might have established that he was a tenant of antiquity in 1919 will not justify us in going behind the document of 1919 which was acted on over a period of years, and will not justify the conclusion that the tenant had no power to surrender his holding and that he did not intend to do so.

[20] The cases reported in 8 Lah. 573[3] at p. 583, which is a Privy Council case, A. I. R. 1944 Lah. 9[4] and A. I. R. 1944 Bom. 210[5] at p. 211 show that the execution of a document such as Ex. P-6 imports a surrender of whatever kind of tenancy was in being in the year 1919 and the commencement of a fresh one from that date; and that holds good even if the previous tenancy was of a permanent nature. Therefore, it is, in my opinion, established that the tenancy here commenced in 1919, and we cannot go behind the document of 1919 and guess at what might have been the position at that date.

[21] The result is that the appeal succeeds and the decrees of the lower Courts are set aside, and a decree granting the plaintiff's claim with costs in all three Courts will now be passed.

V.B.B. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 406 *[C. N. 141.]*

PADHYE J.

Brijmohan Mattulal—Judgment-debtor—Appellant v. *Mt. Chandrabhagabai—Decree-holder—Respondent.*

Misc. Second Appeal No. 93 of 1942, Decided on 4-8-1947, from appellate decree of 1st Addl. Dist. Judge, Nagpur, 11-11-1941.

(a) Civil P. C. (1908), S. 100 — New plea — Plea going to root of jurisdiction can be allowed to be raised for first time in second appeal.

A plea that the executing Court had no jurisdiction to execute the decree for specific performance of a contract of sale of a house by delivery of possession of the site, as the decree passed was merely a decree for specific performance and not for delivery of possession, goes to the very root, namely, the question of jurisdiction of an executing Court and can, therefore, be allowed to be raised for the first time in second appeal. [Para 2]

Annotation :—('44-Com.) Civil P. C., S. 100, N. 58.

(b) Civil P. C. (1908), S. 47 —Power of executing Court — Decree only for specific performance, not for delivery of possession — Executing Court cannot deliver possession.

An executing Court's jurisdiction is limited to the decree itself. If a decree in respect of a particular property or in respect of a particular matter is rightly or wrongly not passed, it cannot be executed in respect of that property or in respect of that matter. A relief for specific performance and one for possession of the property in respect of which specific performance is asked for are two distinct reliefs. They may in certain circumstances be claimed in the same suit, but it is not necessary to do so. [Paras 4 and 5]

Where in a suit for specific performance of a contract to sell a house, there is no prayer for delivery of possession and the decree passed in the suit does

not direct delivery of possession of the property, the executing Court has no jurisdiction to deliver possession in execution under S. 47 on the ground that relief for possession is incidental to the relief for specific performance: 1 A. I. R. 1914 Mad. 465, *Rel. on*; 18 A. I. R. 1931 Pat. 179 and 7 A. I. R. 1920 Pat. 89, *Dissent.*; *Case law referred.* [Para 7]

Annotation:—('44-Com.) Civil P. C., S. 47, N. 75.

Cases referred :—

1. ('31) 18 A. I. R. 1931 Pat. 179 : 131 I. C. 529, Atal Behary v. Barada Prasad.
2. ('14) 38 Mad. 698 : 1 A. I. R. 1914 Mad. 465 : 22 I. C. 912, Krishnammal v. Sundararaju Aiyar.
3. ('20) 5 Pat. L. J. 314 : 7 A. I. R. 1920 Pat. 89: 56 I. C. 322, Deonandan Prasad Singh v. Janki Singh.
4. ('08) 4 N. L. R. 14, Sheodin v. Mt. Godhi Bai.
5. ('18) 14 N. L. R. 176 : 5 A. I. R. 1918 Nag. 221 : 48 I. C. 188, Pandu v. Sital Prasad.
6. ('26) 13 A. I. R. 1926 Rang. 197 : 98 I. C. 160, Maung Myo v. Maung Paw Shun.
7. ('94) 18 Bom. 537, Nathu v. Budhu.
8. ('25) 12 A. I. R. 1925 Bom. 181 : 86 I. C. 137, Krishnaji Babaji v. Sangappa Murigappa.
9. ('17) 40 Mad. 365 : 5 A. I. R. 1918 Mad. 681 : 40 I. C. 429 (F. B.), Rangayya Reddy v. Subramania Aiyar.

Y. S. Tambe—for Appellant.

S. R. Mangrulkar—for Respondent.

Judgment.—This is a second appeal by the judgment-debtor. In execution of a decree for specific performance passed in favour of the decree-holder-respondent in Civil Suit No. 99 of 1933 he took possession of certain property and now claims an additional property, namely, the open site A. B. C. J. shown in the decree-holder's map which according to the decree-holder was included in the property that was agreed to be sold to him by the judgment-debtor and in respect of which a decree for specific performance was passed in his favour. Both the Courts below have held that the site A. B. C. J. was included in the property agreed to be sold and in respect of which a decree was passed and the decree-holder was therefore entitled to be put in possession of that property in execution of the decree in Civil Suit No. 99 of 1933.

[2] Apart from the merits of the case, the appellant-judgment-debtor contended that the executing Court had no jurisdiction to execute the decree in respect of possession of the site as the decree passed in Civil Suit No. 99 of 1933 was merely a decree for specific performance and not for delivery of possession. The question was no doubt raised for first time in second appeal but it goes to the very root, namely, the question of jurisdiction of an executing Court. An executing Court cannot execute anything which goes beyond the terms of the decree passed and the scope of the decree cannot be ascertained from the decree itself which is on the record (paper book page 5). I do not therefore see any valid ground for not allowing the appellant to raise this question. If the executing Court had no jurisdiction at all to execute the decree, then the decree-holder's application under S. 47, Civil P. C., must necessarily fail and will have to be dismissed on that ground alone without going into the merits of the question decided by the two Courts below.

[3] I find from the plaint in Civil Suit No. 99 of 1933 that the reliefs claimed are in these words: (a) A decree directing the defendant to execute a duly registered sale-deed in favour of the plaintiff in respect of the suit house be passed. And Rs. 10 be granted as cost of notice in Maharashtra; (b) That in case the defendant fails to execute the sale-deed this Court be pleased to execute the same on his behalf; (c) Full costs of this suit be saddled on the defendant; (d) Any other relief which the Court deems fit may also be granted. It is thus clear that the relief for possession was not asked for in the plaint. I further find from the decree that no decree was passed for delivery of possession of the house. Relevant portion of the decree runs thus:

"It is ordered that the plaintiff do deposit in Court for payment to the defendant on or before 28-8-34 the sum of Rs. 2,402-12-0 and it is further ordered that the plaintiff do produce and file in Court the necessary stamp paper for the execution of sale-deed on or before 23-8-34. It is further decreed that on the plaintiff's doing this the defendant shall execute the necessary sale-deed conveying the house described below to the plaintiff and shall get it registered at the cost of the plaintiff, and that the sum of Rs. 386-4-0, be paid by the defendant to the plaintiff on account of costs of this suit in case plaintiff does not deduct this sum from the sale price."

The decree gives the description of the property in respect of which a sale deed is to be executed. Thus, not only was there no prayar for delivery of possession but there was also no decree passed either by the first Court or by the lower appellate Court for delivery of possession of the property.

[4] It is beyond doubt that an executing Court's jurisdiction is limited to the decree itself. If a decree in respect of a particular property or in respect of a particular matter is rightly or wrongly not passed, it cannot be executed in respect of that property or in respect of that matter. It is no doubt held in A. I. R. 1931 Pat. 179[1] that even where a decree is only for specific performance and not for delivery of possession, the executing Court can deliver possession as relief of possession is incidental to the relief for specific performance. The learned Judges of the Patna High Court did not agree with the decision in 38 Mad. 698.[2] On the other hand, they followed a previous decision of the Patna High Court in 5 Pat. L. J. 314[3] in which 38 Mad. 698[2] was expressly dissented from. In the earlier ruling of the Patna High Court, Mullick J. observed thus:

"We think therefore that the first objection (i. e. the objection that the Court had no right to give possession)

must fail and upon the officer of the Court executing the document on behalf of the judgment-debtor if he refuses to execute it a right to possession vests in the decree-holder which can be enforced by the execution Court."

The learned Judge also relied on O. 21, R. 32, cl. (5), Civil P. C. I express my respectful dissent from the decision of the Patna High Court as in my view O. 21, R. 32 (5) is not relevant to a situation like the present.

[5] On the other hand, it is clear from the decision in 38 Mad. 698[2] that a relief for specific performance and one for possession of the property in respect of which specific performance is asked for are two distinct reliefs. They may in certain circumstances be claimed in the same suit, but it is not necessary to do so. In fact, it is held in that case that where the plaintiff, who had obtained in a previous suit a decree against the defendants for specific performance of an agreement to sell certain immovable property to the plaintiff and had got a sale deed in his favour in execution of the decree, instituted the present suit for the recovery of possession of the lands from the defendants, the suit was not barred by O. 2, R. 2, Civil P. C. This very positively shows that the two reliefs are distinct. The decision in 38 Mad. 698[2] has been accepted as correct and followed in 4 N. L. R. 11[4] and 14 N. L. R. 176.[5] The Rangoon High Court in A. I. R. 1926 Rang. 197[6] and the Bombay High Court in 18 Bom. 537[7] and in A. I. R. 1925 Bom. 181[8] have taken a similar view.

[6] The following passage at p. 414 of Edn. 2 of the Law of Specific Relief by Agarwal is also relevant:

"In a suit for specific performance of a contract in respect of immovable property the settled practice of Courts in India, where the parties properly sued for specific performance are in possession of the property is to allow a prayer for possession to be added to the prayer for specific performance as such a procedure obviates the necessity for filing a fresh suit for possession to which there could be no defence."

Reliance has been placed on a Full Bench decision in 40 Mad. 365[9] and other decisions.

[7] In my view, therefore, the executing Court went beyond its jurisdiction in entertaining an application under S. 47, Civil P. C., in a proceeding arising out of a decree which was not a decree for possession but only a decree for specific performance of a contract. That in my view was sufficient to reject the application of the decree-holder under S. 47, Civil P. C. His remedy may be by way of a separate suit and he may follow the same.

[8] The other question that was urged before me was regarding the extent of the property against which the decree was passed. The decree-holder contended that the site shown in red in his map and demarcated by letters A B C J was a part of the property which was agreed to be sold to him and in respect of which a decree was passed in his favour. The judgment-debtor, on the other hand, contended that the decree was passed only as regards the house portion which was 65 feet east-west and 25 feet north-south. This excluded the portion which the decree-holder now claims possession of.

[9] In view of what I have held above, it is not necessary for me to decide this second question. This would be decided at proper time and in a proper legal proceeding. There is also no sufficient evidence before me to decide this question as the sale deed which was executed in execution of the decree for specific performance is not on record. That is a very important document for the decision of the question. The Courts below have not also considered whether there is any ambiguity and, if there is any, whether oral evidence was admissible. Any decision on such a scanty material, as is in this case, is bound to be unsatisfactory. I do not therefore propose to give any finding whether the site A B C J was included in the decree under execution or not and set aside the findings of the Courts below.

[10] In conclusion, the appeal is allowed on the first point. The parties to bear their own costs.

S.C. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 408 *[C. N. 142.]*

POLLOCK AND PADHYE JJ.

Messrs. Agarchand Chunnilal—Applicants v. *The Commissioner of Income-tax, C. P. & Berar—Respondent.*

Misc. Civil Case No. 130 of 1945, Decided on 16-12-1947.

Income-tax Act (1922), S. 10—Remission of debt granted by creditor to assessee trader held could not be treated as revenue receipt.

The assessee who was heavily indebted to a creditor was granted a remission of certain amount of the debt by the creditor during the accounting year. In previous years the assessee had been allowed to deduct the interest paid on this debt from his profits for purposes of income-tax. The question was whether this remission could be treated as a revenue receipt:

Held in the circumstances of the case that the amount of remission of debt granted by the creditor to the debtor could not be treated as a revenue receipt of the year of account: (1932) 16 Tax. Cas. 570, *Rel. on*; (1942) 10 I. T. R. 21 (Bom), *Disting.* [Para 3]

Cases referred:—

1. (1932) 16 Tax Cas. 570, Jackson v. British Mexican Petroleum Co., Ltd.
2. ('42) 1942-10 I. T. R. 21 (Bom.), In re Union Bank of Bijapur and Sholapur Ltd.

J. M. Thakar—for Applicants.

V. R. Sen—for Respondent.

Pollock J.—This is a reference under S. 66 (1), Income-tax Act.

[2] The assessee deals in gold, silver, grain and cotton, etc., and as a result apparently of forward contracts entered into through Messrs. Gangaram Asaram of Bombay he became heavily indebted to that firm. The debt due to Gangaram Asaram was shown in the assessees accounts, and interest on the debt was credited to Gangaram Asaram in the accounts each year. For the purposes of income-tax assessment the interest so credited was deducted from the assessee's profits. The assessment year with which we are concerned is the year 1943-44, and the assessment has to be made on the income for the year ending at Diwali 1942. In that year Rs. 1,48,242 was shown as due to Gangaram Asaram, but a settlement was arrived at between Gangaram and the assessee by which the assessee was given a remission of Rs. 54,225, the balance being partly paid in cash and adjusted by hawalas; and the debt being thus reduced to Rs. 40,000 was carried forward in the following years. The question referred to us is

'Whether, in the circumstances of the case, the sum of Rs. 54,225 has been rightly treated as a revenue receipt of the year of account.'

[3] The income-tax authorities have held that this item of Rs. 54,225 is a revenue receipt and not a capital receipt. The Income-tax Appellate Tribunal remarked:

'The fact therefore remains that a certain remission was granted by the creditor in the account which included revenue items which have been previously claimed by the assessee in his trading account and allowed by the Department. It is common knowledge that traders do grant remission to each other at the time of the settlement of an account. The remission may relate to the charging of higher rate of interest than agreed upon or for some credit entries which have been wrongly entered in the account. During the preceding years' assessments large sums on account of interest have been credited to the account of the creditor and allowed by the Department as a revenue deduction from the appellant's assessable income.'

In the five years ending with 1942, Rs. 41,247 was credited to the account of Gangaram as interest. There is no finding, or apparently evidence, that the amount was inflated or bogus or did not represent the true business and was a book-keeping method to diminish their revenue or anything of that kind, in the words of Rowlatt J. in (1932) 16 Tax. Cas. 570[1] at p. 583, and it appears to us that these two cases are very similar. The British Mexican Petroleum Company Limited became heavily indebted to other firms, and a large part of the debt was written off. That debt had been set off as against the profits in the previous year, and the Commissioners of Inland Revenue claimed that they were entitled to reopen the assessment of the previous year. In the alternative they claimed that the assessee company should be required to enter the sum remitted as a credit item in its accounts for the period in which it was remitted. Both those claims failed. Rowlatt J. remarked at p. 585:

'How on earth the forgiveness in that year of a past indebtedness can add to those profits I cannot understand.'

Lord Thankerton at p. 592 said:

'The appellant's alternative contention, which was not seriously pressed by the Attorney-General, is equally unsound, in my opinion. I am unable to see how the release from a liability, which liability has been finally dealt with in the preceding account, can form a trading receipt in the account for the year in which it is granted.'

So also Lord Macmillan at p. 593:

'I cannot see how the extent to which a debt is forgiven can become a credit item in the trading account for the period within which the concession is made.'

The case on which the Income-tax Appellate Tribunal has relied, (1942) I.T.R. 21,[2] appears to us to be clearly distinguishable because in that case there was an actual cash receipt in the year of assessment. In our opinion, therefore, the answer to the question referred to us is 'No.' The applicant will be entitled to his costs in this Court and a counsel's fee of Rs. 100.

K.S. *Answer in the negative.*

A. I. R. (35) 1948 Nagpur 409 *[C. N. 143.]*

HIDAYATULLAH J.

Netram Sadaram—Decree-holder —Appellant v. *Laxman Hari and another — Judgment-debtors — Respondents.*

Misc. Second Appeal No. 214 of 1945, Decided on 13-8-1947, from order of 2nd Addl. Dist. Judge, Amraoti, D/- 25-6-1945.

(a) C. P. and Berar Relief of Indebtedness Act (14 [XIV] of 1939), S. 13 (3) — Deputy Commissioner acts as revenue officer and not as persona designata — He has power to review his own order passed under S. 13 (3): 1944 N. L. J. (Rev.) 537, *Approved*; 1943 N. L. J. (Rev.) 119, *Not approved*. [Para 4]

(b) C. P. and Berar Relief of Indebtedness Act (14 [XIV] of 1939), S. 13 (3) — Payment of two instalments—Deputy Commissioner cannot enlarge time.

The penalty under S. 13 (3) is incurred on the failure to pay the two instalments on the due date and the Deputy Commissioner on an application has to pass an order under S. 13 (3) if two instalments are in arrears at least on the date of the filing of the application: 34 A. I. R. 1947 Nag. 78; 33 A. I. R. 1946 Nag. 45 and Misc. S. A. No. 173 of 1944 (Nag.), *Rel. on*.

On an application by the creditor for an order under S. 13 (3) on default in payment of two consecutive instalments by the debtor the Deputy Commissioner has no power to enlarge the time for payment of the two instalments. [Paras 5, 7]

(c) C. P. and Berar Relief of Indebtedness Act (14 [XIV] of 1939), S. 13 (3) — Order of Deputy Commissioner — Civil Court can question jurisdiction of Deputy Commissioner: 34 A. I. R. 1947 Nag. 78; 33 A. I. R. 1946 Nag. 45 and Misc. S. A. No. 173 of 1944 (Nag.), *Rel. on*. [Para 9]

Cases referred :—
1. ('43) 1943 N. L. J. (Rev.) 119, Dhekal v. Kisan.
2. ('44) 1944 N. L, J. (Rev.) 537, Amrit Nagoji v. Mohan Lal.
3. ('45) I. L. R. (1945) Nag. 973 : 33 A. I. R. 1946 Nag. 45, Vithal v. Laxman.
4. ('46) I. L. R. (1946) Nag, 786 : 34 A. I. R. 1947 Nag. 78 : 226 I. C. 294, Krishna v Udhaorao.
5. Misc. S. A. No. 173 of 1944, D/- 13-8-1946 (Nag.), Mendabai v. Kanchhedi Lal.

M. D. Khandekar and V. G. Hardas—for Appellant.
N. B. Chandurkar — for Respondents.

Judgment. — This is an appeal against the order of Mr. R. Y. Mahajan, Additional District Judge, Amraoti, in Civil Appeal No. 96-A of 1944, decided on 25th June 1945. The matter arises in execution proceedings based upon an order of the Deputy Commissioner under S. 13, Relief of Indebtedness Act. The Debt Relief Court had prepared a scheme of repayment and instalments were granted. This was on 13th February 1940. The instalments fell due on 15th February of each succeeding year. The Deputy Commissioner was moved on the allegation that two instalments were defaulted. The Deputy Commissioner passed an order on 10th August 1944 that the order of the Debt Relief Court had ceased to have effect and the balance remaining due was recoverable as a decree.

[2] Execution proceedings were started and during the course of the proceedings the judgment-debtor filed another order subsequently passed by the Deputy Commissioner rescinding his previous order on which the execution was based. It was contended that the Deputy Commissioner could not rescind or review the order but was *functus officio* the moment the first order was passed.

[3] The executing Court held that the Deputy Commissioner had the power to review his own order and in suitable cases even to revoke it. It further held that in the present case, the order on which execution was based having disappeared, the execution proceeding could not go on. On appeal this decision was upheld.

[4] The only question involved in the present case is whether the Deputy Commissioner is empowered to review his own order passed under S. 13 (3), C. P. Relief of Indebtedness Act. The matter is of first impression so far as the civil Courts are concerned. The subject has, however, been discussed in the Revenue Courts on more than one occasion. In 1943 N. L. J. 119[1] it was held by Binney, Financial Commissioner, that the Deputy Commissioner acts as a *persona designata* but this decision was not followed by a Divisional Bench consisting of Greenfield, Adviser to Governor, and Rau, Financial Commissioner, in 1944 N. L. J. 537.[2] In the latter case it was held that the Deputy Commissioner acts *qua* revenue officer. I am in respectful agreement with the view taken by the Divisional Bench. This being so I am of opinion that as a revenue officer, the Deputy Commissioner is empowered to review his order and he does not become *functus officio* in the way claimed by the appellant. As the learned lower appellate Judge has pertinently pointed out, to deny the power of review would lead to grave results. If the Deputy Commissioner under an error or misapprehension passed an order he would have no power to recall his order if he did not possess the power of review. Once it is held that the Deputy Commissioner acts as a revenue officer, it is evident that he can review his own order.

[5] But in reviewing his order the Deputy Commissioner has no jurisdiction to enlarge the time for payment of the two instalments. The penalty under S. 13 (3) is incurred on the failure to pay the two instalments on the due date and the Deputy Commissioner on an application has to pass an order under S.13(3) if two instalments are in arrears at least on the date of the filing of the application: *See* I.L.R. (1945) Nag. 973;[3] I.L R. (1946) Nag. 786[4] and Misc. second appeal No. 173 of 1944.[5]

[6] In the present case the order of the Debt Relief Court was passed on 13-2-1940 and the first instalment was due on 15-2-1941 and the second on 15-2-1942. Both these instalments were defaulted and the application was filed on 20-5-1942. After inquiry the Deputy Commissioner passed the first order on 9-8-1944. The certificate of the Deputy Commissioner was produced in the Civil Court for execution on 1-9-1944. The two instalments were deposited on 4-9-1944 and the Deputy Commissioner passed the second order on 5-11-1944. The case of the judgment-debtor is that he had a decree against the decree-holder to whom instalments were payable and as the amount of the deceee exceeded the first two instalments, he was entitled to set off his own decree against the amount of the instalments. It is contended that the second order of the Deputy Commissioner took this into account. The second order of the Deputy Commissioner runs as follows :

"5th November 1944. I have gone through the record and I am satisfied that my order granting a certificate ought to be reviewed. The Tahsildar's report of 1-8-1944 was incomplete and wrongly indicated that the debtor had no cause to show. I revoke the certificate. Inform the Civil Court. There is no need for further enquiry because Rs. 200 has been deposited and two kists no longer remain in arrears.

Sd. G. L. Watson.
Deputy Commissioner,
Amraoti district."

The learned Deputy Commissioner gave no reasons for his decision. In fact he did not order any further inquiry because he felt that Rs. 200, having been deposited, the kists no longer remained in arrears.

[7] As has been shown above, the Deputy Commissioner has no jurisdiction to grant further time to the debtor. He must pass an order under S. 13 (3) of the Act if two instalments remain in arrears. The amount of the defaulted kists was deposited when the period had long expired. There appears to be little doubt so far as facts are concerned. There is a certified copy of the order passed by N. L. Pathak, Subordinate Judge, second class, Morsi, in Miscellaneous Judicial Case No. 14 of 1941 on 29-8-1941 by which the creditor in the present case was ordered to pay Rs. 136-14-0 plus costs Rs. 15-4-0. It thus shows that a sum of about Rs. 150 was owing from the present creditor to the judgment-debtor who was required to pay instalments. But the fact remains that the learned Deputy Commissioner did not consider whether this amount could be set off against the instalments due. I understand that this amount was subsequently recovered by the judgment-debtor on 27-4-1946. Learned counsel for the appellant stated during the arguments that the sum was recovered on 21-10-1944 but later pointed out that due to a misreading of the Civil Suit Register this date was wrongly given, the real date being 27-4-1946.

[8] Now to-day the payment of the instalments can only be referred to the deposit of Rs. 200 on 4-9-1944 to which date, as I have shown above, it was not open to the Deputy Commissioner to extend the time for payment. It does appear as if the question of this cross-claim was not mooted and not considered and the matter was solely decided upon the fact of the deposit having been made on 4-9-1944.

[9] It is open to the civil Court to question the jurisdiction of the Deputy Commissioner. This has been laid down by Grille C. J. in I.L.R. (1946) Nag. 786[4] and the observations of the learned Chief Justice have my respectful concurrence. To the same effect are the other decisions to which I have referred above.

[10] In my opinion though the Deputy Commissioner possessed the power of reviewing his order, in the present case he acted without jurisdiction in extending the time for payment till 4-9-1944. This power is not given to the Deputy Commissioner by the Act and in assuming this power he acted without jurisdiction. I hold that the second order of the Deputy Commissioner revoking the certificate is a nullity. The civil Court must ignore that order and proceed as if it was not passed. The appeal is therefore allowed with costs and execution will proceed on the first certificate issued by the Deputy Commissioner.

[11] After the typescript of the order was ready, learned counsel for the respondent challenged the fact that the decree referred to in para. 8 (here para. 6) above had been executed and the full amount recovered. I accordingly sent for the execution case because in my opinion it was necessary to know the correct facts before passing orders in this case and this mode was more satisfactory than asking the parties to file affidavits. I have seen the execution case and find that the amount was in fact paid. Thus the payment of instalments is referable to the deposit made after the expiry of the period allowed to pay the instalments.

[12] Learned counsel says that the matter be judged on facts obtaining on the date the Deputy Commissioner passed the second order and an inquiry be ordered. I find this unnecessary as that order as it stands is void and under the Act time cannot be extended by any Court or other authority. The respondent by his own action has completely shut himself from any relief about which he could have urged something with a show of plausibility.

G.N. *Appeal allowed.*

A. I. R. (35) 1948 Nagpur 411 *[C. N. 144.]*

SHEVDE J.

Mungalal Harbhagat Agarwal — Plaintiff — Appellant v. *Maksuddin Husnoddin — Defendant—Respondent.*

Second Appeal No. 425 of 1943, Decided on 28-10-1947, from Appellate Decree of Additional District Judge, Ellichpur, D/- 6-2-1943.

C. P. and Berar Debt Conciliation Act (2 [II] of 1933), S. 23 — "Time ..... continued"—Meaning of — Period from date of registration of agreement up to date of its receipt in office of Board, cannot be excluded.

The expression "the time during which such proceedings had continued ....." in S. 23 of the Act necessarily postulates effective proceedings which call for the exercise of some judicial act as contradistinguished from a ministerial or a clerical act. After the registration of the agreement the Debt Conciliation Board is not required to exercise any judicial function as a Debt conciliation Board in the matter of conciliation. The agreement which may be good, bad or indifferent is finally settled. Hence the period from the date of the registration of the agreement up to the date when the registered agreement was received in the office of the Debt Conciliation Board and papers were directed to be filed, cannot be excluded. [Paras 3, 5]

N. B. Chandurkar — for Appellant.
M. Y. Sharef — for Respondent.

Judgment. — This second appeal has been preferred by the plaintiff, Mungalal, whose suit for recovery of certain money, due on a pro-note, dated 14th December 1936 (Ex. P-1) has been dismissed in both the Courts below.

[2] The facts which have given rise to this appeal are as follows : The plaintiff instituted this suit on the basis of the pro-note, Ex. P-1. He had a cause of action against the defendant on the date of the pro-note and he could have filed his suit

within the legal period of limitation on or before 14th December 1939. The plaint in the suit was filed and registered on 2nd September 1941. The plaintiff's suit is *prima facie* time-barred, but his contention is that he is entitled to deduct the period that was occupied by the proceedings before the Debt Conciliation Board, Ellichpur, initiated on the application of the debtor-defendant. The defendant had applied to the Debt Conciliation Board on 20th September 1937 for conciliation of his debt. The plaintiff was not agreeable to the scheme of conciliation recommended by the Debt Conciliation Board, whereas the other creditors had accepted it. On 31st January 1938 the agreement was drawn up with reference to those creditors who had accepted the scheme of conciliation. The said agreement was later on sent for registration under S. 12 (2), C. P. and Berar Debt Conciliation Act, 1933 (2 [II] of 1933), hereinafter described for lucidity as the Act. The agreement in question was actually registered on 9th February 1938 and it was received back by the Debt Conciliation Board on 5th March 1938 from the Sub-Registrar, Ellichpur, and thereupon on the same day the Debt Conciliation Board directed the papers to be filed. The plaintiff's contention is that the whole period commencing with the filing of the application before it on 20th September 1937 up to 8th July 1939, when his application for review was thrown out, ought to be excluded from the period of limitation. It is conceded by Mr. N. B. Chandurkar, the learned counsel for the appellant, that his client's suit would not be within time, even if he were entitled to exclude the period between 20th September 1937, on which the plaintiff-appellant made the application before the Debt Conciliation Board, and the date 9th February 1938, upon which the agreement was registered. It is also further conceded that even if the additional period occupied by the proceedings started on the application for review commencing from 31st March 1938 up to 8th July 1939, the date upon which the application for review was rejected, were excluded, the plaintiff's suit would not escape the bar of limitation.

[3] The only point, therefore, that calls for decision is whether the period from 9th February 1938 (i. e. the date of the registration of the agreement) up to 5th March 1938 (i. e. when the registered agreement was received in the office of the Debt Conciliation Board, Ellichpur, and papers were directed to be filed) should be excluded or not. If this period were excluded it is not disputed that the plaintiff's suit would escape the bar of limitation; if it were not excluded it is admitted, that his suit instituted on 2nd September 1941, was time-barred.

[4] It is contended by Mr. Chandurkar that under S. 23 of the Act the plaintiff is entitled to exclude the time during which such proceedings had continued and it has been argued that the proceedings did not terminate with the registration of the agreement on 9th February 1938, but that they should be deemed to have continued even up to 5th March 1938, that is, until the time when the registered agreement was received in the office and the papers were directed to be filed. I cannot accede to this contention, for the simple reason that the proceedings which commenced with the application of the debtor on 20th September 1937 actually terminated on 9th February 1938, when the agreement was registered. This position is supported by the plain and unambiguous language of S. 12 (2) of the Act. Under the provisions of S. 12 (2) of the Act, the proceedings undoubtedly continued until the agreement was registered. When it is once registered, it takes effect, as if it were a decree of a civil Court. That means, in other words, that after the agreement is registered, there remains nothing to be done by the Debt Conciliation Board so far as the conciliation of the debt is concerned. In so far as the agreement, after it is registered, has the effect of a decree, it can be executed as a decree according to the usual procedure. The proceedings before the Debt Conciliation Board must, therefore, be deemed to be effective proceedings until the agreement is actually registered.

[5] The order-sheet, dated 5th March 1938, (EX. P-3) on which Mr. Chandurkar places his main reliance runs thus : "5th March 1938. Agreement received duly registered. Civil Court informed. File." That order of 5th March 1938, cannot, by any stretch of reasoning, be interpreted to mean that it amounts to any exercise of judicial function by the Debt Conciliation Board. The expression "the time during which such proceedings had continued ....." in S. 23 of the Act necessarily postulates effective proceedings which call for the exercise of some judicial act as contradistinguished from a ministerial or a clerical act. It is quite obvious that after the registration of the agreement on 9th February 1938, the Debt Conciliation Board was not required to exercise any judicial function as a Debt Conciliation Board in the matter of conciliation. The agreement which may be good, bad or indifferent was finally settled. The conciliation of the debt so far as the creditors who were agreeable thereto were concerned was completed. When the scheme of conciliation of debt was actually embodied in the agreement and when it was registered, the whole proceedings before the Debt Conciliation Board did come to an end altogether. It is futile to contend that after the effective termination of the proceedings

before the Debt Conciliation Board, mere receipt of the registered agreement in the office of the Debt Conciliation Board from the Sub-Registrar's office and mere order to file papers could, with any rhyme or reason, be regarded as proceedings before the Debt Conciliation Board so as to exclude the period from 9th February up to 5th March 1938.

[6] I, therefore, agree with the learned Judge in the Court below in holding that the plaintiff is not entitled to exclude the period from 9th February 1938 up to 5th March 1938 under the provisions of S. 23 of the Act and hold that the present suit was rightly held as being barred by limitation.

[7] The appeal before me fails and is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Nagpur 413 *[C. N. 145]*

HIDAYATULLAH J.

Balchand Tikaram and others — Accused-Applicants v. *Emperor.*

Criminal Revn. No. 204 of 1947, Decided on 2-1-1948, from order of Addl. Sessions Judge, Saugor, D/-10-3-1947.

(a) Defence of India Rules (1939), R. 81 (4)—Central Provinces Order requiring "dealers" to give correct returns of stock, with declaration—'Dealer' includes "producer."

Where the "dealers" are required by the order of the Provincial Govt. (Central Provinces) to give returns of their stock, the word "dealers" applies also to persons who manufacture and sell. It is true that ordinarily the word is applied to a person who sells articles in the same condition in which he bought them but that is because of the large number of traders of this kind to be found in this country. There is nothing wrong in speaking of a 'furniture dealer' even though he may be a manufacturer and may not be merely buying and selling furniture made by others.

The fact that the form of return does not apply strictly to a 'producer' because there is no column where the 'dealer' can show the quantity "produced" by him as opposed to the quantity bought by him, is not conclusive of the matter.

Consequently, persons who press out oils and produce oil cakes as by-product, are 'dealers' in oil cakes within the meaning of the order. [Paras 3 &4]

(b) Defence of India Rules (1939), R. 81 (4)—Central Provinces Order requiring dealer to give correct returns of stock with verification—Dealer stating quantity approximately without verification—Order is contravened—Prosecution need not show that quantity was more than shown in return.

Where the return filed by a dealer as to his stock, under the order of the C. P. Government requiring dealers to give returns of their stock with verification, does not make a true statement of the quantity and is not verified as required by the prescribed form, but merely states the quantity approximately, the order is contravened, and an offence punishable under R. 81 (4) is committed. Prosecution need not prove that actual quantity in stock was more than that shown in the form. [Para 5]

(c) Defence of India Rules (1939), R. 81 (4) — C. P. Government order requiring dealers to give return of their stock and verify same — *Mens rea* must be proved for conviction under R. 81 (4) for contravention of order.

For conviction under R. 81 (4) for contravening order requiring dealers to give returns of their stock and verify the same, *mens rea* must be proved. The persons having nothing to do in the matter cannot be convicted. [Para 6]

Case referred :—

1. (1891) 7 T. L. R. 302, N. E. Rly. Co. v. Mayor, etc. Kingston-upon-Hull.

M. R Bolde—for Applicants.

R. Kaushalendra Rao, Govt. Pleader — for the Crown.

Order.—The applicants were convicted under R. 81 (4), Defence of India Rules for contravention of the Provincial Government's Order relating to oil-cakes. The facts are that the applicants (who are all brothers) are proprietors of Hira Oil Mills, Saugor, and in contravention of the order of the Provincial Govenment did not submit a true return of their stocks of oil-cakes in the three months which are the subject of this prosecution. Their sentences were varied on appeal and as they stand to-day they are :

Applicant 1—Rs. 2000 for each of the three offences. Total Rs. 6,000.

Applicants 2 & 3 — Rs. 300 for each of the three offences. Total fine Rs. 900 each.

[2] Various grounds were urged in the petition for revision but now the main argument is the applicability of the order to the applicants. It is contended that the order applies only to 'dealers' and the applicants are not dealers because the applicants press out oils and the oil-cakes are merely a by-product. In this sense the applicants contend they are 'producers' rather than dealers. Since the clause contravened applies to dealers, it is urged, no offence has been committed by the accused. In this connection reliance was placed upon the meaning of the word 'dealer' and it was argued that the word is used in the order in the sense of a person who 'buys and sells' and thus the Provincial Government must be held to have purposely excluded the application of the order to 'producers.' Reference was also made to the form prescribed which, it was urged, strengthens this argument and to certain other orders of the Provincial Government in which a distinction is made between 'producers' and 'dealers.'

[3] The learned Sessions Judge has discussed at length the several meanings of the word' dealer' and has shown that the word applies also to persons who manufacture and sell. It is true that ordinarily the word is applied to a person who sells articles in the same condition in which he bought them but that is because of the large number of traders of this kind to be found in this country. There is nothing wrong in speak-

ing of a 'furniture dealer' even though he may be a manufacturer and may not be merely buying and selling furniture made by others. See in this connection the wide meaning given to the word 'dealer' in (1891) 7 T. L. R. 302.[1]

[4] It is true that the form does not apply strictly to a 'producer' because there is no column where the 'dealer' can show the quantity 'produced' by him as opposed to the quantity bought by him. But that in my opinion is not conclusive of the matter. If the meaning of the word is clear, the person filling in the form could state the fact in it by specifying the quantity 'produced' as has been done in the present case by the applicants. There is no force in this contention. Indeed accused 1 in giving the return shows that he well understands this position.

[5] The gravamen of the charge against the applicant 1 is not that he has not given a return but that the return does not make a true statement of the quantity and is not verified as required by the prescribed form. Applicant 1 has merely stated the quantity approximately. It is contended that it was not proved by the prosecution that the quantity was more than shown in the form. That is neither here nor there. There is a sound administrative reason to compel the dealers to give a declaration about the true quantity and also to give a declaration to that effect since a person making a false declaration is liable under the Penal Code for it. Applicant 1 had been warned about this and there is no excuse for not complying with the express directions in this behalf. In my opinion there was contravention of the order and the conviction of applicant 1 cannot be said to be bad. I accordingly confirm it.

[6] As regards the liability, applicants 2 and 3, there is no proof that these applicants did anything in the matter. They cannot be said to have shared the *mens rea* which in my opinion must be proved. Their convictions are not proper. I therefore set aside their convictions and the sentences of fines imposed on them. The fines which have already been recovered will be refunded to them.

[7] As regards applicant 1, the of fine Rs. 6.000 is too heavy and excessive. It is true that the Mills had been told that the forms must show the true quantity and must contain a declaration to that effect. But the fact remains that he did submit a form and that the form being incomplete the accused was required to adopt it for his own purpose. That proves his desire to comply with the law. Though it was not necessary for the prosecution to prove that he had understated the quantity, the proof of such a fact would have proved that the offence was more serious. This has not been done and there is nothing to show that the accused purposely did not give a declaration to save himself from further consequences. In my opinion the ends of justice would be served by imposing a fine of of Rs. 500 on each count, that is to say, a total fine of Rs. 1,500. I find that the fine has already been recovered. The balance will now be refunded to applicant 1. With this modification the application for revision is dismissed.

R.G.D. *Order accordingly.*

A. I. R. (35) 1948 Nagpur 414 *[C. N. 146.]*

HEMEON J.

Gulabchand Bhagiratha—Accused—Applicant v. *Emperor.*

Criminal Revn. No. 487 of 1947, Decided on 7-2-1948, from order of 2nd Addl. Sessions Judge, Amraoti, D/-30-9-1947.

(a) C. P. and Berar House Rent Control Order (1947), Cl. 14 — Indirect interference with water connection—Connection cut off by municipality on landlord's application—Landlord is liable.

Clause 14 applies to indirect interference also and when the municipality cuts off the water supply of the house as a result of the landlord's application, the landlord is liable under Cl. 14. [Para 4]

(b) C. P. and Berar House Rent Control Order (1947), Cl. 14 — Clause is not ultra vires powers under S. 2, C. P. and Berar Regulation of Letting of Accommodation Act (11 of 1946) under which order was made.

Clause 14, C. P. and Berar House Rent Control Order is covered by the words "regulating the letting and subletting of any accommodation" in S. 2, Regulation of Letting of Accommodation Act. Rule making power is conferred by the opening part of the section and the function of Cls. (a) to (d) is merely illustrative. This is borne out by the fact that they are preceded by the words "in particular" which connote that the preceding contents of the section relate to the generality of the powers conferred on the Provincial Government.

Clause 14 is not, therefore, ultra vires the powers under S. 2: 32 A. I. R. 1945 P. C. 156, *Foll.*; 30 A.I.R. 1943 F C 1, *Not foll.* [Paras 6 and 9]

Cases referred:—

1. ('43) 1943 F. C. R. 49: 30 A.I.R. 1943 F.C. 1: I.L.R. (1943) Kar F. C. 26 : I. L. R. 1944 Bom. 183 : 207 I. C. 1: 44 Cr. L. J. 558 (F. C.), Keshav Talpade v. Emperor.
2. ('45) 1945 F. C. R. 195 : 32 A. I. R. 1945 P. C. 156: I. L. R. 1945 Kar P. C. 371 : 72 I. A. 241 : 221 I. C. 243 (P. C.), Emperor v. Sibnath Banerji.

T. J. Kedar—for Applicant.
R. Kaushalendra Rao, Govt. Pleader—for the Crown.

Order.— Gulabchand of Amraoti was convicted and sentenced to undergo 4 months rigorous imprisonment under Cl. 14, C. P. and Berar House Rent Control Order, 1947, and to pay a fine of Rs. 50 under Cl. 13 (1) (a) *ibid.* read with S. 8, C. P. and Berar Regulation of Letting of Accommodation Act, 1946, by the first class Magistrate, Amraoti and his appeal was dismissed by the Second Additional Sessions Judge, Amraoti. He has now come up in revision to this Court.

[2] As a result of his application of 25th March 1947 to the municipality, the water connection of his tenants Madanlal, Ratanlal, Bhaurao and Mathuradas (P. Ws. 2-5) was stopped and on 2nd April 1947 he issued them notices to vacate their house without the previous written permission of the Controller. He subsequently applied to the Controller for such permission on the ground of non-payment of rent by the tenants and the Controller on 1st September 1947, granted him the permission. An appeal from that order was summarily dismissed by the Deputy Commissioner, Amracti, on 22nd September 1947.

[3] So far as the contravention of Cl. 13 (1) (a) of the Order is concerned, there can be no question that it took place and I was not addressed regarding it. It was also clear that as a result of the applicant Gulabchand's application to the municipality, the water connection of his tenants was stopped, but it was urged that his act was not covered by Cl. 14 of the Order, inasmuch as that clause contemplates direct interference by a landlord with the water connection of a house occupied by his tenant.

[4] Clause 14 runs as follows:

"No landlord shall interfere with the ..... water connections .... of the house so as to affect materially the enjoyment of the house by the tenant."

There is nothing in the wording of the clause to restrict it to direct interference and from its terms it is clear that interference of any kind with the water connections is prohibited, if such interference materially affects the tenant's enjoyment of the house. This ban thus, applies to indirect interference and it follows that when the municipality cut off the water supply of the house in question as a result of his application, he was liable under clause 14 of the Order.

[5] This does not conclude the matter, as his learned advocate raised the interesting contention that this clause was *ultra vires* of the Central Provinces and Berar Regulation of Letting of Accommodation Act, 1946, under S. 2 of which the Order was made. That section is:

Regulation of letting and sub-letting, etc.—The Provincial Government may, by general or special order which shall extend to such areas as the Provincial Government may, by notification, direct, provide for regulating the letting and sub-letting of any accommodation or class of accommodation whether residential or non-residential, whether furnished or unfurnished and whether with or without board and in particular, (a) for controlling the rents for such accommodation either generally or when let to specified persons or classes of persons or in specified circumstances, (b) for preventing the eviction of tenants or sub-tenants from such accommodation in specified circumstances, (c) for requiring such accommodation to be let either generally, or to specified persons or classes of persons, or in specified circumstances, and (d) for collecting any information or statistics with a view to regulating any of the aforesaid matters."

[6] There is in my view no force in the contention that the words "regulating the letting and sub-letting of any accommodation" do not cover a provision which inhibits interference of the kind in question. "Regulating" in this context means subjecting to rules or restrictions; and clause 14 is clearly a clause which is designed to place restrictions on a landlord's powers of intermeddling with conveniences in such a manner that the tenant's enjoyment of the house let to him is materially affected thereby.

[7] The contention that as clauses (a) to (d) of S. 2, Central Provinces and Berar Regulation of Letting of Accommodation Act, 1946 did not cover clause 14 of the Order, it was not permissible to invoke the aid of the more general words "regulating the letting and sub-letting of any accommodation ....." in S. 2. of the Act, cannot succeed. This contention was based on the rule of the Federal Court in 1943 F. C. R. 49[1] to the effect that as the Legislature had set out in plain and unambiguous language in para. (x) of S. 2 (2), Defence of India Act, the scope of the rules which might be made providing for apprehension and detention in custody, it was not permissible to pray in aid the more general words in S. 2 (1) of the Act, in order to justify a rule which so plainly went beyond the limits of para. (x).

[8] In 1945 F.C.R. 195,[2] however, their Lordships of the Judicial Committee of the Privy Council, who were of the view that that case had been wrongly decided, made the following observations:

"Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub sections (1) and (2) of S. 2, Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement .... In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and 'the rules' which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as, indeed, is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1) '.

[9] I am aware that S. 2, Central Provinces and Berar Regulation of Letting of Accommodation Act, 1946, does not contain the words "without prejudice to the generality of the powers conferred .....", but it is manifest that the rule-making power is conferred by the opening part of the section and that the function of clauses (a) to (d) is merely illustrative. This is borne out by the fact that they are preceded by the words "in particular" which connote that the preceding contents of the section relate to the generality of the powers conferred on the Provincial Government.

[10] The applicant's conviction under clause 14 of the Order read with S. 8, Central Provinces and Berar Regulation of Letting of Accommodation Act, 1946, was, therefore, in order and it is maintained. It seems to me, however, that the punishment awarded was inappropriate and unduly harsh. The tenants were duly evicted from the house in 1947 for failure to pay the rent of the house for several months and it is clear that they were extremely unsatisfactory tenants. This does not condone the applicant's high-handed action, but it is undoubtedly a circumstance in his favour in awarding punishment. There was also the fact that the rent from the house constituted his only source of income, as he is physically disabled. The sentence of 4 months' rigorous imprisonment is, therefore, set aside and replaced by a fine of Rs. 100. In default of payment of that fine he shall undergo 1 month's rigorous imprisonment.

[11] Subject to this modification, the application is dismissed.

R.G.D. *Revision dismissed.*

A. I. R. (35) 1948 Nagpur 416 *[C. N. 147.]*

BOSE J.

Emperor v. *Amir Khan s/o Abdulla and another — Non-applicants.*

Criminal Revn. No. 107 of 1947, Decided on 9-10-1947, from order of 2nd Addl. Sessions Judge, Jubbulpore, D/- 22-1-1947.

Criminal P. C. (1898), S. 488 (3)—Husband against whom order under S. 488 is passed declared insolvent—Arrears of maintenance can be recovered by proceedings under S. 488 (3).

Insolvency of a person in itself is no bar to a proceeding under S. 488 (3). Where after an order of maintenance against the husband is passed, the husband is declared insolvent, insolvency does not bar the proceedings under S. 488, for the recovery of the arrears of maintenance. The fact that the bulk of an insolvent's property vests in the Receiver and that this might, in given cases, afford "sufficient cause" for non-payment of the maintenance is of course relevant, but, there may be cases in which a part of the insolvent's property does not vest in the Receiver : 25 A. I. R. 1938 All 253, *Relied on.* [Para 4 & 5]

Quære: Whether wife has two remedies, one by regarding arrears due as "debt" provable in insolvency and the other under S. 488 (3). [Para 6]

Case referred:—

1. ('38) I. L. R. (1938) All. 486 :25 A. I. R. 1938 All 253 : 175 I. C. 235:39 Cr. L. J. 553, Shyama Charan v. Anguri Devi.

Order.—The question here is whether S. 488, Criminal P. C., applies to a person who is adjudced insolvent after an order of maintenance has been made against him.

[2] The order for maintenance was passed in favour of the non-applicant's wife on 7th August 1944. The non-applicant applied to be adjudicated an insolvent on 30th January 1945 and was adjudicated on 27th July 1945. On 29th January 1945 the non-applicant divorced his wife. The question relates to the arrears which accrued meanwhile.

[3] The learned Magistrate holds that the wife's only remedy is under the Insolvency Act where she must prove her debt. He considers that S. 488, Criminal P. C., no longer applies because of Ss. 28 and 34, Provincial Insolvency Act.

[4] There is some difference of opinion on this point, but I agree with Allsop J. in I. L. R. (1938) ALL. 486[1] that insolvency in itself is not a bar. As he points out, the order passed by a Magistrate under S. 488 (3), Criminal P. C., against a person, who fails to pay without sufficient cause, is a sentence of imprisonment. No part of the Provincial Insolvency Act confers immunity from arrest or detention against sentences of imprisonment passed by a Criminal Court.

[5] The fact that the bulk of an insolvent's property vests in the receiver and that this right in given cases afford "sufficient cause" for non-payment of the maintenance is of course relevant, but as Allsop J. points out, there may be cases in which a part of the insolvent's property does not vest in the receiver. In such cases, provided the portion left to the insolvent is sufficient to enable him to comply with the order under S. 488, the fact of adjudication would afford no protection. I set aside the learned Magistrate's order and direct him to proceed under S. 488 (3).

[6] I may add that the non-applicant's wife regarded the arrears due to her as a "debt" provable in the insolvency and applied to the Insolvency Court to prove it. She succeeded and has been put on the list of scheduled creditors. But that is neither here nor there. I am not concerned here with whether she has two remedies, or whether the Insolvency Court was right or wrong. All I hold is that insolvency in itself is not a bar to proceedings under S. 488, Criminal P. C.

R.G.D. *Order set aside.*

END

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OUDH CHIEF COURT

1948

(upto 26th July 1948)

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AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	1947	OACC	56	36*con*	1947	AWRCC	175	88*con*	1947	OACC	196	130	1947	OACC	353
	1946	AWRCC	56		22	Luck	349		1947	AWRCO	281		1947	AWRCO	353
	1947	OWNCC	180	38	1947	OWNCC	217		22	Luck	407		1947	OWNCC	564
	48	Cr L J	542		1947	OACC	181	97	1947	OACC	128		49	Cr L J	202
	230	I C	144		1947	AWRCC	181		1947	OWNCC	481	131	1947	OWNCC	549
7	1947	OWNCC	500		22	Luck	471		1947	AWRCC	128		1947	OACC	373
	1947	OACC	138	40	1947	OWNCC	219		49	Cr L J	114		49	Cr L J	212
	1947	AWRCC	138		1947	OACC	72	98	1947	OACC	93		1947	AWRCC	373
9	1947	OWNCC	168		1947	AWRCC	72		1947	AWRCO	93	135	1947	OACC	347
	1947	OACC	158		1947	AWRRevB	50		1947	OWNCC	298		1947	OWNCC	542
	1947	AWRCC	158		22	Luck	474		1947	AWRRevB	76		1947	AWRCC	347
	22	Luck	308	41	1947	OACC	36	99	1947	OACC	146		23	Luck	103
17	1947	OACC	105		1947	AWRCC	36		1947	AWRCC	146	138	1947	AWRCC	296
	1947	AWRCC	105		1947	OWNCC	87		1947	OWNCC	484		1947	OWNCC	513
	1947	OWNCC	391		22	Luck	291		49	Cr L J	116		1947	OACC	296
	48	Cr L J	948		229	I C	493		22	Luck	616		1948	AWRCO	2
	22	Luck	391	42	1947	OACC	102	103	1947	OACC	124		1948	OACC	2
19	1947	OWNCC	229		1947	AWRCC	102		1947	OWNCC	483		23	Luck	137
	1947	OACC	132		1947	OWNCC	299		1947	AWRCC	124	139	1947	OACC	366
	48	Cr L J	666		22	Luck	368		49	Cr L J	126		1947	OWNCC	509
	1947	AWRCC	132	44	1947	OWNCC	236	104	1947	OACC	237		1947	AWRCC	366
	22	Luck	294		1947	OACC	167		1947	AWRCO	237	142	1947	AWRCO	294
	231	I C	42		1947	AWRCC	167		1947	OWNCC	517		1947	OWNCC	539
21	1947	OWNCC	215	46	1947	OWNCC	257		49	Cr L J	122		1947	OACC	294
	1947	OACC	172		1947	OACC	98		23	Luck	9		23	Luck	108
	1947	AWRCC	172		1947	AWRCC	98	106	1947	OWNCC	284	144	1947	OACC	272
	22	Luck	276		1947	AWRRevB	80		1947	AWRCC	209		1947	AWRCC	272
22	1947	OACC	32		22	Luck	365		1947	OACC	209		1947	OWNCC	537
	1947	AWRCC	32	47	1947	OWNCC	238		1947	AWRRevB	89		23	Luck	101
	1947	OWNCC	136		1947	OACC	80	107	1947	OACC	66	145	1947	AWRCC	292
	22	Luck	192		1947	AWRCC	80		1947	AWRCC	66		1947	OWNCC	507
	229	I C	30		22	Luck	497		1947	OWNCC	157		1947	OACC	292
24(1)	1947	OACC	22	49	1947	OWNCC	212		22	Luck	237		23	Luck	62
	1947	AWRCC	22		1947	OACC	78		231	I C	5	147	1948	O W N	209
	1947	OWNCC	58		1947	AWRCC	78	108	1947	OWNCC	359		23	Luck	13
	22	Luck	372		231	I C	132		1947	OACC	144	152	1947	OWNCC	416
	228	I C	617	51	1947	OWNCC	225		1947	AWRCC	144		1947	AWRCC	297
24(2)	1947	OWNCC	366		1947	OACC	168		22	Luck	518		1947	OACC	297
	1947	OACC	137		1947	AWRCC	168	110	1948	OACC	8		22	Luck	503
	1947	AWRCC	137		22	Luck	484		1948	AWRCC	8	154	1947	OACC	291
	22	Luck	509	54	1947	OWNCC	97		22	Luck	396		1947	AWRCC	291
25	1947	OWNCC	295		22	Luck	93	113	1947	OWNCC	494		1947	OWNCC	546
	1947	OACC	205		1947	OACC	245		1947	OACC	352		23	Luck	135
	1947	AWRCC	205		1947	AWRCC	245		1947	AWRCC	352	156	1947	OACC	289
	48	Cr L J	783		229	I C	421		49	Cr L J	112		1947	AWRCC	289
	231	I C	396	76FB	1947	OACC	119		23	Luck	1		1947	OWNCC	515
27	1947	OWNCC	232		1947	OWNCC	369	114	1947	OWNCC	548	157	1947	OACC	275
	1947	OACC	76		1947	AWRCC	119		49	Cr L J	108		1947	AWRCC	275
	1947	AWRCC	76		22	Luck	461		1947	OACC	371		1947	OWNCC	561
	22	Luck	363	80	1947	OWNCC	286		1947	AWRCC	371		23	Luck	70
28	1947	OWNCC	194		1947	OACC	207		23	Luck	37	160	1947	OACC	287
	1947	OACC	179		1947	AWRCC	207	116	1947	OWNCC	579		1947	AWRCC	287
	1947	AWRCC	179	81	1947	OACC	126		1947	OACC	383		1947	OWNCC	512
	22	Luck	244		1942	OWNCC	503		1947	AWRCC	383		23	Luck	111
80	1947	OACC	97		49	Cr L J	43		23	Luck	22	162FB	1947	OWNCC	591
	1947	AWRCC	97		1947	AWRCC	126	125	1947	OACC	278		1947	OACC	394
	1947	AWRRevB	79		22	Luck	492		1947	AWRCO	278		1947	AWRCO	394
	1947	OWNCC	505	84	1947	OWNCC	221		1947	OWNCC	558		23	Luck	40
	48	Cr L J	951		1947	OACC	150		23	Luck	58	165		...	
	22	Luck	614		1947	AWRCC	150	127	1947	OACC	364	175	1947	OACC	95
81	1947	OWNCC	259		22	Luck	373		1947	AWRCC	364		1947	AWRCO	95
	1947	OACC	107	86	1947	OACC	94		1947	OWNCC	522		1947	AWRRevB	77
	1947	AWRCC	107		1947	AWRCC	94	129	1947	OACC	350		22	Luck	230
	22	Luck	151		1947	OWNCC	281		1947	AWRCC	350	176	1947	OACC	51
	228	I C	48		22	Luck	481		1947	OWNCC	523		1947	AWRCC	51
86	1947	OWNCC	255	88	1947	OWNCC	306		23	Luck	74		1947	OWNCC	149

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176*con*	22	Luck	217
	229	I C	202
178	1947	OWNCC	234
	1947	AWRCC	173
	1947	OACC	173
	22	Luck	234
179	1947	OACC	356
	1947	OWNCC	555
	1947	AWRCC	356
	49	Cr L J	279
	23	Luck	141
181	1947	OACC	354
	1947	OWNCC	520
	1947	AWRCC	354
	49	Cr L J	286
	23	Luck	145
183	1947	OACC	369
	1947	OWNCC	629
	49	Cr L J	290
	1947	AWRCC	369
184	1947	OWNCC	619
	49	Cr L J	291
	1947	OACC	398
	1947	AWRCC	398
187	1947	OACC	359
	1947	OWNCC	534
	1947	AWRCC	359
	49	Cr L J	295
	23	Luck	53
190	1948	O W N	142
191	1948	OACC	40
	1948	AWRCC	40
	1948	O W N	139
193FB	1947	AWRCC	402
	1947	OWNCC	623
	1947	OACC	402

AIR 1948 Oudh AIR	Other Journals		
193*con*	23	Luck	114
197	1948	O W N	172
203	1948	O W N	179
214FB	1948	OACC	31
	1948	AWRCC	31
	1948	O W N	110
218	1948	AWRCC	13
	1948	OACC	13
	1948	O W N	125
219	1948	O W N	132
220	1948	OACC	37
	1948	AWRCC	37
	1948	O W N	117
222	1948	OACC	28
	1948	AWRCC	28
	1948	O W N	93
223	1948	AWRCC	14
	1948	OACC	14
225	1948	O W N	100
	1948	AWRCC	76
	1948	OACC	76
226	...		
234	1947	OACC	104
	1947	AWRCC	104
	1947	O W N	354
	22	Luck	490
235	1948	AWRCC	90
	1948	OACC	90
	1948	O W N	153
238	1947	OWNCC	375
	1947	AWRCC	210
	1947	OACC	210
	22	Luck	325
246	1948	OACC	105
	1948	AWRCC	105
	49	Cr L J	384

AIR 1948 Oudh AIR	Other Journals		
246*con*	1948	O W N	223
247	1948	O W N	156
254	1948	OACC	25
	1948	AWRCC	25
	1948	O W N	89
255	1948	O W N	114
	1948	AWRCC	85
	1948	OACC	85
257	1948	O W N	87
	1948	AWRCC	83
	1948	OACC	83
258	1948	O W N	85
	1948	AWRCC	77
	1948	OACC	77
260	1948	OACC	26
	1948	AWRCC	26
	1948	O W N	91
261	1947	OACC	231
	1947	AWRCC	231
	1947	OWNCC	525
	23	Luck	68
262	1948	OACC	29
	1948	AWRCC	29
	1948	O W N	137
263	1948	O W N	96
	1948	AWRCC	79
	1948	OACC	79
266	1948	AWRCC	21
	1948	OACC	21
	1948	O W N	126
270	1948	AWRCC	6
	1948	OACC	6
271	1948	O W N	13
	1948	AWRCC	47
	1948	OACC	47

AIR 1948 Oudh AIR	Other Journals		
279	1948	AWRCC	17
	1948	OACC	17
282	1948	O W N	1
	1948	AWRCC	93
	1948	OACC	93
291	1948	O W N	103
	1948	AWRCC	69
	1948	OACC	69
297	1948	OACC	35
	1948	AWRCC	35
	1948	O W N	120
299	1948	OACC	106
	1948	O W N	144
	1948	AWRCC	106
301	1948	OACC	110
	1948	O W N	148
	1948	AWRCC	110
305	1948	AWRCC	1
	1948	OACC	1
	1948	O W N	133
306	1948	O W N	23
	1948	AWRCC	4
	1948	OACC	4
307	1947	OWNCC	421
	1947	AWRCC	301
	1947	OACC	301
	22	Luck	522
349	1948	AWRCC	43
	1948	OACC	43
	1948	O W N	122
350	1948	AWRCC	89
	1948	OACC	89
	1948	O W N	141
351	...		

ILR 22 Luck

ILR	AIR		
1	1947	O	116
15	"	"	41
19	"	"	71
26	"	"	135
33	"	"	128
37	"	"	122
48	"	"	104
71	"	"	133
79	"	"	131
82	"	"	93
84	"	"	129
88	"	"	101
93	1948	"	54
141	1947	"	171
151	1948	"	31
164	1947	"	174
181	"	"	132
183	"	"	142
185	"	"	114
190	"	"	158
192	1948	"	22
196	1947	"	146
200	"	"	143
203	"	"	149
204	"	"	162
207	"	"	232
212	"	"	218
217	1948	"	176
220	1947	"	139
227	"	"	138
229	"	"	239
230	1948	"	175
234	"	"	178
237	"	"	107
240	1947	"	233
244	1948	"	28
249	1947	"	164
270	"	"	98
276	1948	"	21
279	1947	"	204
291	1948	"	41
294	"	"	19
299	1947	"	235
308	1948	"	9
325	"	"	238
349	"	"	36
353	1947	"	206
363	1948	"	27
365	"	"	46
368	"	"	42
372	"	"	24
373	"	"	84
379	1947	"	223
391	1948	"	17
396	"	"	110
403	1947	"	228
407	1948	"	88
428	1947	"	210
443	"	"	195
461	1948	"	76
471	"	"	38
474	"	"	40
478	1947	"	202
481	1948	"	86
484	"	"	51
490	"	"	234
492	"	"	81
497	"	"	47
508	"	"	152
509	"	"	24(2)
512	1947	"	201

ILR 22 Luck

ILR	AIR		
515	1949	O	19
518	1948	"	108
522	"	"	307
609	1947	"	230
614	1948	"	30
616	"	"	99

ILR 23 Luck.

ILR	AIR		
1	1948	O	113
3	1949	"	56
9	1948	"	104
13	"	"	147
22	"	"	116
37	"	"	114
40	"	"	162
47	1949	"	48
53	1948	"	187
58	"	"	125
62	"	"	145
65	1949	"	51
68	1948	"	261
70	"	"	157
74	"	"	129
77	1949	"	37
96	"	"	53
101	1948	"	144
103	"	"	135
108	"	"	142
111	"	"	160
114	"	"	193
126	1949	"	69
135	1948	"	154
137	"	"	138
139	1949	"	65
141	1948	"	179
145	"	"	181
147	1949	"	63
150	1948	"	165
167	"	"	271
179	"	"	156
182	"	"	131
189	"	"	297
193	"	"	203
210	"	"	197
221	1949	"	66
224	"	"	80

1947 OWN (C. C.)

OWN	AIR		
1	1946	PC	173
5	"	"	103
11	"	"	132
16	"	"	187
18	"	"	151
24	1947	O	145
27	"	"	68
30	"	"	98
34	"	"	171
40	"	"	133
42	"	"	104
58	1948	"	24(1)
59	1947	"	174
70	1946	PC	127
76	1947	O	142
78	"	"	94
80	"	"	158
82	"	"	114
85	"	"	148
87	1948	"	41
88	1947	"	232

1947 OWN (C. C.)

OWN	AIR		
97	1948	O	54
130	1947	"	161
132	"	"	162
134	"	"	143
136	1948	"	22
138	1947	"	239
139	"	"	159
142	"	"	204
145	"	"	138
146	"	"	146
149	1948	"	176
151	1947	"	139
156	"	"	157
157	1948	"	107
159	1947	"	233
162	"	"	235
168	1948	"	9
180	"	"	1
194a	1947	"	173
194b	1948	"	28
197	1947	"	164
212	1948	"	49
215	"	"	21
217	"	"	38
219	"	"	40
221	"	"	84
225	"	"	51
229	"	"	19
232	"	"	27
234	"	"	178
236	"	"	44
238	"	"	47
242	1947	"	174
255	1948	"	36
257	"	"	46
259	"	"	31
267	1947	"	206
281	1948	"	86
284	"	"	106
285	1947	"	149
286	1948	"	80
287	1947	"	195
295	1948	"	25
298	"	"	98
299	"	"	42
306	"	"	88
320	1946	PC	82
328	"	"	123
333	"	"	92
337	1947	"	8
344	1946	"	189
354	1948	O	234
359	"	"	108
362	1947	"	228
366	1948	"	24
369	"	"	76
375	"	"	238
391	"	"	17
399	1947	"	230
402	"	"	210
412	1949	"	19
414	1947	"	228
416	1948	"	152
421	"	"	307
481	"	"	97
483	"	"	103
484	"	"	99
494	"	"	113

1947 OWN (C. C.)

OWN	AIR		
495	1949	O	56
500	1948	"	7
503	"	"	81
505	"	"	30
507	"	"	145
509	"	"	139
512	"	"	160
513	"	"	138
515	"	"	156
517	"	"	104
520	"	"	181
522	"	"	127
523	"	"	129
525	"	"	261
528	1949	"	63
530	"	"	51
534	1948	"	187
537	"	"	144
539	"	"	142
542	"	"	135
546	"	"	154
548	"	"	114
549	"	"	131
555	"	"	179
558	"	"	125
561	"	"	157
564	"	"	130
565	1949	"	48
569	"	"	69
576	"	"	53
579	1948	"	116
591	"	"	162
595	1949	"	37
609	1947	PC	168
611	"	"	113
615	1949	O	65
619	1948	"	184
623	"	"	193
629	"	"	183

1947 OWN (H.C.)

OWN	AIR		
1	1947	A	86
4	"	"	136
5a	"	"	190
5b	"	"	141
6	"	"	5
10	"	"	178
11	"	"	171
12	"	"	176
13	1948	"	16
15	1947	"	345
19	"	"	225
24	"	"	169
26	1948	"	56
29	"	"	75
32	1947	"	429

1948 OWN

OWN	AIR		
1	1948	O	282
13	"	"	271
23	"	"	306
25	"	PC	39
29	1947	"	173
33	1948	"	20
37	"	"	42
41	1947	"	117

1948 OWN

OWN	AIR		
43	1947	PC	40
48	"	"	213
52	"	"	135
57	1949	A	117
61	1948	"	177
64	"	"	129
66	"	"	326
67	"	"	108
72	"	"	197
73	"	"	252
85	"	O	258
87	1948	"	257
89	"	"	254
91	"	"	260
93	"	"	222
94	1949	"	66
96	1948	"	263
100	"	"	225
102	1949	"	76
103	1948	"	291
110	"	"	214
114	"	"	255
117	"	"	220
120	"	"	297
122	"	"	349
125	"	"	218
126	"	"	266
130	1949	"	68
132	1948	"	219
133	"	"	305
134	1949	"	80
137	1948	"	262
139	"	"	191
141	"	"	350
142	"	"	190
144	"	"	299
148	"	"	301
153	"	"	235
156	"	"	247
172	"	"	197
179	"	"	202
194	1949	"	1
209	1948	"	147
216	1947	"	233
219	1949	"	78
223	1948	"	246
224	1949	"	32
231	"	"	14
237	"	"	11
241	"	"	31
244a	"	A	100
248	1948	"	444
251	"	"	433
254	"	"	336
258	"	"	273
261	"	"	353
279	1949	"	173
282	1949	A	184
286	"	"	191
290	"	"	201
292	"	"	207
295	"	"	204
298	"	"	195
302	"	"	148
314	"	"	190
315	"	"	220
316	"	"	263
317a	"	"	175

1948 OWN				1948 OWN				1948 OWN				1948 OWN				1948 OWN			
OWN		AIR		OWN		AIR		OWN		AIR		OWN		AIR		OWN		AIR	
317b	1948	A	432	343	1949	A	241	373	1949	A	187	390	1949	A	216	416	1949	A	423
318	"	"	169	346	"	"	285	376	"	"	257	392	"	"	427	419	"	"	320
320	"	"	382	348	"	"	161	380	"	"	103	394	"	"	170	421	"	"	340
				354	"	"	272	381	"	"	221	397	"	"	215	424	"	"	404
333	1949	"	218	358	"	"	158	382	"	"	194	399	"	"	225	425	"	"	347
336	"	"	243	362	"	"	176	383	"	"	213	404	"	"	245	426	"	"	324
337	"	"	255	366	"	"	203	385	"	"	248	408	"	"	301	428	"	"	270
340	"	"	289	367	"	"	425	388	"	"	308	412	"	"	210	429	"	"	431

CASES OVERRULED OR REVERSED IN A. I. R. (35) 1948 OUDH

('43) A. I. R. (30) 1943 Oudh 243=19 Luck 109=1943 O. W. N. 50 = 206 I. C. 7, Ali Raza Khan v. Nawazish Ali Khan	Reversed in A. I. R. (35) 1948 P. C. 134.
('44) A. I. R. (31) 1944 Oudh 295 = 20 Luck. 256= 1944 O. W. N. 372 = 1944 A. W. R. C. C. 255, Ram Naresh Singh v. Jai Raj Singh	Overruled in A. I. R. (35) 1948 Oudh 76 (F. B.).

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1948
Oudh Chief Court

*** A. I. R. (35) 1948 Oudh 1** *[C. N. 1.]*

KIDWAI J.

Bishnath Prasad and another—Accused — Appellants v. *Emperor.*

Criminal Appeal No. 209 of 1946, Decided on 7-11-1946, against order of Addl. Sessions Judge, Unao, D/- 16-5-1946.

(a) Penal Code (1860), S. 366-A—Illicit intercourse —Intention.

Where at the time the girl was removed, there was no intention on the part of the accused that she should be used for sexual intercourse, the accused is not guilty of an offence under S. 366-A. The intention of getting her married is not sufficient. [Para 7]

(b) Penal Code (1860), S. 375—"Without her consent" —Evidence.

Where, in a case of alleged rape of girl of over 14 years of age, the evidence showed that the girl left her home without compulsion, that she journeyed with the accused from place to place, that though literate, she did not write or communicate with her people, that she never complained of any ill treatment by the accused to any of the people she met and there was only her own evidence that the alleged sexual intercourse was without her consent:

Held that the circumstances indicated that if there was any sexual intercourse it was with her consent and the offence of rape was not proved beyond reasonable doubt. [Para 8]

(c) Penal Code (1860), S. 366—"Against her will."

The accused were charged under S. 366. The allegation was that they abducted a girl with idea of getting her married for the profit of the accused. The girl deposed that whenever her marriage was talked of, her own consent was asked for. There was no intenion or knowledge on the part of the accused of illicit intercourse with the girl at the time of her removal.

Held that the offence under S. 366 was not made out. [Para 9]

(d) Penal Code (1860), S. 363—Ingredients.

In order to make out a case under S. 363 the prosecution must establish the following ingredients: (1) That the age of the girl is less than 16 years; (2) That the girl was taken or enticed away; (3) That she was in the keeping of her lawful guardian; and (4) That the guardian did not consent to her removal. [Para 9]

(e) Evidence Act (1872), S. 45 —Medical opinion as to age.

The evidence of a doctor as to age as an expert is valuable but by itself is not sufficient to fix the exact age. [Para 11]

***(f) Evidence Act (1872), S. 35—Register of births in Police station — Entries in — Admissibility— Evidentiary value.**

Under S. 35, it is not necessary that the duty should be prescribed by any enactment —it is enough if it is prescribed by rules made under authority of an enactment. [Para 22]

A certified copy of an extract from the birth register maintained by the head constable writer of the police thana in performance of his duties imposed under the rules framed by the Inspector-General of Police under S. 12 of the Police Act, is admissible in evidence under S. 35, Evidence Act: 6 A. I. R. 1919 Oudh 75; 14 O. C. 68; 15 O. C. 351 and 19 I. C. 528 (All.), *held no longer authoritative; Case law reviewed.* [Para 26]

Such a copy is valuable evidence of age. It cannot be trusted for the exact date of birth, but it is accurate to within a few days. [Para 26]

(g) Evidence Act (1872), S. 79—Section has no application to original documents. [Para 22]

(h) Penal Code (1860), S. 363—Sentence.

Accused (husband and wife) found guilty under S. 363—Accused past middle age and lost their service—Girl kidnapped nearly 16 years of age and herself a willing party—Sentence of accused reduced from 7 and 4 years rigorous imprisonment respectively to 3 years' rigorous imprisonment and 2 years' simple imprisonment respectively. [Para 27]

Cases referred:—

1. ('20) 54 I. C. 166: 22 O. C. 250: 6 A. I. R. 1919 Oudh 75, Mahomed Jafar v. Emperor.
2. ('11) 14 O. C. 68 : 10 I. C. 713, Sampat v. Gauri Shankar.
3. ('12) 15 O. C. 351 : 18 I. C. 653, Habib-ul-lah v. Emperor
4. ('13) 19 I. C. 528 (All), Jiwan Bakhsh v. Khan Bahadur Khan.
5. ('22) 9 A. I. R. 1922 All. 510 : 77 I. C. 52, Sheo Balak v. Gaya Prasad.
6. ('14) 24 I. C. 540:1 A. I. R, 1914 All. 99, Mt. Baldei v.Abhey Ram.
7. ('16) 19 O. C. 221: 3 A. I. R. 1916 Oudh 115 : 36 I. C. 941, Bisheshar Dayal v. Hira Lal
8. ('19) 22 O. C. 124 : 6 A. I. R. 1919 Oudh 426: 52 I. C. 162, Mt. Zaib-un-nissa v. Mt. Hasrat-un-nissa.

9. ('46) 1946 A. W. R. (P. C.) 135: 33 A. I. R. 1946 P. C. 103: I.L.R. (1946) Kar P. C. 111: 225 I. C. 188 (P. C.), Shyam Pratap Singh v. Collector of Etawah.
10. ('25) 12 A. I. R. 1925 All. 79: 46 All. 637: 87 I. C. 938, ShibDeo Misra v. Ram Prasad.
11. ('34) 1934-11 O. W. N. 416 : 21 A. I. R. 1934 Oudh 167 : 148 I. C. 418, Jai Bhagwan v. Guttoo.
12. ('19) 46 Cal. 152: 6 A. I. R. 1919 Cal. 721: 46 I. C. 237, Tamijuddin Sarkar v. Tazu.
13. ('18) 41 Mad 26: 5 A. I R. 1918 Mad 451: 41 I. C. 286, Ramalinga Reddi v. S. Kotayya.
14. ('26) 13 A. I. R. 1926 Mad. 985 : 95 I. C. 1005, Chakravarthi Nainar v. Pushpavathi Ammal.
15. ('33) 20 A. I. R. 1933 Lah. 601 : 14 Lah 473 : 144 I. C. 45, Mahomed Hassan v. Safdar Mirza.
16. ('35) 22 A. I. R. 1935 Pat 474: 160 I. C. 116, Nanhak Lal v. Baijnath Agarwala.
17. ('37) 24 A. I. R 1937 Nag. 264: I. L.R (1937) Nag. 382 : 172 I. C. 287, Shrikisan Bhikamchand v. Jagoba Mahipat.

Hakimuddin and Bashir Ahmad — for Appellants.
P. N. Chaudhri, Asst. Govt. Advocate—for the Crown.

Judgment. — Appellant 1, Bishnath Prasad, Brahmabhat by caste, was the headmaster of a boys school in model village Hussainnagar close to the town of Unao. He was also librarian of the village library and was placed in charge of the village radio set supplied by the Rural Development Department. The task of issuing permits for sugar and kerosene oil was also assigned to him. Appellant 2, Mt. Rani Devi, is his wife and was mistress in the girls' school of Hussainnagar. Shankar Sahai, alias Lalloo, is the son of the two appellants and he was in charge of the control shop in the village. Thus the family occupied a very prominent position and it may be said that, next to Pandit Jagdish Prasad Dwivedi, the zamindar of the village who was Chairman of the District Rural Development Association and Vice-Chairman of the Education Committee of the District Board, it was the most influential in the locality.

[2] The family used to live in the pucca part of the house of one Audh Behari Brahman, a distant relative of Pandit Jagdish Prasad, who, with his nieces and nephews, the sons and daughters of his deceased brother, Kunj Behari, lived in the kachcha portion of the same house. The eldest of the children is Mt. Surjan Dei, who, according to the prosecution case, was aged about 13 or 14 years in 1944 and, according to the defence, was then aged about 19 or 20 years. Kunj Behari died about 10 or 11 years ago and the mother of the children is alleged to have died about four years before the incident at her father's house at Rahimabad, district Lucknow, though the defence alleges that she is still alive. Thus for some time before the incident the children lived without the care either of a mother or a father with their paternal or maternal uncles in the house. It is natural that in the circumstances many of the duties of the lady of the house devolved upon the eldest girl, Surjan Dei, and that there were greater opportunities of her being misguided by interested persons since the two men were engaged upon the business of carrying a livelihood and were often absent from the house for the whole day.

[3] The prosecution alleges that on the night of Janam Ashtmi, i. e. the night between 11th and 12th August 1944, Audh Behari and his family had gone to sleep after the celebrations were over. When Audh Behari woke in the morning Surjan Dei had disappeared. He made enquiries from appellant 2 and searched for the girl but she could not be traced. He thereupon informed the chaukidar and various relatives, including Pandit Jagdish Prasad, but did not make a regular report to the police because of the calumny and dishonour that would attach to the family. It is also alleged that Pandit Jagdish Prasad asked a distant relation of his, Prakash alias Bhajju, P. W. 7, to keep a look out for the girl who was said to have disappeared with the appellant Bishnath, though it is not stated how Bishnath came to be suspected.

[4] Prakash states that he visited various places in search of the girl but did not find her. He, however, met her accidentally in the company of appellant 1 on 1st March, 1945 at about 6-30 p. m. buying bangles at a shop in Dwarkapuri Bazar at Cawnpore. He proceeds that Bishnath Prasad also saw him and hastened off with the girl to the house of a vakil in muhalla Gandhinagar. Prakash followed and recovered the girl with the aid of a doctor and one Pandit Madho Prasad, P. W. 2. Thereafter the accused and the girl were taken to Jarib Ki Chauki and thence to Thana Sisamau where the first information report, Ex. 1, was lodged under S. 363, Penal Code, by Prakash, claiming to be the uncle of the girl and the statement of the girl herself was recorded in the general diary. Exhibit 2 is a copy of an extract containing this statement. P. W. 14, Mst. Surjan Dei, tells us that the report was recorded after she had had an hour's talk with Prakash but Prakash denies this. In any case the report was made at about 10. P. M. which gave sufficient time for such a consultation. The report simply mentioned that Bishnath had enticed the girl away and that all searches made by the uncle of the girl and by himself had proved fruitless. He then describes how he had found the girl in the manner stated above.

[5] Bishnath was arrested and sent to jail. The girl was sent to an orphanage and the case was sent to the Kotwali, Unao, within whose jurisdiction the offence had been committed. The accused was released on bail at Unao and, on 16-3-1945, the girl was entrusted to her uncle who brought her home. So far no report had been made against Mt. Rani Devi and no case had been started against her but during the

course of the police investigation she was also implicated and she was arrested on 27-5-1945, and eventually the prosecution was launched against both the husband and the wife.

[6] The following two charges were framed against the accused:

"Firstly, that you on or about the night between 11th and 12th day of August, 1944 at about 2 A. M. abducted Mt. Surjan Dei from village Hussainnagar with intent that she may be forced or seduced to illicit intercourse and thereby committed an offence punishable under S. 366/366-A, I. P. C.

"Secondly, that you, Bishnath accused, committed rape on or about 12-8-1944 upon Mt. Surjan Dei and thereby committed an offence punishable under S. 376, I. P. C. and I direct that you be tried on the said charge."

The accused pleaded not guilty. Mt. Rani Devi denied all knowledge of, or participation in, the alleged abduction. Bishnath filed a lengthy written statement Ex. 32, in the Court of the Committing Magistrate and he confirmed it in the Sessions Judge's Court. The whole of the written statement is directed against Pandit Jagdish Prasad and his supposed tyrannical attitude to the accused and his family. He is alleged to be the author of the prosecution and Audh Behari, his relation, is only his tool. The written statement then proceeds to make allegations against the chastity of Surjan Dei and names her various supposed paramours, including Prakash (P. W. 7). It then says that the accused decided to leave for pilgrimage and to secure his transfer because of the oppression of Pandit Jagdish Prasad. He accordingly got leave and proceeded to Cawnpore where, on the day on which he was to set out for pilgrimage to Rameshwaram, Audh Behari turned up at his daughter's house at Cawnpore and brought Mt. Surjan Dei with him. Audh Behari stated that she had been caught with Lalloo, the accused's son, on the Janam Ashtmi night and so he could no longer keep her since the whole village had come to know of it and Lalloo had run away. He, therefore, brought the girl to entrust her to Lalloo or leave her with Bishnath to get her married somewhere. On the accused's objection that he was going on a pilgrimage Audh Behari replied that he could take her with him. All the protests of the accused were silenced by threats and so the accused kept Surjan Dei and took her with him to Allahabad, Benares and other places to find a husband for her. He failed and finally brought her back to Cawnpore. Audh Behari was all along kept informed of his movements but was not prepared to spend any money on the marriage of his niece. The result was that the girl was left on his hands. He again wrote to Audh Behari from Cawnpore. Audh Behari and Prakash came to his house at Cawnpore. The former asked him to keep the girl a little longer since he was settling her marriage. He agreed. Thereafter Prakash revived his liaison with the girl and so he moved away from the house to another one. Prakash got infuriated at this and, in revenge, got the accused arrested on a false charge when he saw him.

[7] It may be stated at the outset that the charge under S. 366-A, I. P. C., is not made out against either of the accused. Section 366-A can only be applicable if the taking away of the girl was

"with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse."

While under S. 366 the removal of a minor even with the intention of giving her in marriage without her consent is illegal if she is under 16 years of age, this is not so if she is above that age. In the present case all the evidence shows that it was with the idea of getting her married, perhaps for a consideration, that the girl was removed. As to illicit intercourse by the accused himself, the learned Additional Sessions Judge, although he has held the charge of rape proved, has further held that, at the time the girl was removed, there was no intention on the part of either accused that appellant 1 should have sexual intercourse with her. I see no reason to differ from this finding, particularly when it is remembered that appellant 2 is the wife of appellant 1. The conviction of the accused under S. 366-A can, therefore, not stand.

[8] Similarly the charge under S. 376 against appellant 1 for the alleged rape cannot stand. The sole evidence in support of this is the medical evidence, Exs. 16 and 30, which shows that, when examined by the doctor, it appeared that the girl was used to sexual intercourse, and the evidence of the girl herself as P. W. 14 which shows that the accused had sexual intercourse with her. The defence pleaded that the evidence of the girl on this point should not be accepted because she did not mention this either in Ex. 2 or in Ex. Z-17, her previous statement before the police, and it was only after a great deal of time had elapsed that she mentioned it for the first time in Ex. Z-18. It is not necessary for me to decide whether her evidence of the sexual intercourse is true or not because the circumstances indicate that, if there was any sexual intercourse, it was with her consent. The girl left her home without compulsion; she journeyed with Bishnath from place to place : she is literate and can write letters but she did not write to or communicate with her people : she never complained to any of the people she met of any ill-treatment by the accused. There is only her own evidence that the sexual intercourse if it

really did take place, was without her consent. She is over 14 years of age and consequently the offence of rape is not proved beyond reasonable doubt.

[9] There remains then a consideration of the question whether any offence under S. 366, Penal Code, has been made out : and, if it has not, whether any other offence for which the appellants can be convicted in this case, is proved. The first thing to be noticed in this connection is that the charge was of abduction with a view to illicit intercourse. I have already shown, in dealing with the charge under S. 366-A, there was no intention or knowledge of illicit intercourse. It was always alleged that the girl was abducted with a view to get her married for the profit of both the accused. With regard to marriage too the evidence of P. W. 14, Surjan Dei herself discloses that she was induced to leave the house of her uncle tempted by the offer of a wealthy bridegroom and a happy marriage. She further deposes that wherever her marriage was talked of, her own consent was asked for. Perhaps this is the reason why the Additional Sessions Judge did not include the words

"With intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person *against her will.*"

The case under S. 366, I. P. C., is also not made out. This does not, however, mean that the appellants are not guilty of any offence at all. I consider that the evidence in this case clearly establishes a case under S. 363, I. P. C., the section under which the original report was made. In order to make out a case under S. 363, the prosecution must establish the following ingredients: (1) that the age of the girl is less than 16 years; (2) that the girl was taken or enticed away; (3) that she was in the keeping of her lawful guardian; and (4) that the guardian did not consent to her removal. In the present case each one of these ingredients is disputed.

[10] The prosecution alleged that the girl was about 13 or 14 years of age while the defence case was that she was about 19 or 20 years. In support of its case the prosecution relied upon the evidence of P. W. 15, Audh Behari, the uncle of the girl. Exhibit 16, the report of the Civil Surgeon, Ex. 30, the Civil Surgeon's evidence, Ex. 23 the copy of the school register of the girls' school at Hussainnagar and Ex. 24, an extract from the copy of the birth and death register.

[11] The statement of Audh Behari as to age is very vague and cannot be accepted. Exhibit 23, copy of the school register would give the age as about 14½ years at the time of the occurrence since it shows 2nd January 1930, as the date of birth. The document is not of much assistance because it is notorious that the ages given at school are not accurate. The medical evidence shows that the age of the girl at the time of the medical examination, on 9-4-1945, was about 15 years, that is to say, in August 1944, it would be about 14¼ years. The doctor, in his statement, Ex. 30, abides by his estimate but adds that such estimates may be out by six months or even a year. Thus the girl in question could, allowing for a margin of one year, be about 15¼ years on 11-8-1944. The doctor has stated in cross-examination that the estimate is a little more accurate if X-Ray examination takes place. He has also given the data upon which such estimates are based although he has not noted them down in this particular case in Ex. 16. It is objected that he had the school leaving certificate of the girl, Ex. 23, before him when he made the report and he merely took the estimate there given. In support of this it is pointed out that the copy of the certificate filed in this case was obtained on 9-4-1945 and that that is the day on which the police reported that the girl's age should be ascertained (*vide* Ex. Z-2 and Ex. 15). There is, however, no evidence that, as a matter of fact, Ex. 23 was shown to the doctor. There is no mention of it being forwarded to him either in Ex. Z-2 or in Ex. 15 nor was the doctor asked in cross-examination whether he had Ex. 23 before him. Moreover, even if it was shown to him it would only mean that the doctor had some estimate but it would not mean that his judgment as an expert was controlled by this certificate. The evidence is valuable but by itself it is not sufficient to fix the exact age.

[12] I come then to Ex. 24, the copy of an extract from the birth register. This document was vehemently attacked as inadmissible for two reasons: (1) That it is not shown to have been prepared by a chaukidar or some public servant in the discharge of his official duty; (2) That it is not shown that it refers to Surjan Dei and not to some one else.

[13] In support of the first point reliance was placed upon 54 I. C. 166:22 O. C. 250.[1] This decision itself shows that a considerable amount of conflict existed as to the admissibility of such documents. I have, therefore, considered all the cases mentioned in it as well as some others which I have been able to find and I have come to the conclusion that the document is admissible and affords valuable evidence of birth. In considering this document it must be borne in mind that it is not a copy of a chaukidar's register but of a register maintained at the thana subsequently deposited in the record room of the District Magistrate, Unao (vide P. W. 11 Sarfaraz Khan, the reader of the Unao Collectorate who brought the register).

[14] The first case on this point is 14 O. C. 68[2], *which related to a chaukidar's register*. In that case it was admitted that the entry was not made by a chaukidar and Chamier J. C. (later Sir Edward) held that it was not admissible in evidence because

"there is no evidence that it was made by any other public servant or that it was the duty of any other public servant to make it."

[15] The matter again came up for consideration in 15 O. C. 351,[3] which also related to a chaukidar's register. In this case Lindsay J. C. (later Sir Benjamin) referred to the decision in 14 O. C. 68.[2] He then held that in the case before him also the entry was made by some person other than the chaukidar. He then proceeded :

"it was held that the entry was not admissible under S. 35, Evidence Act, because *there was nothing to show that the making of such entries was an act required of a chaukidar in the discharge of his official duty* and that there was no other section except S. 35 which would justify the reception in evidence of such an entry. I have no reason for supposing as at present advised that the ruling in 14 O. C. 68[2] is erroneous in law: at the same time it is not necessary for me to consider the question because even assuming that the entry was admissible it proves nothing."

[16] In 19 I. C. 528,[4] which involved the question of the admissibility of a municipal register of births and deaths the learned Judges followed 14 O. C. 68[2] and held that it was not shown that the entries were made by a public servant in discharge of his official duties. This case was followed without any discussion in A. I. R. 1922 ALL. 510.[5]

[17] These four cases were based on an absence of proof that any duty of making entries were any part of the official duties either of the chaukidar or some other official. As a matter of fact this duty is imposed upon the chaukidar and the head constable writer of the thana under the rules framed by the Inspector-General of Police under S. 12, Police Act. This position is made quite clear in subsequent decisions both of the Judicial Commissioner's Court and of the Allahabad High Court. Those decisions can, therefore, no longer be considered authoritative and in any case they did not relate to a register of the kind now under consideration.

[18] 14 O. C. 68[2] was again considered by a learned single Judge of the Allahabad High Court in 24 I. C. 540[6] in which also a question of the admissibility of a chaukidar's register arose, and the learned Judge said:-

"I should hesitate to dissent from the authority of Chamier J. on this point; but I am content to say that I feel some doubt as to the correctness of his view."

He then proceeded to distinguish 14 O. C. 68[2].

[19] The point was again considered by a Bench of the Judicial Commissioner's Court in 19 O. C. 221.[7] The learned Judicial Commissioners felt that, for the purposes of the case before them it was not necessary for them to come to a definite finding as to whether such a register is or is not a public document. The judgment is, however, instructive and takes the matter much further. At page 227 the Judicial Commissioners say:.

"Section 10, para 367 of the Police Manual, U. P. and Oudh (1900) sets out rules for the registration of deaths among the population. In that paragraph it is distinctly laid down that the head-constable writer will keep up a register of deaths in the prescribed form, that when the village policeman comes to make his report, the head-constable writer will ask him whether any death had occurred since the date of the last report, that the writer need not require the exact day on which the man, woman or child reported as dead died. The date on which the village policeman's report is made will be assumed to be the date of death, this course of "procedure, being for all practical purposes of registration, quite sufficient". The paragraph then provides that the writer shall also enter in the village policeman's pocket register of births and deaths any reports of such that he may make. *From this it is clear that the primary register which has to be kept up, is a register of deaths at the police station* . . . . . ."

Paragraph 368 is a similar paragraph relating to births.

[20] Thus there is a great deal of difference between the chaukidar's register and the thana register —the latter being the primary register. This case establishes that a register such as the present one was maintained by the head constable writer of the thana in performance of his official duties.

[21] The case in 14 O. C. 68[2] was referred to in 22 O. C. 124[8] in which Daniels J. C. held:

"Whatever the state of the law as to chaukidar's registers may have been in 1910, it is perfectly clear that the register of which a copy is before me is an official register made by a public servant in the discharge of his official duty and as such in admissible under S. 35."

This case clearly makes Ex. 24 admissible.

[22] The whole law was reviewed in 22 O. C. 250[1] in which Ashworth, A. J. C., referred to all the previous decisions of his Court, to paras. 367 and 368 of the Police Manual and to S. 50 of U. P. Act 20 [XX] of 1856 and then held:

"It, therefore, follows that chaukidars were lawfully assigned the duty of verbally reporting births and deaths and the station writers were lawfully required to make the entry to the chaukidar's dictation. If then the entry can be proved to have been made by the station writer, the entry is relevant under S. 35, Evidence Act."

The learned additional Judicial Commissioner then proceeds to hold that the entry was inadmissible inasmuch as it was not duly certified under S. 79, Evidence Act, and was not directed by any law to be kept in order to justify the application of S. 81. With due deference to the learned Additional Judicial Commissioner, S. 79 has no application to original documents and his own judgment shows

that the Registers were maintained under a law, i. e., the Rules made by the Inspector-General of Police with the approval of the Provincial Government under S. 12, Police Act 5 [V] of 1861. It is not necessary that the duty should be prescribed by any enactment —it is enough if it is prescribed by rules made under authority of an enactment. In 1946 A. W. R. P. C. 135[9] at p. 139 their Lordships of the Judicial Committee admitted in evidence, and placed great reliance upon, a pedigree contained in an estate note book of the Court of Wards because the Court of Wards Manual provides for the maintenance of such a book. Their Lordships say:

"This document is, therefore, an official document prepared by a public authority in pursuance of a statutory duty."

Another criticism was repelled by their Lordships in the following words:

"The criticism directed against this document is that it does not show the sources on which the Court of Wards based its findings, and that 'the assumption of charge file' on which the pedigree purports to be founded was not produced. But this is not criticism of weight against a public document. The Court must assume that the Court of Wards did its duty to the best of its ability, and based the pedigree on material of accuracy of which it was satisfied. No cross-examination of the two witnesses from the Court of wards who were called was directed to ascertain the sources on which the pedigree was founded. In their Lordships view, this is much the most important document on either side and, in the absence of any reason for supposing the document to be incorrect, their Lordships think that it must be accepted as accurate."

Exactly the same reasoning will apply to a register maintained at the thana under rules framed under S. 12, Police Act.

[23] In A. I. R. 1925 ALL. 79[10] all the cases mentioned above were noticed by Sulaiman and Kanhaiya Lal. JJ., at page 81 of their judgment and their Lordships say:

"Under the police Act (No. [V] of 1861), S. 12, the Inspector-General of Police is authorised to frame orders and rules relative to, amongst others, the collecting and communication by them of intelligence and information etc. Under the Police Regulations, Chapter 24, para. 274, sub-clause 4, the Head Muharrir of every police station officer has to keep registers of births and deaths and make entries therein as reported by the village chaukidars. There are prescribed forms, Nos. 1 and 5, which have to be used for that matter. The register in question contains printed pages of the form No. 5 and it was manifestly kept at the police station and later on forwarded to head-quarters. The mere fact that the entries in it are made in chronological order would not show that this document is not an official book. We are clearly of opinion that this register was an official book, register or record made by a public servant in the discharge of his official duty within the meaning of S. 35, Evidence Act. An entry made therein would, therefore, be itself a relevant fact."

[24] In 1934 O. W. N. 416[11] a Bench of this Court held that an entry in a municipal register of births and deaths was admissible under S. 35. Such registers are also maintained under rules made under S. 298, U. P. Municipalities Act.

[25] The same view has been taken by other High Courts with regard to similar registers-*vide* 46 Cal. 152,[12] 41 Mad. 26,[13] A. I. R. 1926 Mad. 985,[14] A. I. R. 1933 Lah. 601,[15] A. I. R. 1935 Pat. 474,[16] and A. I. R. 1937 Nag. 264.[17]

[26] On a consideration of all these authorities there can be no doubt that under S. 35, Evidence Act, Ex. 24 is admissible in evidence as being a certified copy of a public document. Further it is valuable evidence of age. It cannot be trusted for the exact date of birth because the chaukidar does not visit the thana every day and the entry is only made when he visits the thana in the regular course of his duties; but it is accurate to within a few days. In judging of this I cannot lose sight of the fact that, at the time that the entry was made, i. e. in 1928, no one could have been interested in getting a wrong entry recorded. This evidence, therefore, clearly establishes that the girl to whom it relates was less than 16 years of age on 11th and 12th August 1944. [His Lordship considered the rest of the evidence and held that there could be no doubt that the accused had committed the offence of kidnapping punishable under S. 363, Penal Code and proceeded]: I have already said that the conviction of either of the accused under Ss. 366/366A and 376, Penal Code, cannot be sustained. I, therefore, partly allow the appeal and set aside those convictions and convict both the accused under S. 363, Penal Code.

[27] The Additional Sessions Judge sentenced the accused Bishunath Prasad to seven years' rigorous imprisonment and Rani Devi to four years' rigorous imprisonment. These sentences cannot stand. In determining the sentence under S. 363, Penal Code, I have to consider the conduct of the accused. There can be no doubt that they are both educated persons placed in authority and having great confidence reposed in them. They have abused their trust. Further they have thought fit to make attacks upon all and every person concerned in the case without any regard to facts. This was done no doubt on the advice of their advisers but they cannot be wholly exempted from all blame in the matter. At the same time the girl, Surjan Dei, was herself a willing party and she was nearly 16 years of age. Further she was no longer under the care of either of the accused. Moreover both the accused have been heavily punished by losing their service and they are both past middle age. I think that a sentence of three years' rigorous imprisonment on Bishunath Prasad and two years' simple imprisonment on Mt. Rani Devi will meet the ends of justice and I accordingly

reduce their sentences from seven years' rigorous imprisonment and four years' rigorous imprisonment to three years' rigorous imprisonment and two years' simple imprisonment respectively.

V.B.B. *Appeal partly allowed.*

A. I. R. (35) 1948 Oudh 7 *[C. N. 2.]*

KIDWAI J.

Kamla Prasad v. *Ram Narain.*

Second Appeal No. 155 of 1941, Decided on 3-3-1947, from order of Civil Judge, Sultanpur, D/-25-1-1941.

(a) Oudh Laws Act (18 [XVIII] of 1876), S. 9 — Pre-emption — Lessee of under-proprietary rights cannot subsequently claim to be transferee by sale, when limitation for pre-emption has expired.

Where a deed calling itself a lease has been executed and there is no fraud, it is not open to the lessee subsequently to go behind this lease deed, when the question of pre-emption of another land arises, and lead evidence to show that the deed was in fact a sale and claim to be a co-sharer by reason of it and thus entitled to pre-empt: 29 A. I. R. 1942 Oudh 55, *Foll.*; 30 A. I. R. 1943 Oudh 125 and 31 A.I.R. 1944 Oudh 263, *Rel. on.*

Where by reason of the fact that a transfer was put in the form of a lease the co-sharers were deprived of their right of pre-emption with respect to it it would be assisting in the perpetration of a fraud on their right, however weak it might be considered to be, if the person claiming under it is permitted to assert greater rights when the period of limitation for filing a suit for pre-emption has expired. [Para 8]

(b) Limitation Act (1908), Art. 144—Mutation does not confer title—Lessee lawfully in possession for more than 12 years—Mutation of lessee as under-proprietor—Lessee, if under-proprietor by adverse possession.

Mutation of names cannot confer a title which did not previously exist. Where the lessees of under proprietary rights were wrongly recorded as under-proprietors, which mistake could not be explained, it cannot confer a title on the lessees, and make them under-proprietors and co-sharers. [Para 9]

The fact that lessees were in possession for more than 12 years, which they were entitled to by reason of the deed of lease, their possession which was lawful cannot be said to be adverse to anybody. The fact that they were wrongly entered as under-proprietors, when in fact the mutation order treated the transferees as lessees could not make them under-proprietors by adverse possession. [Para 9]

Annotation : ('42-Com.) Limitation Act, Arts. 142 & 144, Note 59.

(c) T. P. Act (1882), S. 105 — Lease or sale — Transfer of under-proprietary rights — Transferor's liability to rent not affected—Transfer is sale.

The distinction between lease and sale is a very nice one but it is nevertheless a real distinction. The question really is whether the transfer operates to substitute the transferees for the transferor for all purposes and terminates all the rights and liabilities in the property which is being dealt with. [Para 10]

In the case of rent-free tenure no present liability to payment of rent exists. But this does not mean that no such liability can come into existence in the future. Thus rent may be assessed either under S. 79, U. P. Land Revenue Act, or under the resumption Chapter of the U. P. Tenancy Act. Where there is nothing in the deed by which the transferor of under-proprietary rights divested himself of this liability, under the law his liability would continue and consequently in case of such transfer it cannot be said that the transfer terminated all his rights and liabilities in respect of the property dealt with by it, especially when an yearly payment was reserved to the transferor. In such a case transfer is a lease. [Para 10]

In such a case the transferor remains an under-proprietor by reserving an interest in land. By such a transaction he cannot create another under-proprietary right in the same land, he cannot also confer any such thing as "sub-under-proprietary rights." By such a deed the transferees cannot become under-proprietors by whatever name the deed is called : 21 A. I. R. 1934 Oudh 145, *Ref.* [Para 11]

Annotation: ('45-Com.) T. P. Act, S. 42 Note 42.

Cases referred:

1. ('34) 11 O. W. N. 843: 21 A. I. R. 1934 P. C. 153: 9 Luck. 407 : 61 I. A. 235: 151 I. C. 74 (P. C.), Birendra Bikram Singh v. Brij Mohan Panday.
2. ('41) 1941 O. W. N. 1122 : 29 A. I. R. 1942 Oudh 55 : 17 Luck. 281 : 196 I. C. 617, Sita Ram Singh v. Jagdeo Missir.
3. ('42) 1942 O. W. N. 504 : 30 A. I. R. 1943 Oudh 125 : 18 Luck. 303 : 204 I. C. 85, Srinath v. Ram Narain.
4. ('44) 1944 O. W. N. 155 : 31 A. I. R. 1944 Oudh 263 : 20 Luck. 15: 218 I. C. 322, Jagdeo Missir v. Sita Ram Singh.
5. ('34) 11 O. W. N. 430 : 21 A. I. R. 1934 Oudh 145 : 9 Luck. 670 : 149 I. C. 550, Bindeshwari Prasad v. Krishna Murari.

R. B. Lal and M. M. Lal—for Appellants.
K. P. Misra—for Respondents 1 and 2.

Judgment. — Plaintiff respondent 1 and the predecessor of respondents 2/1 and 2/2 instituted a suit in the Court of the Munsif, North Sultanpur, for pre-emption of a share in mahal Manpur Dahla in village Sukhanpur Ashraf Patti, District Sultanpur. They claimed to be members of the village community inasmuch as they were co-sharers in a different mahal-Manpur Dhaurahra in the same village and they alleged that vendees—respondent No. 4 and the predecessors of the appellants—were strangers. The sale deed had been executed on 18-4-1939, for a consideration of Rs. 400/- and at one stage the amount of the consideration was challenged but there is no longer any dispute with regard to it.

[2] The vendees, who were defendants 1 and 2, claimed that they were not strangers but co-sharers in the mahal in which the property sold was situated. They, therefore, claimed a preferential right.

[3] The trial Court found that the plaintiffs were co-sharers in mahal Manpur Dhaurahra and, as such, members of the village community. It also found that, although the vendees are recorded in the khewat as under-proprietors in mahal Manpur Dahla, they are in fact not under-proprietors but only the holders of permanent lessee rights. It accordingly held that the plaintiffs had a preferential right to pre-empt and decreed the suit.

[4] The vendees appealed and the civil Judge of Sultanpur upheld the findings of the Munsif and dismissed the appeal. Both the Courts rejected the oral evidence led by the vendees to show that Buddhu who had executed the transfer, EX. A-13, in their favour, had agreed to sell his under-proprietary rights outright and the deed had assumed its present form on the advice of a petition writer with a view to avoid pre-emption. The lower appellate Court has also held that the real value of the property conveyed by EX. A-13 would be about RS. 800/- and the fact that the consideration of EX. A-13 is only RS. 200/- is an indication that sale was not intended.

[5] One of the vendees, Nakched has come up in appeal to this Court. He has impleaded the other vendee as respondent 4 and has made a note in the grounds of appeal that, under O. 41, R. 4, Civil P. C., the appeal is for the benefit of respondent 4 also. During the pendency of the appeal Nakched died and is now represented by his heirs.

[6] In appeal the right of the plaintiffs as members of the village community is not disputed nor is it disputed that, in view of the decision of the Judicial Committee in 11 O. W. N. 843[1] the holder of a permanent lease is not a member of the village community entitled to pre-empt. It is, however, contended that the Courts below have erred in their construction of EX. A-13, the deed under which the vendees hold their previously existing rights. Their learned advocate contends that it is not the name which is given to a document but its substance that must be considered in determining the rights of a party claiming under it. He further argues that both sales and leases are transfers, in the former case ownership and in the latter the right of enjoyment alone being transferred. He contends that a consideration of EX. A-13 leads to the conclusion that Buddhu divested himself of all vestige of ownership which thereafter vested in Nakched and Gayadin and the mere fact that an yearly payment reserved to the vendor is called rent does not mean that it is in fact rent and may well be a part of the price. In support of this plea, apart from the terms of EX. A-13 itself, he relies upon the proceedings for mutation of names on the basis of EX. A-13, as *contemporanea expositao* indicating what the parties understood at that very time to have been the effect of EX. A-13.

[7] The learned counsel for the respondent, on the other hand, urges that the deed EX. A-13, is not the deed of transfer involved in the suit but it is the deed which forms the basis of the vendee's alleged previous co-sharership. No question of construction, therefore, arises since such a deed must be accepted at its face value.

[8] The learned counsel for the appellant has placed before me a large number of decisions in which it has been held by this Court that it is the substance of the transaction and not its form that is to be considered in deciding the question. All these decisions, however, except one dealt with the construction of the deed which formed the basis of the transaction then in suit. On the other hand, the specific point involved was decided by a learned single Judge of this Court in 1941 O. W. N. 1122.[2] In that case a deed calling itself a lease was executed in favour of the person who claimed to pre-empt alleging that the lease in his favour was really a sale deed and that he had accordingly become a co-sharer. Madeley J., said:

"In my opinion it was not open to the respondent to go behind this lease deed and lead evidence to show that it was a sale. As I have said, no fraud was pleaded and I do not think that the plaintiff could plead fraud in order to take advantage as a pre-emptor."

This view was cited by another single Judge in 1942 O. W. N. 504[3] and later was the subject of an appeal under S. 12 (2), Oudh Courts Act. In 1944 O. W. N. 155[4] a Bench of this Court on appeal upheld the view of Madelay J., and held that the pre-emptor was precluded from contending that he was a co-sharer. In the present case it is the vendee who seeks to show that his previous title deed confers upon him rights different from those which it ostensibly purports to do. The position is exactly the same as in the case of the pre-emptor asserting sale and I, sitting as a single Judge, am bound by the decision in the previous cases. Further, I say so with respect, the decisions to which I have referred are based upon sound reasoning. By reason of the fact that a transfer was put in the form of a lease the co-sharers were deprived of their right of pre-emption with respect to it and it would be assisting in the perpetration of a fraud on their right, however weak it might be considered to be, if the person claiming under it is permitted to assert greater rights when the period of limitation for filing a suit for pre-emption has expired.

[9] There is, however, one point of distinction which must be noted and that is that, while in 1944 O. W. N. 155[4] the name of the original under-proprietor continued to be recorded in the papers, in the present case his name has been removed and that of the transferee has been substituted in the revenue records. It is not disputed that, mutation of names cannot confer a title which did not previously exist, but it is contended that 12 years have now elapsed since mutation was effected and Nakched and his brother have perfected their title by adverse possession. Apart from the fact that no plea of adverse possession was taken in the Courts below, I cannot find any

support for it from the evidence on the record. Undoubtedly Nakched was entitled to be in possession under Ex. A-13 and to have his name entered in the khewat. His possession cannot be considered to be adverse to anybody; it can be, and should be, referred to the lawful title which he possessed under Ex. A-13. Further Ex. A-15, a copy of the order for mutation, shows that Nakched and Gayadin were treated as *lessees* but some how or other it is not explained how the entry in the khewat is of under-proprietary right. Thus it cannot be said that Nakched and his brother became under-proprietors by adverse possession after the transfer in their favour.

[10] Even, however, if it is open to consider the real nature of Ex. A-13, I must hold it to be a lease and not a sale. The distinction between the two is a very nice one but it is nevertheless a real distinction. The question really is whether the transfer operates to substitute the transferees for the transferor for all purposes and terminates all the rights and liabilities in the property which is being dealt with. A consideration of Ex. A-13 shows that this has not been done. If the transfer had been made by a superior proprietor undoubtedly the right created would have been under-proprietary right, which means that the mere reservation of an annual money payment would operate as the reservation of an interest in property. It is contended that it is so because the liability of the proprietor to pay the Government revenue remains and he has thus not divested himself of all his liabilities which are as much a part of the ownership of property as rights. In the present case the tenure is rent-free and so no present liability to the payment of rent exists. This does not mean that no such liability can come into existence in the future. Thus rent may be assessed either under S. 79, U. P. Land Revenue Act, or under the resumption Chapter of the U. P. Tenancy Act. There is nothing in Ex. A-13 by which Budhu divested himself of this liability. Under the law his liability would continue and consequently it cannot be said that Ex. A-13 terminated all his rights and liabilities in respect of the property dealt with by it.

[11] Further it is agreed (*see* 11 O. W. N. 430[5] at p. 434) that there cannot be two under-proprietary rights in the same land and that an under-proprietor cannot confer any such thing as "sub-under-proprietary" rights; he can only create another under-proprietor by parting with all his rights. Thus if any interest is reserved by Buddhu he has not parted with all his rights and he remains an under-proprietor the necessary corollary of this being that Nakched and his brother did not become under-proprietors. By the deed Ex. A-13 a right to receive Rs. 3/7/- per annum, by whatever name it is called, is reserved to the transferor. It is argued that this is in the nature of an annuity as a part of the price and cannot be rent within the meaning of that term in the Oudh Rent Act, or the U. P. Tenancy Act because it is not paid for the use and occupation of the land or of a right in the land. This is begging the whole question: Ex. A-13 cannot be construed leaving out of consideration the provision as to payment of Rs. 3/7/- and then holding that, since no interest is reserved, Rs. 3/7/- is not rent. The provision for the payment of Rs. 3/7/- is as much a part of the terms of Ex. A-13 as any other provision. This coupled with the fact that Ex. A-13 does not terminate the liability of Buddhu *vis-a-vis* the superior proprietor to pay rent if it is assessed clearly indicates that Buddhu reserved some interest, however small. Thus Ex. A-13 cannot be construed as a deed of sale. The result is that I uphold the decree of the lower appellate Court and dismiss this appeal with costs.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 9 *[C. N. 3.]*

GHULAM HASAN C. J. AND MISRA J.

Mian Tej Singh—Plaintiff-Appellant v. *Daljit Singh—Defendant—Respondent.*

First Appeal No. 39 of 1943, Decided on 17-1-1947, against decree of Civil Judge, Bahraich, D/- 27-2-1943.

(a) Oudh Estates Act (1 [I] of 1869), S. 3—Grant of jagir—Nature of interest under grant—Gift by grantee—Decision of Settlement Court recognising gift — Adverse possession of donee — Civil P. C. (1908), S. 11—Limitation Act (1908), Art. 144.

Where certain villages were granted in 1865, by the Government as revenue free *jagir* to the grantee for his lifetime on the condition that after his death half of the Government revenue would be payable by his heirs in the first succeeding generation and full Government revenue by the subsequent generations and the name of the grantee was entered in lists 1 and 5 prepared in pursuance of S. 8, Oudh Estates Act:

Held (1) that the interest under the grant was absolute, heritable and transferable: *Case law discussed.* [Paras 19, 23, 30]

(2) that the decision of the Settlement Court recognising the proprietary rights of the donee from the grantee and the records of right consequent thereon which operated as the decrees of Settlement Courts operated as *res judicata*: 1 O. C. 124 and 1 O. C. 289, *Rel. on.* [Paras 20 and 33]

(3) that the donee and his successors having remained in possession as owners for a period of 70 years acquired, in any event, proprietary rights in the property by prescription. [Para 33]

Annotation:—('44-Com.) C. P. C., S. 11, Note 77. ('42-Com) Lim. Act, Art. 144 Note 60 Pt. 2.

(b) Crown Grants Act (1895), S. 3—Crown grant in unqualified terms—Effect.

Unqualified words of conveyance in a Crown grant cannot be regarded as qualified merely by virtue of the provisions of the Crown Grants Act: 3 A. L. J. 628, 23 A. I. R. 1936 Oudh 121 and 33 A. I. R. 1946 P. C. 127, *Rel. on; Case law Referred.* [Para 31]

Cases referred:—
1. ('15) 18 O. C. 163 : 2 A. I. R 1915 Oudh 65 : 31 I. C. 728, Husain Ali Mirza v. Mahomed Azim Khan.
2. ('36) 11 Luck. 588 : 23 A. I. R. 1936 Oudh 121: 159 I. C. 311, Shams Ara Begam v. Fakhr Jahan Begam.
3. ('98) 1 O.C.124,Jai Pattar Singh v. Ram RattanLal.
4. ('98) 1 O. C. 289, Bhagwan Bakhsh v. Chandi Dat.
5. ('78) 6 I. A. 54 : 3 Bom. 186 : 3 Sar. 889 (P. C.), Gulabdas Jugjivandas v. Collector of Surat.
6. (1900) 26 I. A. 216 : 27 Cal. 156 : 7 Sar. 580 (P.C.), Maharani Beni Pershad Koeri v. Dudh Nath Roy.
7. ('19) 46 I. A. 88 : 5 A. I. R, 1918 P. C. 203 : 46 Cal. 683 : 50 I. C. 1 (P. C.), Ram Narayan Singh v. Ram Saran.
8. ('31) 58 I. A. 215 : 18 A. I. R. 1931 P. C. 160 : 59 Cal. 1 : 132 I. C. 727 (P. C.), Nawab Bahadur of Murshidabad v. Karnani Industrial Bank Ltd.
9. ('27) 2 Luck. 335 : 13 A. I. R. 1926 Oudh 561 : 97 I. C. 897, Ahmad Azim v. Safigan.
10. ('38) 25 A.I.R. 1938 Mad. 623 : I.L.R. (1938) Mad. 767 : 182 I. C. 587, Sundararajulu Naidu v. Papiah Naidu.
11. ('89) 22 P. R. 1889, Mt. Dakho v. Mt. Gano.
12. ('61-63) 9 M. I. A. 55 : 1 Sar. 842 (P. C.), Raja Nursingh Deb v. Roy Koylasnath.
13. ('67) 4 Bom. H. C. R. O. C. 1, Naoroji Beramji v. Henry Rogers.
14. ('38) 25 A. I. R. 1938 Bom. 113 : 174 I. C. 256, Gajanath Chintaman v. Jankibai Kashinath.
15. ('06) 3 A. L. J. 628, Dost Mohammad Khan v. Upper India Bank, Ltd.
16. ('46) 73 I. A. 123 : 33 A. I. R. 1946 P. C. 127 : I.L.R. (1946) Kar P.C. 129 : 1946 F.C.R. 111 : 226 I.C. 1 (P.C.), Jagannath Bakhsh Singh v. United Provinces.
17. ('22) 1 Pat. 201 : 9 A. I. R. 1922 Pat. 411 : 69 I. C. 849, Gulam Nabi v. Basudeo Das.
18. ('29) 16 A. I. R. 1929 All. 781 : 124 I. C. 534, Bhoopal Rai v. Shiam Sunder Lal.
19. ('39) 14 Luck. 723 : 26 A. I. R. 1939 Oudh 257 : 183 I. C. 821, Amar Krishna Narain Singh v. Nazir Hasan.

M. Wasim and Tirloki Nath Kaul—for Appellant.
Niamat Ullah and Siraj Hussain—for Respondent.

Judgment.—The suit, out of which this appeal airses, was instituted by Mian Tej Singh appellant for a declaration that he is the absolute owner of certain properties including four villages, Bamhnauti Shankarpur, Airiye Bamhrauri, Fateh pursa and Reotipurwa in District Bahraich. These villeges formed part of Chileri Estate, which was confiscated in 1858 by virtue of Lord Canning's proclamation. They were granted along with several other villages to Sardars Fateh Singh and Jagjot Singh sometime between 1865-1867. These Sardars were grandsons of the late Maharaja Ranjit Singh of Lahore who had rendered conspicuous services to the Crown and whose family, it was desired by the Government of Her late Majesty Queen Victoria, should be suitably provided for. A communication to that effect was despatched by the Right Hon'ble the Secretary of State for India on 25-5-1865. Subsequently the aforenamed villages were transferred by Sardars Fateh Singh and Jagjot Singh to plaintiff's grand-father Mian Uttam Singh in lieu of his past services by means of a registered deed of gift, dated 31-3-1867, and were in due course mutated in his favour.

[2] On the passing of the Oudh Estates Act (1 of 1869) the names of Fateh Singh and Jagjot Singh were entered in lists 1 and 5, prepared under S. 8 of the Act. Sadar Fateh Singh died in 1872. His widow, Mt. Lachhmin Kuer, succeeded to her husband's estate under S. 22 of the Act, and on her death the interests of the late Sardar passed to Sardar Jagjot Singh. The latter died in 1915 and was succeeded by his son, Sardar Amar Singh. The defendant, Sardar Daljit Singh, who was a minor at the time of the institution of this suit but who has since attained majority, is the present successor of the Taluqa, being the grandson of Sardar Amar Singh.

[3] Mian Uttam Singh died in 1889 and was succeeded by his son, Mian Indar Singh. The plaintiff, Mian Tej Singh is one of the two surviving sons of Mian Indar Singh. The villages in suit have by virtue of a family settlement, dated 23-6-1938, fallen to Tej Singh's share.

[4] There was some dispute regarding the gifted villages between Daljit Singh's mother, who acted as his guardian and Mian Tej Singh. This dispute gave rise to proceedings under S. 145, Cr. P. C. in November 1938. In course of these proceedings the property was attached. The case eventually came to this Court in revision, and the parties were directed to obtain a decision as to their rights from a competent Court of civil jurisdiction. Meanwhile the villages were kept under attachment. Hence the suit which gives rise to this appeal.

[5] The plaintiff alleged that Sardars Fateh Singh and Jagjot Singh were absolute owners of the villages which were transferred to his grandfather, that the latter and after him his descendants have been in possession thereof, that under the family settlement, dated 23-6-1938, the villages have fallen into plaintiff's share and were mutated in his favour in the revenue records and that in November 1938, the defendant's guardian started proceedings under S. 145, Cr. P. C., which resulted in attachment of the villages in suit. He prayed for declaration of his title in accordance with the directions of this Court. The plaintiff also sought declaratory relief with respect to some other property, but we need not enter into that part of the case inasmuch as the decree granting the declaration in respect of it is not challenged by Sardar Daljit Singh.

[6] The suit was resisted on various grounds. So far as the villages are concerned, the genuineness and the validity of the gift deed were denied, and possession of plaintiff and his ancestor as well as plaintiff's relationship with Uttam Singh was questioned. On these points the decision of the learned Civil Judge was in plaintiff's favour. The principal defence, however, related to the nature of the estate granted to Sardars

Fateh Singh and Jagjot Singh under the grant, and this is practically the only defence with which we are concerned in this appeal in view of the arguments addressed to us from the Bar. It was pleaded that the interest granted to the two Sardars was neither heritable nor transferable. The grant in fact, it was said, created a succession of life interests in favour of the grantees' family, and the transfer by Fateh Singh and Jagjot Singh could not operate to vest in Mian Uttam Singh and his successors' rights which could enure beyond the donor's life-time. Issues 1 and 6 covered these pleas. They were as follows:

"*Issue 1.* Did Fateh Singh and Jagjot Singh hold and possess the villages in suit as mere Guzaradars as alleged?

"*Issue 6.* Were Fateh Singh and Jagjot Singh incompetent to transfer the villages in suit under the terms of their grant? If so, its effect on the gift set up by the plaintiff?"

The first issue and the substantive part of the sixth issue were decided by the learned Civil Judge of Bahraich in favour of Sardar Daljit Singh. The result was that the plaintiff's suit failed so far as it concerned the four villages. Mian Tej Singh has now come up in appeal.

[7] We have had the advantage of hearing elaborate arguments on behalf of the parties. Unfortunately the actual grant or the sanad is not before us. The plaintiff alleges that it is being withheld by the other side while the defendant maintains that no document of grant or sanad was ever given to Fateh Singh and Jagjot Singh. We find, there are distinct indications on the record to show that a taluqdar's sanad existed and was in possession of the original grantees. The wajibularz of village, Moorawwa, the parent village of the Taluqa, while giving its history distinctly refers to it. It says:

"Under the order, dated 30-4-1867, this village was granted by the Government as revenue free jagir to Sardaran Fateh Singh and Jagjot Singh, for their lifetime on this condition that after their death half of the Government revenue will by payable by other heirs in the first succeeding generation and full Government revenue by the heirs in the second succeeding generation. But up till now it stands entered in the *Talukdari Sanad.*"

It will be remembered that the Taluqa of Chilari was confiscated to Government by virtue of Lord Canning's Proclamation of 1858. It is well known that no sanads were granted in Oudh by the Government of India prior to 10-10-1859, and it is impossible to assume, as the lower Court has assumed, that the reference in the above passage is to a sanad, granted to the previous Taluqdar. There is again a reference to a sanad in identical words in the last *rubkar (rubkar akhiri)* of the Settlement Department, dated 15-4-1872, (Ex. 26). That the sanad was in actual possession of Sardar Jagjot Singh appears from another *rubkar* of 1881 from the Deputy Commissioner of Gonda which required the grantee to attend his Court along with sanad for verification. This document was sent to the Tahsildar of Qaisarganj with the direction that the aforesaid Sardar be asked to present himself in the Gonda Court along with the sanad. Exhibits 101, dated 21-9-1881, 100, dated 22-9-1881 and A14, dated 23-9-1881, show that the order was complied with. It is difficult to explain these specific references to the Sardars' sanad on any other hypothesis but that sometime before 1872 a taluqdari sanad was in fact issued. The only person who is likely to have it now is the defendant and the plaintiff accordingly summoned it from him by means of an application, dated 17-7-1942. On notice being issued the general agent of Daljit Singh presented an application by way of reply on 18-8-1942, and stated therein that no Taluqdari sanad was ever granted and no such sanad was with the defendant. Certified copies of Taluqdari sanads are sometimes not available, since the existing Government records do not always contain their duplicates. The plaintiff is thus at a disadvantage, and he is forced to fall back upon other evidence to prove the nature of the grantees' interest.

[8] The history of the grant begins with the despatch from the Secretary of State to the Government of India in 1865 which directed that provision should be made for the members of the family of the late Maharaja. Reference to this despatch is contained in the extract of proceedings of Government of India, Foreign Department (Political), dated 10-7-1865, which was forwarded on 19-7-1865, (Ex. A-1) to the Punjab Government for information and Communication to Fateh Singh and Jagjot Singh and to the Chief Commissioner of Oudh and the Financial Department. Since different interpretations are put by the parties' advocates upon the language employed in this document, we would like to reproduce material parts of it here. Before we do so, we might give a short pedigree of Maharaja Ranjit Singh's family so far as it is necessary for this judgment. It is found in Ex. A 19.

(See pedigree on page 12.)

[9] The material portion of the extract of Government of India proceedings says:

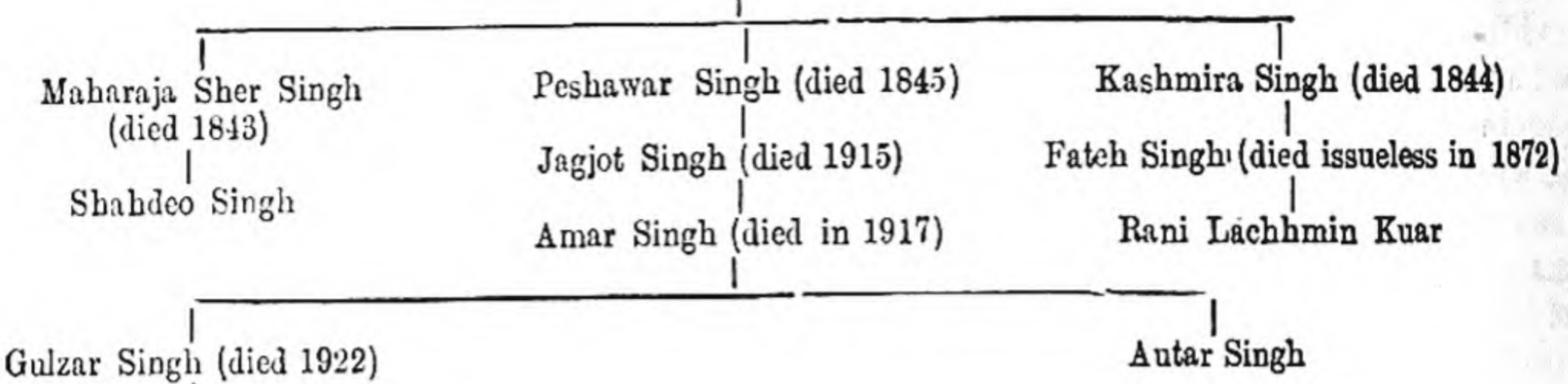
"Received despatch, dated 25-5-1865 No. 37, political from the Right Hon'ble the Secretary of State for India respecting the provision to be made for the members of the family of the late Maharaja Sher Singh of Lahore.

The members referred to are—

1st—Shah Deo Singh, son of the late Maharaja Sher Singh.

2nd—Fateh Singh, son of the Koonwar Kashmira Singh.

3rd—Jagjot Singh, son of the Koonwar Pesewara Singh.



For Shahzada Shah Deo Singh the Government of India recommended.....

As regards Fateh Singh and Jagjot Singh the Government of India proposed (1) the continuance to each for life, on the death of their mothers, of the pension of Rs. 1,800 a year, granted to those ladies respectively and (2) the grant to each, of a tract of land, not in the Punjab, yielding Rs. 5,000 per annum. The land to be held in Jagir for life and subject to assessment at half rates in the next generation, and full rates thereafter. The Home Government have approved of both proposals. His Excellency in Council accordingly resolves that the first proposal be observed when the time comes for its adoption, and that, as regards the second it will be best to grant the land in Oudh from the ensuing harvest. It will be desirable if practicable that these grants be villages in which the proprietary rights in the soil belonged to the Government."

[10] A copy of this document, as stated above was forwarded to the Chief Commissioner of Oudh also, and since he was chiefly concerned he desired to ascertain the exact import of resolution. Accordingly his Chief Secretary addressed a communication to Government of India (Foreign Department) on 15-4-1867, seeking clarification of Government's intention. This letter, (Ex. 132), *inter alia* said:

"The Chief Commissioner concurs in the view taken by the Financial Commissioner that it was the intention of the Government to grant the Sardars each land yielding a gross rental of Rs. 10,000 revenue free for their lives, the land to be held by the second generation at half the Government revenue assessed upon it and in the third and subsequent generations at full Government demand.

I am desired to inquire whether this view of the Chief Commissioner is in accordance with the real intention of the Government."

[11] The reply of the Government of India (Ex. 131) is dated 30-4-1867. It said that the Chief Commissioner's interpretation regarding the grant was correct. It appears, however, that meanwhile the Financial Commissioner's view of the Government's intention had been acted upon and summary settlement of 31 villages in Tahsil Bahraich and of one village in Khanpur Tahsil yielding an income of Rs. 19,396 (*vide* Ex. 146) with Sardars Fateh Singh and Jagjot Singh was ordered. This order is contained in the remarks column of statement A (Ex. 146). It says:

"From Rabi 1273 Fasli Chilari Estate and Barat Segraura were given to Jagjot Singh and Fateh Singh. As per letter No. 1055, dated 14-5-1866, of the Financial Commissioner and according to the order of the said officer "summary settlement is ordered. Dated 12-10-1866.'

See also Ex. 145, dated 6-2-1867.

[12] We have already mentioned that the names of the two sardars were entered in lists 1 and 5, prepared in pursuance of S. 8 Oudh Estates Act (I of 1869.) List 1 contained the names of all persons who were to be considered Taluqdars within in the meaning of the Act. List 5 consisted of grantees to whom sanads or grants had been made up to the date fixed for closing of the lists, declaring that the succession to the estate comprised in such sanads or grants must thereafter be regulated by the rule of primogeniture.

[13] According to S. 2 of the Act "estate" means "(a) the Taluqa or immovable property acquired or held by a taluqdar or grantee in the manner mentioned in S. 3, S. 4 or S. 5, and

(b) ....."

Section 5 lays down that:

"Every grantee shall possess the same rights and be subject to the same conditions in respect of the estate comprised in his grant as a taluqdar possesses and is subject to, under S. 3, in respect of his estate."

[14] The latter section amongst other things provides that"

"Every Taluqdar with whom a smmmary settlement of the Government revenue was made between the first day of April, 1858, and the 10th day of October 1859 or to whom, before the passing of this Act and subsequently to the first day of April, 1858, a Taluqdari sanad has been granted,

Shall be deemed to have thereby acquired a permanent, heritable and transferable right in the estate comprising the village and land named in the list attached to the agreement or qabuliat executed by such Taluqdar when such settlement was made,

"or which may have been or may be decreed to him by the Court or an officer engaged in making the first Regular Settlement of the Province of Oudh, such decree not having been appealed from within the time limited for appealing against it, or, if appealed from having been affirmed,

"subject to all the conditions affecting the Taluqdar contained in the orders passed by the Governor-General of India on the 10th and, 19th day of October 1859 and republished in the first Schedule hereto annexed, and subject also to all the conditions (other than those relating to succession) contained in the sanad under which the estate is held.

(Explanation — notwithstanding anything contained in the Crown Grants Act, 1895, the conditions of the sanad relating to succession, in so far as they are inconsistent with the provisions of this Act, shall not apply to the estate.")

[15] By S. 10 the Courts were enjoined to take judicial notice of the lists and to regard them as a conclusive evidence of the fact that the persons named therein are Taluqdars or grantees within the meaning of the Act. Reference may also be made to S. 11, Oudh Estates Act, which confers on the Taluqdars and grantees a power to transfer or bequeath their estates.

[16] The names of Sardars Fateh Singh and Jagjot Singh having been entered in lists 1 and 5, it must be held that since the passing of the Act, permanent, heritable and transferable rights in the lands were possessed and enjoyed by them. Presumably these rights had their origin in the sanad and since they belonged to list 5 we further believe that the sanad must have been in the ordinary primogeniture form.

[17] The policy of the Government in regard to the grants of Taluqas in Oudh may now be adverted to. It is well known that this policy was a subject of prolonged consideration for a period of about 10 years before the Act came to be passed. By 1865 it was decided that the Taluqdars in Oudh should have a free right of disposal of their property and that in case of intestate succession the rule to be applied to them was to be that of primogeniture as far as possible, provided there was a custom of primogeniture in the family or the Taluqdars concurred in adopting the rule. It may be recalled that at one stage Mr. Wingfield, the then Chief Commissioner, pressed the Viceroy for adoption of the English rule of entail but though he made repeated attempts for obtaining its recognition Lord Canning and his successors resolutely refused to accept the suggested limitations on the Taluqdars' power.

[18] Having regard to these facts it appears unlikely that the Government of India's minute of 10-7-1865, intended to confer upon Sardars Fateh Singh and Jagjot Singh a non-transferable estate for life with a provision for similar successive life estates in favour of the future generations.

[19] Set in this relief we will now consider the proceedings of the Government of India, the relevant portion of which has been re-produced above. Under it the grant to each of the two Sardars was described as a *jagir* and it comprised two distinct items (1) A tract of land yielding Rs. 5,000 per annum, and (2) A grant of the revenues of the land in their entirety to Fateh Singh and Jagjot Singh and of half of those revenues to the generation following. What was meant by a *jagir* in Oudh at that time is clear from settlement circular No. C. 1123 of 1862. This circular conveyed certain instructions to Commissioners of Divisions. In the 12th paragraph of the aforesaid circular it was pointed out that a grant of a *jagir* in Oudh generally carried with it proprietary rights in the soil and that when a holding is released in favour of one or more *muafidars*, the Government simply consents to waive its claim to the payment of land revenue on a holding in perpetuity for the life or lives of one or more specified person or persons. See in this connection 18 O. C. 168[1] and 11 Luck. 588.[2]

[20] We have no reason to believe that the Government of India used the word *Jagir* when they applied it to grants in Oudh in a different sense. The rights which were intended to be conferred in the tract of land would thus appear to be absolute. The concession as to the revenue was to last for the lifetime of Fateh Singh and Jagjot Singh only. In the next generation it was to be assessed at half rates. No remission was allowed in case of subsequent generations. That this was the meaning is clear also from the correspondence between the Chief Commissioner of Oudh and the Government of India (Exs. 132 and 131) to which we have already referred. It would be noticed that these documents avoided the use of term '*Jagir*.' Each of the Sardars, according to the true intent of Ex. A1, was to be given land yielding a gross rental of Rs. 10,000 revenue free for their lives in order that it may secure to the third and the subsequent generation an income of Rs. 5,000 annually. The first item of the grant was thus intended to be heritable. Transferability must follow as an adjunct. It was in this light that the summary settlement was made with the grantees and it was in this light again that the property came to be recognised as a Taluqdari estate by Act I of 1869 and at the First Regular Settlement.

[20A] The events which followed the gift of four villages to Mian Uttam Singh, confirm the view that we take of the nature of Sardars' interest. Soon after the delivery of possession to the donee the Sardars themselves applied for mutation being effected in favour of the Mian, (Ex. 89). Orders to that effect were passed on 22-2-1868, (Ex 90). It seems to have been in the mind of every one at the time that the donors possessed the power to alienate. During the course of the First Regular Settlement Mian Uttam Singh applied to the Settlement Court to have his name entered as owner of the villages in suit in the record of rights which was then under preparation; vide Exs. 2, 5, 8 and 10. It is pertinent to remember in this connection that the duty of the Settlement Courts was to prepare exhaustive records of rights and for this purpose all persons, who were claimants to lands, were required to file cases in these Courts. The decisions of the Settlement Officer were given effect to in the record of rights and this record had the force of a decree

of civil Court: vide, 1 O. C. 124[3] and 1 O. C. 289.[4] The name of Mian Uttam Singh was entered in the record of rights as owner by orders, EXS. 3, 7, 9 and 11. In EX. 20 the *wajibularz* of village Moorawwa the Settlement Officer made a mention of the gift of 1867 whereby villages Banhnauti, Shankarpur, Airiya Bambrauri, Fatehpurwa and Reotipurwa were transferred to plaintiff's ancestors. Similarly, in the waji-bul-araiz of four villages (EXS. 12, 14, 16 and 18) the title of the then owner, namely, Uttam Singh was traced to the gift The importance which we attach to these documents lies in the fact that they confirm the view that we take about the character of the grant so far as the transferability of the lands is concerned. If what was given to Sardars Fateh Singh and Jagjot Singh was merely an entailed estate of a limited life interest, it is difficult to believe that the settlement Courts would have been oblivious of it or that they would have condescended to recognise Mian Uttam Singh as owner. The subsequent peaceful devolution of the villages to the succeeding generations of the transferee durind a period of 75 years is also not without significance.

[21] The appellant's side invited our attention to history of devolution of the Chilari Estate after the death of the original grantor and to certain litigations. In our judgment these events are unimportant and scarcely affect the issue, for the devolution after the passing of Act [1] of 1869 was bound to be in accordance with S. 22 and the subsequent rights of the Sardars were likewise to be governed by the provisions of the Act.

[22] A great deal of the case law was laid before us by the learned counsel at the bar in aid of the construction which each party desired to place on EX. A1. It is however, (not?) necessary to examine them, for it is hardly ever, if at all, profitable to try to interpret the terms of a document by referring to the considerations which prevailed in construing other documents executed in different circumstances and couched in different language, except in so far as they expound some principle of general application. We will, therefore, notice only such cases as fall within the exception. We propose to examine them in connection with two further contentions advanced on behalf of the respondent. These are: (1) that the grant to Sardars Fateh Singh and Jagjot Singh being with the avowed object of making provisions for the members of the family of the late Maharaja Sher Singh, it must be regarded as a maintenance grant and as such it must be confined to a life interest in favour of Sardars Fateh Singh and Jagjot Singh with successive life estates in favour of the later generations; (2) that in grants made by the Crown the rule of interpretation in view of the Crown Grants Act is different from the rule which is applied to private grants. It is said that every such grant must take effect according to its tenor notwithstanding any rule of law or enactment of the Legislature to the contrary.

[23] The first contention is sought to be supported with reference to a number of decisions amongst which may be mentioned, 6 I.A. 54,[5] 26 I.A. 216,[6] 46 I.A. 88,[7] 58 I.A. 215,[8] 2 Luck 335,[9] A.I.R. 1938 Mad. 623[10] and 22 P. R. 1889 p. 71.[11] Before we deal with these cases it is necessary to point out that our view of the nature of the Sardars estate does not depend upon construction of the *sanad* since that document is withheld. It rests on the inferences drawn from documents and circumstances of the case. The conclusion so derived is that the grant was absolute in the sense that it conferred full proprietorship on the grantees. We are clear that the intentions of the Secretary of State for India to make provision for the members of the family of the late Maharaja Sher Singh did not impress the grant with a non-transferable character. It is true that if the bestowal of the villages was made as a maintenance grant, ordinarily it would have enured for the lifetime of the grantees having regard to the object of the grant if the terms thereof did not militate against such construction. There is nothing, however, to show that the sanad in this case purported to confer limited rights of that kind or that it was of the character of the maintenance grant. In 6 I. A. 54[5] a *sanad* was granted by the East India Company to one Najamooddin Khan avowedly for the purpose of making some suitable provision as a subsidy for the expenses of the grantee and his descendants and it was provided that if it be necessary thereafter for the Government to resume the *jagir* given on account of maintenance or otherwise, the amount of the income thereof would still be given to Najamoodin Khan or his children or descendants from the Company's treasury. The *sanad* further provided for a special pension of RS. 6,000/- per annum in favour of Najamooddin Khan. The main object of the grant of the property there was to secure a pension of RS. 24,000/- per annum to the family and a portion thereof was to be paid out of revenues of certain mohals, constituting the jagir. Their Lordships having regard to the peculiar character of the grant from the Government under the circumstances which they emphasised and with the objects specified above, came to the conclusion that it conferred upon the descendants of Najamooddin nothing more than a mere estate for life. They observed that it was not a case of the State merely granting a *jagir* and declaring that the grant should be hereditary

but that it was a grant of a *jagir* accompanied with the grant of a pension, under circumstances which indicated that the intention was to give the *jagir* and the pension subject to the same conditions, namely, that both were unalienable. 6 I. A. 54,[5] therefore, does not afford any assistance to the respondent. It is true that the property was given as a *jagir* but that term, as pointed out by their Lordships, had a somewhat different significance in Bombay from what it has in Oudh.

[24] The case reported in 26 I. A. 216[6] also related to a grant made to three persons expressly in lieu of maintenance. Its provisions showed that the maintenance there contemplated was not only for the grantees personally but also for the heirs. One of the grantees, namely, Barmeshwar executed a mokurruri lease in favour of another person. He died thereafter without leaving any issue and a question then arose whether the transfer was within the competence of the grantee so as to entitle the lessee to remain in possession of the property after the death of Barmeshwar. Lord Davey, who delivered the judgment of the Board, observed as follows:

"Their Lordships will not discuss at length the terms of the grant to Barmeshwar, which was expressly made "in lieu of maintenance". It was, therefore, *prima facie* resumable on the death of the grantor in accordance with the law laid down in the cases cited by the Subordinate Judge. It contains no words purporting to grant a perpetual interest, and as Barmeshwar died childless it is unnecessary to say whether his family would have taken the benefit of it if not resumed."

We think the case is not an authority for the proposition that whenever a grant is made with the object of making a provision for the grantee's family, the property covered by it must necessarily be regarded as non-transferable.

[25] In 46 I. A. 88[7] their Lordships said that a *jagir prima facie* gives a life estate only. They, however, pointed out that it may be granted in such terms as to be heritable but in order to make the estate one of inheritance the terms, if they have to be considered alone, must be unambiguous, and must show clearly whether it was intended that the right of inheritance should be general or confined to a particular class of heirs. The rule cannot apply to the case before us. A *Jagir* in Oudh, we have already pointed out, carries with it proprietary right in the soil. Besides, the language of Ex. A1 as well as the evidence to which reference has been made above indicate that heritable and transferable rights were conferred by the *sanad* and were conveyed to plaintiff's grandfather. The proceedings of the summary settlement of 1868 and the first Regular Settlement show that they were recognised as such by Settlement Officers who were charged with the preparation of the record of rights.

[26] In 58 I. A. 215[8] an enactment gave statutory effect to a previous grant of successive life estates. Considerations which prevailed there are wholly inapplicable to the present case.

[27] The Punjab case, 22 P. R. 1889 p. 71,[11] is of a similar kind. An *istamrar* grant was made for the life of the grantee who later proposed that it should be continued to the children. A supplementary grant was thereupon made in favour of the heirs of the original grantee on payment of certain rents in *istamrar*. The object was the support of each generation of children and it was held that the interest of the *istamrardar* was such that he could not charge the estate beyond his lifetime. It is clear that in face of the life estate of the first grantee it was unlikely that the subsequent grants to the following generations could be absolute. The intention was that each generation was to hold as grantee from the Government. We are unable to deduce from this case the principle for which the respondent contends.

[28] The Oudh case, 2 Luck. 335,[9] dealt with the construction of a family settlement whereby certain properties were allotted to one of the parties thereto in lieu of maintenance. The learned Judges said that the question whether the estate conferred was absolute or limited depended upon the circumstances of each case and if these circumstances negatived the grant of full proprietorship, the mere use of the word "proprietor (malik)" or "for ever" would not enlarge it. They took care to say that if the deed stated clearly that the grantee would have absolute interest, such interest could not be controlled by the mere fact that the motive of the grant was maintenance. We may add that cases in which full proprietary interest has been held to be conferred upon the grantees in spite of the fact that the object of the grant was to provide for maintenance are not wanting. *See* for example, 9 M. I. A. 55,[12] 4 Bom. H. C. R. O. C. 1[13] at p. 18; 18 O. C. 168[1] and A. I. R. 1938 Bom. 113.[14] We have already said that in the circumstances of the present case the conclusion that the *sanad* was heritable and transferable is irresistible.

[29] The Madras case, A. I. R. 1938 Mad. 623,[10] does not take the matter further. The deed of grant clearly provided that its object was to make permanent provision for the grantee and his heirs as compensation for the loss sustained by resumption of certain emoluments. It expressly said that the grantee and his heirs were to appropriate the rents and profits for their own use and were prohibited from alienating the village by grant, gift, sale or otherwise, it being liable to revert to the East India Company in default of legal heirs. Being a Crown grant, the

prohibition as to the alienation was valid. It was sought, nevertheless, to attach and sell the aforesaid village and it was observed that the only interest which could be available to the decree-holder was to enjoy the rents and profits during the lifetime of the grantee. That being so, the learned Judges refused to countenance the sale.

[30] Ordinarily, when a grant is made to a person for his maintenance, it means that he is to enjoy the property for life but when the instrument of grant or the circumstances of the case and the evidence clearly indicate that the grantor intended to confer absolute interest on the grantee and future generations, we have no doubt that even if the object was to provide for the grantee's family it would not operate to entail the estate. In the case before us proprietary rights in the villages were granted in addition to the release of revenue wholly in favour of Fateh Singh and Jagjot Singh and partly in favour of the next generation. The fact that the release of revenue was intended to operate for the lifetime of the two Sardars cannot and does not limit the proprietary interest in the villages.

[31] The second contention need not detain us long. The actual *sanad* is not forthcoming. The evidence, to our mind, is clear that what was given was a transferable estate. Assuming, however, that the *sanad* was couched in the language of Ex. A1, (which we think is very improbable) the general rule of interpretation that a grantee acquires all that interest which the transferor is then capable of passing in the property must be applied. It is difficult to agree with the defendant's contention which was accepted by the Court below that no such interest woud pass unless the Crown grant conveyed it expressly. Unqualified words of conveyance in a Crown grant cannot be regarded as qualified merely by virtue of the provisions of the Crown Grants Act. As observed in 3 A. L. J. 628[15] the object of the legislature in passing the Act was to validate any provisions, restrictions, conditions and limitations which might be contained in any Crown Grant and which otherwise might be held to be obnoxious to the restrictions imposed in respect of grants generally by the Transfer of Property Act. It was not intended by the legislature that unconditional grants made by the Crown free from restrictions as to alienation must nevertheless have restrictions imposed on them. The same view was taken by Sir Carlton Moss, King C. J., and Ziaul Hasan J. in 11 Luck. 588[2], in respect of Crown Grant in which no restrictive language regarding heritability or transferability was used. They held that it carried full proprietary rights. In 73 I. A. 123[16] at p. 133 their Lordships of the Privy Council, dealing with S. 3, Crown Grants Act, refused to read its language in its apparent generality. They observed that:

"The whole Act was intended to settle doubts which had arisen as to the effect of the Transfer of Property Act, 1882, and must be read with reference to the general context. . . . . ."

See also 1 Pat. 201[17] at p. 206, 4 Bom. H. C. R. O. C. 1[13] at pp. 18, 18 O. C. 168[1] at p. 177-178, A.I.R. 1929 ALL. 781[18] and 14 Luck. 723[19] at p. 741.

[32] On behalf of the respondent the case was argued also on the assumption that the grant purported to create a trust in favour of the succeeding generations. Our attention was drawn to the definition of "trust" in S. 3, Trusts Act, and it was said that the Government having given the property for the benefit of the Sardars as well as for the benefit of future generations, the grantees must be regarded as trustees for their successors. In the view that we have taken of the nature of the grant and of conferment thereby of proprietary rights on the grantees, this argument does not fall to be considered. We may add that we would, in any case, find it difficult to hold that one life tenant is a trustee for the next life tenant; or, to conceive that the two Sardars accepted the obligation to hold the property for the benefit of indeterminate future generations.

[33] We ought to mention that the appellant's learned counsel pressed upon us two further arguments in support of the appeal. He urged that the decision of the Settlement Court, recognising the proprietary rights of Mian Uttam Singh as against the Sardars must be given conclusive effect and the question should not be reagitated now by reason of the rule of *res judicata*. He also maintained that the donee and his successors having remained in possession of the property as owners for a period of over 70 years, they must in any event be considered to have acquired proprietary rights by prescription. The lower Court repelled these contentions, but in our opinion they must prevail, for Sardars Fateh Singh and Jagjot Singh, after the passing of the Act of 1869 and after the inclusion of their names in lists 1 and 5, appended to that Act, must (even if the view of the learned civil Judge regarding the restricted nature of the rights of the grantees under Ex. A-1 be assumed to apply) be regarded as absolute owners of the property in suit. The decisions and the records of right consequent thereon which operate as decrees of Settlement Courts must be given finality and must bind the parties' successors. Further, if the successors of the grantees had a cause of action against the donee or against those who claimed under him their remedy was extinguished after a lapse of 12 years from the accrual of the right to sue.

[34] The result of what has been said above is that the appellant must succeed. We accordingly

allow the appeal and set aside the decision of the Court below in so far as it purports to dismiss the plaintiff's suit in respect of the four villages, namely, Bambnauti Shankarpur, Airiya Bamhrauri, Fatehpurwa and Reotipurwa. In addition to the declaration given by the Court below, we grant the plaintiff a further declaration that he is full owner of the aforesaid villages and as such is entitled to remain in possession thereof. The appellant is entitled to costs of this Court and of the Court below.

D.H. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 17 *[C. N. 4.]*

KAUL AND MADELEY JJ.

Bikaru and others—Accused—Applicants v. *Emperor.*

Criminal Misc. Applns. Nos. 165 and 169 of 1946, Decided on 18-2-1947.

Criminal P. C. (1898), S. 561A—Scope—No revision or appeal against conviction—Powers under S. 561A, if can be used—Acquittal of one of accused in appeal—General observations in judgment against prosecution—Convictions of non-appealing accused, if can be set aside under S. 561A.

Powers under S. 561A are certainly wide, but they are not unlimited. They can be exercised only when the Code makes no provision for dealing with the matter, and the Court is satisfied that there is an abuse of its process which calls for interference, or otherwise to secure the ends of justice it is necessary that the High Court should step in and exercise its inherent powers. The law having provided, by means of appeal and revision, the modes by which a conviction recorded by a Court of Sessions can be set aside, the High Court would not ordinarily entertain an application under S. 561A for this purpose. When the Criminal Procdure Code deals with any subject its provisions should be taken to be exhaustive so far as that matter is concerned. But it cannot be said that the High Court can never set aside a conviction in exercise of its inherent powers; it will do so in exceptional cases.

A case can be conceived where in dealing with an appeal filed by one of the convicted persons the Court comes to the conclusion that the entire prosecution case is false and concocted; in such a case it may be permissible for the Court to exercise its inherent powers on behalf of non-appealing persons who were also convicted with the one who filed an appeal and was acquitted. Such a case would be an instance where the High Court would rightly exercise its inherent powers and set aside the conviction even though the convicted persons did not appeal or invoke the exercise of the revisional jurisdiction of the High Court. The reason for this view is clear. It is assumed that in that case the entire prosecution story was held to be false and concocted. Thus there would be no justification for keeping in detention persons who must necessarily be deemed to have been wrongly convicted. But where in dealing with the appeal, the High Court was considering only the case of one appellant who had actually appealed and the scope of the inquiry was limited to the determination of the guilt or innocence of that particular accused, the observations made in the judgment acquire their meaning and significance from the scope of the enquiry with which the Court was for the time being concerned. The generality of the expressions used, unless the language expressly said so, is not to be taken as intending to lay down any absolute dicta unrelated to the point or points which are to be determined. The scope of the inquiry before the Court for the time being limits the meaning and the significance of the general reflections. It would be altogether wrong when the Court makes certain observations in dealing with the case of any individual appellant to cull out certain passages from the judgment, and to argue on their basis that they lead to an inference as regards the guilt or innocence of other persons whose case was not being considered by the Court at all.

[Paras 4 and 5]

Annotation : ('46-Com.) Cr. P. C., S. 561A, Notes 2 and 5.

J. D. Pradhan—for Applicants.

Government Advocate—for the Crown.

Order.—These are two applications made under S. 561A, Criminal P. C. Application No. 165 is made by three applicants Bikaru, Ram Sudhi and Udit. Audhey is the sole applicant in the other application No. 169. As both these applications arise out of the same order, and are based on the same grounds, they may conveniently be dealt with together. They arise on the following facts :

[2] On the night between 12th and 13-12-1945, one Ram Din was murdered not far from Singhwa Nala which is about a hundred kasis from village Itiabdullah. Six persons Bikaru, Ram Sudhi, Udit, Audhey, Piarey and Hardin were alleged to have participated in the murder. Hardin absconded and so far as we are aware has not been arrested. The remaining five accused were tried by the Sessions Judge of Gonda and convicted under S. 302/149, Penal Code. Each of them was sentenced to transportation for life. Piarey filed an appeal which was disposed of by this Court on 28-10-1946. His participation in the crime was found not to have been established beyond reasonable doubt, and he was accordingly acquitted. These two applications were made on behalf of the remaining four accused praying that in view of certain observations made in the judgment of this Court disposing of Piarey's appeal, the conviction of the present applicants should be set aside. The applications, as already stated, purport to be made under S. 561A, Criminal P. C.

[3] It was argued before us at the hearing of the application that in view of certain observations made by this Court in its judgment in Piarey's appeal it should be held that the entire prosecution story as to the murder of Ram Din and the participation of the present accused in the crime were disbelieved and accordingly the applicant's conviction should also be set aside.

[4] Before dealing with the merits of these applications we will consider how far this pro-

cedure for getting the applicants' conviction set aside is permissible under the law. Ordinarily a conviction by a subordinate Court can be set aside by the High Court only in appeal or in exercise of its revisional jurisdiction The present applicants had a right to appeal against their conviction by the Sessions Judge. They did not avail themselves of that right Under S 439 (5), Criminal P. C, where an appeal lies under the Code of Criminal Procedure, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. Thus it is clear that the present applicants had no right to apply for the exercise of the revisional jurisdiction of this Court in the matter of their conviction. This, however, does not debar the High Court from taking up the case in revision *suo motu*. When the Criminal Procedure Code deals with any subject, its provisions should be taken to be exhaustive so far as that matter is concerned. It follows therefore, that the applicants cannot avail themselves of any of the two ordinary modes of procedure by which their convictions can be set aside, namely, appeal or revision Section 561A of the Code preserves the inherent powers of the Court, (1) to prevent abuse of the process of the Court and (2) to secure the ends of justice. These powers are certainly wide, but they are not unlimited They can be exercised only when the Code makes no provision for dealing with the matter, and the Court is satisfied that there is an abuse of its process which calls for interference, or otherwise to secure the ends of justice it is necessary that the High Court should step in and exercise its inherent powers. We are clear that the law having provided the modes by which a conviction recorded by a Court of Session can be set aside, the matter to which these applications are directed would not ordinarily fall within the purview of S 561A We do not hold that the High Court can never set aside a conviction in exercise of its inherent powers, but it will do so in exceptional cases.

[5] The next question which arises for consideration is whether either of the two applications before us constitute such an exceptional case. Reliance is placed on certain observations made by the Court in disposing of Piarey's appeal, and in view of them we are asked to set aside the applicants' conviction though they filed no appeal and are not entitled to ask the Court to exercise its revisional jurisdiction in their behalf. We can conceive of a case where in dealing with the appeal filed by one of the convicted persons the Court comes to the conclusion that the entire prosecution case is false and concocted; in such a case it may be permissible for the Court to exercise its inherent powers on behalf of persons who were also convicted with the one who filed an appeal and was acquitted. Such a case would be an instance where the High Court would rightly exercise its inherent powers and set aside the conviction even though the convicted persons did not appeal or invoke the exercise of the revisional jurisdiction of the High Court. The reason for this view is clear. It is assumed that in that case the entire prosecution story was held to be false and concocted. Thus there would be no justification for keeping in detention persons who must necessarily be deemed to have been wrongly convicted. Though it is not specifically pleaded. the argument of the learned counsel for the applicants implied that in dealing with the case of Pearey, appellant, this Court discredited the entire prosecution case. Reliance in support of his contention was placed on the following observations:

(1) "Not only there are material discrepancies in the statements of these witnesses as regards what happened . . . . . but that there are certain inherent improbabilities in the version given by them which makes their story difficult of acceptance." (2)' It is impossible to reconcile the evidence of these witnesses with this medical evidence. (3) "We are unable to accept the prosecution version that the murderers of Ram Din continued to strike him till the witnesses were within a few paces of them It is very unlikely that they would expose themselves to the risk of being identified by the villagers." (4) We find it difficult to believe that if a murder was committed at about five gharis after nightfall within two hundred paces of a village with one hundred families no other person except such of them as ran in response to the alarm when it was first heard, would go there at any time during the night. Nor is it easy to believe that all the nine persons who had run in response to the murdered man's cries for help would stop near the dead body throughout a cold December night without any one of them returning to the village to inform others about what had happened."

These are general observations which divorced from the context in which they occur might appear to lend support to the applicants' contention. It should, however, be borne in mind that in dealing with the appeal, to which reference has been made, this Court was considering only the case of one appellant Pearey. The scope of the inquiry was limited to the determination of the guilt or innocence of that particular accused. We may point out that the observations made in a judgment acquire their meaning and significance from the scope of the enquiry with which the Court is for the time being concerned The generality of the expressions used, unless the language expressly says so, is not intended to lay down any absolute *d cta* unrelated to the point or points which are to be determined The scope of the inquiry before the Court for the time being limits the meaning and the significance of the general reflections. It would be altogether wrong when the Court makes certain observations in dealing with the case of any individual appellant

to cull out certain passages from the judgment, and to argue on their basis that they lead to an inference as regards the guilt or innocence of other persons whose case was not being considered by the Court at all. In dealing with the case of any individual appellant the Court considers the evidence from a particular point of view This is determined by the specific case sought to be proved against that appellant and his defence. In dealing with this case the Court does not take into consideration any points which, though they might be of considerable importance as regards the cases of other co-accused, have no material bearing as regards the case of the individual appellant whose guilt or innocence is being determined.

[6] We do not propose to deal at length with each of the observations contained in the judgment in Pearey's appeal on which reliance was placed by the applicants' counsel. The applicants cannot ask this Court to deal with their applications as if they were appeals or applications in revision We are clear, as they are debarred from availing themselves of either of these remedies, they cannot be permitted to make the Court do so indirectly If we treat these applications as appeals or revision petitions, we would be going against the express provisions of the law and exercising a jurisdiction not vested in us It is, however, the duty of the High Court to see that if the innocence of any convicted person is established, he should not be held in detention It is from this point of view that we have approached the present applications. We have carefully examined the judgment given in Pearey's appeal. The conclusion at which the Court arrived is thus summed up in the last paragraph.

"Having considered the evidence carefully we are not satisfied that Pearey's participation in the commission of this crime is established beyond reasonable doubt. There is no evidence of any close association between the present appellant and Udit or any of the other accused. He was not one of those who held out a threat to murder Ramdin if his improper attentions to Jhingaura did not cease. Nor was he among the persons who, according to the prosecution version, lured Ram Din to the place of murder. Nor did Jagai who claims to have seen Ram Din going towards the jungle with Audhey and Hardin specifically mention Pearey as one of the party. For the reasons already given we are unable to accept the evidence of the prosecution witnesses so far as the present appellant is concerned. We accordingly allow the appeal set aside the conviction and the sentence passed upon Pearey and acquit him."

[7] The paragraph reproduced above makes it abundantly clear that in that appeal it was only Pearey's case that was examined. The evidence was considered only for a special point of view. The present applicants can ask for interference only if it was apparent from the judgment in Pearey's appeal that they were not guilty and were wrongly convicted. We are unable to hold that that judgment leads to any such conclusion and the applicants are therefore not entitled to ask us to treat the present applications as appeals or revision petitions. We are clear that no case has been made out for interference in exercise of the inherent powers of this Court The applications are accordingly rejected.

R G.D. *Applications rejected.*

A. I. R. (35) 1948 Oudh 19 [*C. N. 5.*]

KIDWAI J.

Chhangu v. *Surajpal.*

Criminal Ref No. 48 of 1946, Decided on 19-12-1946, made by Sessions Judge Fyzabad, D/ 30-8-1946.

Criminal P. C. (1898), S. 139A — Inquiry in two stages essential — Criminal P. C, S 537.

The language of S. 139A is perfectly clear and unambiguous and requires evidence at two stages; once in the enquiry under S 139A and again in the proceedings under S. 137. If the parties are deprived of their right of producing evidence at either of these stages and the order is made absolute, they are materially prejudiced and the irregularity is not curable under S. 537, Criminal P. C.; *Case law referred.* [Para 5]

('46-Com.) Cr. P. C., S. 139A N. 4.

Cases referred: —

1. ('41) 1941 O. W. N. 54: 28 A. I. R. 1941 Oudh 271: 192 I. C. 70, Pratap Narain v. Ram Kumar.
2. ('46) 1946 O. W. N. 108: 34 A. I. R. 1947 Oudh. 65: 223 I. C. 463, Mahabir v. Asharfi.
3. ('46) 1946 O. W. N. 57: 33 A. I. R. 1946 Oudh 108: 222 I. C. 532, Ram Narain Gupta v. Emperor.
4. ('28) 15 A. I. R. 1928 All. 627: 50 All. 871: 110 I. C. 213, Munna Tewari v. Chandarbali.
5. ('42) 29 A. I. R. 1942 All. 443: 203 I. C. 495, Ram Dayal v. Mt. Jagamba Debi.
6. ('39) 26 A. I. R. 1939 Pat. 460: 18 Pat. 76: 184 I. C. 47, Harnandan Lal v. Rampalak Mahato.
7. ('30) 17 A. I. R. 1930 Cal. 286: 57 Cal. 526: 125 I. C. 600, Pran Nath v. Emperor.
8. ('09) 3 I. C. 7 (Cal.), Hirday Chandra Das v. Shib Chandra.
9. ('38) 25 A. I. R. 1938 Lah. 523: I. L. R. (1939) Lah. 381: 176 I. C. 669, Emperor v. Tulsi Ram.

B. K Dhaon — for Applicants.
H. Husain—for Opposite Party.

Order. — Surajpal and ten others applied to the Sub-Divisional Officer of Sultanpur praying that action be taken under S. 133, Criminal P. C. against Changu Manihar and Brij Bhawan Singh. They alleged that Changu with the permission of his zamindar opposite party No. 2, was constructing a house in such a way as to block the way on plot No. 23 of the abadi which is used by the public. They further alleged that a channel for carrying water from a well on plot No. 24 to the fields outside the abadi for the purpose of irrigation was also being stopped. They said that this action of the opposite party caused loss not only to them but also to the general public. A police report was called for and thereafter the opposite parties were summoned to

show cause why proceedings under S. 133, Cr. P.C. should not be taken. They appeared and filed a written statement on 22-3-1946. This written statement has an important bearing on the case but I do not wish to say anything further with regard to it because it is advisable not to say anything which may affect the merits.

[2] Thereafter the learned Magistrate called upon the Naib Tahsildar to report and he also reported that the opposite parties had obstructed a public way. Thereupon, on 27-4-1946, the learned Magistrate issued a preliminary order under S. 133, Criminal P. C.

[3] On 8-5-1946, the opposite party No. 1 filed another written statement in which he pleaded that he had not constructed his house on any part of a public road. The Court then proceeded to record evidence and after completing its enquiry it made its order absolute. The learned Magistrate held that plot No. 23 was a "Rasta" and had always been used by the public. The opposite parties applied to the Sessions Judge, Fyzabad, in revision and challenged the legality of the order. The learned Sessions Judge has come to the conclusion that the procedure prescribed by Criminal Procedure Code for such cases has not been followed and the order should be set aside. He accordingly referred the case to this Court under S. 438, Criminal P. C.

[4] It appears from the record that only one enquiry took place after the preliminary order under S. 133, Criminal P. C. had been passed by the learned Magistrate. In the circumstances of the case there should have been two enquiries, one under S. 139A, Criminal P. C., and the other under S. 137, since opposite party No. 1 denied the existence of the public right in respect of the land upon which he had raised the walls involved in this case. Section 139A, cl. (1) provides that in such a case

"the Magistrate shall, before proceeding under S. 137 or S. 138, enquire into the matter."

Then follows cl. (2) which is as follows:

"If in such enquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and, if he finds that there is no such evidence, he shall proceed as laid down in S. 137 or S. 138, as the case may require."

[5] Thus it is only after the determination of the question of the public right, that further proceedings under S. 137 can be taken. The language of the section is perfectly clear and unambiguous and requires evidence at two stages; once in the enquiry under S. 139A, Criminal P. C. and again in the proceedings under S. 137. If parties are deprived of their right of producing evidence at either of these stages they are materially prejudiced and it cannot be said that only an irregularity has been committed which may be cured by invoking the aid of S. 537, Criminal P. C. In 1941 O. W. N. 54[1] a learned Judge of this Court held that, in such cases the Magistrate can only proceed under S. 137, Criminal P.C. after recording a finding under S. 135A, Criminal P. C. and that if this had not been done the order of the Magistrate must be set aside. In that case this Court returned the case to the Magistrate and directed him to proceed again with the case and hold an enquiry first under S. 139A, Criminal P. C. and then under S. 137, Criminal P. C.

[6] In 1946 O. W. N. 108,[2] the Magistrate after an enquiry under S. 139A, Criminal P. C. made his conditional order absolute without taking evidence under the provisions of S. 137, Criminal P. C. It was contended that there was no prejudice and, therefore the irregularity was cured by S. 537, Criminal P.C. Thomas (Sir George) C. J. refused to accept this contention and held that the law provides for two distinct stages in an enquiry under Chapter X of the Criminal P. C. The first is prescribed by S. 139A and it is only when he finds that there is no reliable evidence in support of the denial of the public right that he can undertake the enquiry under S. 137. That enquiry too must be completed before the conditional order can be made absolute. He said:

"Both the stages must be complied with as the provision is mandatory and it is not a question of a mere irregularity which can be cured by S. 537, Criminal P. C."

He also set aside the order of the Magistrate and directed that he should proceed to dispose the application according to law.

[7] The learned counsel who opposed the reference, relied upon 1946 O.W.N. 57,[3] but that case does not assist him since, in that case both the stages were gone through though, at the second stage the counsel for the parties stated that they did not wish to lead any additional evidence. Thus the Court complied with the requirements of the law and it is always open to the parties not to lead evidence. There was no defect in the procedure at all. That is not the case here.

[8] The order of the learned Magistrate dated 29-6-1946, by which he made the order of his predecessor absolute must, therefore, be set aside. The question then arises whether the Magistrate should be directed to take up this case from the stage commencing with the passing of the preliminary order. The learned counsel supporting the reference strongly contends that this is not a case to which S. 133, Criminal P. C. has any application at all. I cannot agree with this contention, since the section does not refer to a public way but only to a way "which is or may be lawfully used by the public." That is a fact to

be determined on the evidence in the enquiry under S. 139A, Criminal P. C. and I do not wish to say anything which might prejudice the evidence before that enquiry commenced. Different interpretations have been placed by different Courts upon the meaning of the word public: *vide* A. I. R. 1928 ALL 627,[4] A I. R. 1942 ALL. 443[5] and A. I R. 1939 Pat 460.[6] The case reported in A. I. R. 1930 Cal. 286[7] related to a case under S. 283 which relates to a "public way" and has no application. In the three other cases the Court was acting under S. 133, Criminal P. C. and it was only as a result of the enquiry under S. 139A. Criminal P. C that the question as to whether there was or was not a "public right" arose for determination. No doubt in giving its finding under S. 139A (2), Criminal P. C the learned Magistrate will duly consider all these authorities as well as the decision of a Bench of the Calcutta High Court presided over by Sir Lawrence Jenkins in 3 I. C. 7,[8] in which their Lordships say that all that S. 133 requires is that the way should be one wich is "or may be lawfully used by the public."

[8] Mr Dhaon also relied upon the decision of Walford J. in Cri. Rev. No. 88 of 1946 decided on 9-9-1946 which has not been reported. In that case the learned Judge set aside the order of the Magistrate and did not order proceedings to commence afresh. In that case, however, the learned Judge came to the conclusion that the right claimed was at the best only an easement and that S 133, Criminal P. C. did apply to such cases. He also held that the obstruction was one of two years' standing and he followed the decision of the Lahore High Court in A. I R. 1938 Lah. 523[9] for the proposition that S. 133, Criminal P. C. was not intended for obstructions of long standing. The case is, therefore, inapplicable to the facts of the present case

[9] I accordingly accept the reference made by the learned Sessions Judge Fyzabad, set aside the order of the Magistrate dated 29-6-1946 and direct that the Magistrate should proceed to hold an enquiry under S. 139A, Criminal P. C. and thereafter, if necessary, under S. 137, Criminal P. C. and then pass such orders as the facts proved may warrant.

G.B.S. *Reference accepted.*

A. I. R. (36) 1948 Oudh 21 *[C. N. 6.]*

KIDWAI J.

Lal Yogendra Bakhsh Singh—Plaintiff—Appellant v. *Lala—Defendant—Respondent.*

Second Appeal No. 34 of 1941, Decided on 16-12-1946, from order of Civil Judge, Unao, D/- 28-11-1940.

U. P. Tenancy Act (17 [XVII] of 1939), Ss. 90 and 91—Applicability—Provision in lease for payment of haqooq-i-zamindari—Suit for recovery of such dues—Maintainability.

Section 90 does not apply to a case where the liability sought to be enforced has arisen before the U. P. Tenancy Act came into force. Even in cases where it applies, it does not affect a provision in the contract of tenancy relating to giving of bhusa etc. to the landlord.

A contract of tenancy executed before the U. P. Tenancy Act came into force provided that the tenants shall pay the haqooq-i-zamindari over and above the rent or shall pay compensation at the rate mentioned in the contract in lieu of those rights and that these haqooq were to be regarded as a special part of the compensation for the letting of the land. In a suit brought by the landlord for the recovery of these dues:

Held, (1) that S. 90 did not apply to the case; [Para 5]

(2) that S. 91 also did not apply. It applies only to realisation of cesses and not to claims made with regard to something which had been converted into rent by agreement of parties: [Para 5]

(3) that the effect of the provision in the contract of lease regarding these dues was to make them part of the rent: 4 A. I. R. 1917 All. 483, *Applied*; 1943 R D. 244; 1943 R. D. 485 and 1944 R. D. 457, *Rel. on.* [Paras 2, 4]

(4) that the suit was therefore maintainable. [Para 5]

Cases referred :—

1. ('15) 38 All. 286 : 4 A. I. R 1917 All 483 : 35 I. C. 208 (F. B.), Rangi Lal v. Jassa.
2. ('43) 1943 R D. 244 (B. R.), Paltoo v Iqbal Husain.
3. ('43) 1943 R D. 485 (B R.), Duni Chand v. Tellu.
4. ('44) 1944 R. D. 457 (B. R.), Mahomad Ejaz Rasool Khan v. Surja.
5. ('42) 1942 O.W.N. 683 : 30 A.I.R. 1943 Oudh 131 : 18 Luck 652 : 204 I.C. 283, Jogendra Bakhsh Singh v. Mangal.

H. Husain—for Appellant.

P. N Chaudhari—for Respondent.

Judgment.— The appellant Lal Yogendra Baksh Singh is a taluqdar and village Akhori lies within his taluqa. Lala and Ram Dayal respondents in the two appeals respectively are his tenants. The contract of tenancy provides that they shall pay the rent entered in cash and that they shall pay the 'haqooq-i-zemindari' detailed in the qabuliat over and above the rent or that they shall pay money compensation at the rate mentioned in the qabuliat in lieu of those rights. The qabuliat in both the cases provided that these *haqooq* were to be considered a special part of the compensation (that is *muawiza*) for the letting of the land. These *haqooq* were not paid for the years 1344 to 1346F. Consequently the appellant brought the suits against the respondents in the Revenue Court for realization of those dues. Those suits were dismissed by the District Judge of Una by his judgment dated 6-6-1939 on the ground that the Revenue Courts had no jurisdiction but that the plaintiff would be at liberty to institute suits in the civil Court if he was so advised. Thereafter the plaintiff filed suits on 7-6-1939, in the Court of the Munsif South Unao, for recovery of Rs. 7-8-0 and Rs. 7-11-0 from the

two respondents respectively The learned Munsif decreed both the suits but on appeal the civil Judge reversed the decrees of the Munsif and dismissed both the suits.

2 The taluqdar has now come up in appeal and it is urged on his behalf that the suits ought to have been decreed because under the contracts entered into between the parties, haqooq-i-zamindari must be treated as part of the rent and there is nothing in the law to make such a contract illegal. It was laid down by a Full Bench of the Allahabad High Court in 38 ALL 286[1] that the result of the entry of the zemindari dues in the qabuliat was to make them part of the rent In present case the qabuliat also contains specific mention of the various zamindari dues realizable by the landlord It further provides the compensation to be paid in cash in case the tenant fails to pay up those zemindari dues. The decision of the Allahabad High Court is, therefore, fully applicable to the present case. This view has also been taken repeatedly by the Board of Revenue in cases: *vide* 1943 R D 244;[2] 1943 R. D. 485[3] and 1944 R. D. 457[4] I have not been referred to any decision of this Court in which this matter has been decided.

[3 The learned counsel for the respondents has referred to the case in 1942 O. W. N. 683[5] in which it was held that if the taluqdar was entitled to realize four chattaks of ghi annually from his Ahir tenants under the terms of the wajib-ul-arz as return for their using his banjar land for grazing purposes, the tenant were bound to provide this ghi or to make payment for it unless they could show that they were prevented from using the land as their grazing ground. In that case the suit was based upon custom and the claim was not rent due The case is, therefore, not applicable to the facts of the present case but it shows that this Court has laid down the proposition that something over and above the rent can be realized unless there is some illegality and that the judgment of the Civil Judge inasmuch as it holds that nothing over and above the rent can be realized in any case is not correct.

[4] The learned lower appellate Court has found that such dues could not be realized because the Oudh Rent Act forbade the realization of anything over and above the rent He seems to have misunderstood the argument of the plaintiff The plaintiff claimed these dues not as something over and above the rent but as part of the rent by virtue of a contract entered into between him and his tenants. The reason which the learned Civil Judge, therefore, gives proceeds upon a wrong assumption altogether and is not justified by the facts of the case.

[5 The learned Civil Judge next proceeded to hold that the enforcement of these demands infringed the provisions of Ss. 90 and 91, U. P. Tenancy Act Section 90 does prohibit any contract that the tenant shall render any service or do any work for the landholder as part of the contract of tenancy This section cannot, however, apply to the present case because the liability that is sought to be enforced in the present case is one that arose before the new Tenancy Act came into force. Had the liability arisen after 1-1-1940 no doubt S. 90 would have been applicable to that part of the agreement which relates to rendering of service by providing a *goi* or pair of bullocks to the landlord for the the purpose of working on his fields but it would not even then affect the rest of the contract which relates to giving bhusa, etc. S. 91 applies only to the realization of cesses which may be notified by the Provincial Government in the official Gazette to be not recoverable. No such notification has been brought to my notice and even if such notification had been issued it would only relate to cesses and not to a claim made with regard to something which has been converted into rent by agreement of parties. The decision of the lower appellate Court cannot, therefore, be upheld and must be set aside.

6] I, therefore, allow these appeals, set aside the decision of the lower appellate Court and restore that of the trial Court. The appellant will get his costs of both the appeals.

N.S.D. *Appeals allowed.*

A. I. R. (35) 1948 Oudh 22 [C. N. 7.]

MISRA J.

Mahadeo—Defendant—Appellant v. *Brijlal—Plaintiff—Respondent.*

Second Appeal No. 330 of 1941, Decided on 20-11-1946, from order of Dist. Judge, Lucknow, D/- 18-7-1941.

Civil P. C. (1908), O. 21, Rr. 101 and 103—Order for possession under R. 101—No suit by decree-holder under R. 103—Acquisition of forcible possession by decree-holder—Effect—Limitation Act (1908), Art. 11-A.

After the expiry of one year from the date of order under O. 21, R. 101 the right of the party in whose favour that order is passed becomes conclusive. If within that time the decree-holder does not file a suit under O. 21, R. 103 his right to claim possession upon the same title (which is defeated in the proceedings under O. 21, R. 100) is barred.

The acquisition of forcible possession by the decree-holder after delivery of possession to the successful party under R. 101, cannot operate to arrest the running of time against the decre -holder. nor can it invest him with a fresh right to reagitate the question of title which had already been extinguished.

[Paras 2, 3]

('42-Com.) Limitation Act, Art. 11-A, Note 10, Pts. 1 & 2.

Siraj Husain and Ganesh Pd.—for Appellant.
Jagdish Chandra—for Respondent.

Judgment.—This appeal arises out of a suit for declaration of ownership of a house on a title based upon a sale deed executed on 3rd October 1936 by one Gur Prasad son of Jagmohan in favour of the plaintiff Brij Lal. It appears that possession of the house was not delivered to Brij Lal after its transfer. In pursuance of a decree obtained by him on 24th July 1937, he obtained actual delivery of possession in execution on 6th September 1937; objections were thereafter preferred in the execution Court by Mahadeo who claimed to be an owner in his own right These objections were under R. 100 of O. 21, Civil P. C., and were allowed on 9th December 1937. Possession was, therefore, delivered to Mahadeo on 17th January 1938. Under R. 103 of O. 21 a suit by Brij Lal to establish his right in derogation of the one which was granted by the order of 9th December 1937 was necessary, and in the absence thereof the decision was conclusive. Such a suit could be filed within a period of one year from the date of the order under Art. 11A of the Limitation Act. Brij Lal did not file any such suit as is contemplated by R. 103 It appears that some time in July 1939 or thereabouts he took forcible possession of the property which Mahadeo had to recover by suit under S. 9, Specific Relief Act. The present suit for declaration was then filed by Brij Lal on 16th July 1940, and the title upon which he relied was the earlier title which he set up against Mahadeo in the proceedings under S 100, (O. 21, R. 100?) Civil P C namely the sale deed of 3rd October 1936. Mahadeo resisted the suit upon a number of grounds The one with which we are concerned related to the bar created by R. 103 of O. 21 The trial Court did not accept the defendant's contention and in view of its other findings it passed a decree in plaintiff's favour. The appellate Court affirmed that decree Mahadeo defendant has come up by way of second appeal

[2] The only contention that has been urged before me by Mahadeo's learned counsel is that after the expiry of a year from 9th December 1937, which was the date of the order in Mahadeo's favour under R. 101 of O 21, the right to claim possession upon the title which was then defeated is barred There can be no doubt that the order of 9th December 1937, became finally conclusive after the expiry of year and that the right of the party in whose favour that order was made became absolute Brij Lal could not, therefore, set up again the right which was rejected by that order in a subsequent suit. Since the substance of the present suit was the establishment of the right which was the subject of the order, this suit ought to have failed. The trial Court, however, rejected the defence holding firstly that after the order of 9th December 1937, and in spite of the delivery of possession to Mahadeo on 17th January 1938, Brij Lal still remained in possession of the property and in the second place that the cause of action for the present suit was different, being dispossession not by virtue of the order under R 101 of O 21 but by virtue of the decree under S 9, Specific Relief Act, which was passed in Mahadeo's favour on 15th May 1940 When the case went up to the Court of first appeal the first ground was apparently negatived. The learned District Judge observed that there was plenty of evidence to show that Mahadeo got possession under the order. He observed:

> "We do not know how long he remained in possession but we do know that he was subsequently dispossessed by the plaintiff who thereafter remained in possession until Mahadeo brought a suit on the basis of his possessory title under S. 9. Specific Relief Act."

The learned District Judge, however, went on to say in a subsequent portion of his judgment:

> "that plaintiff being in possession adversely to the order under R. 101 had no need to proceed under R. 103."

I am clear that an acquisition of possession by the plaintiff after the delivery of possession to Mahadeo on 17th January 1938, could not operate to arrest the running of limitation against him from the date of the order of 9th December 1937, and further that if the second dispossession of Mahadeo took place on 15th July 1939, as was alleged by the defendant in the suit under S. 9, Specific Relief Act, the high-handed act of Brij Lal could not invest him with a fresh right to reagitate the question of title which had already been extinguished.

[3] The next point which influenced the Courts below was that the cause of action upon which the present declaratory suit was founded was different from the cause of action upon which the suit under O 21, R. 103 would have been based. It appears to me, however, that the title which is set up in the declaratory suit is the same title upon which the plaintiff claimed possession of the property in 1937 and which was defeated then. That title could not be revived after the expiry of one year from the date of the order.

[4] It is urged by the learned counsel for the respondent that the finding about Mahadeo's obtaining possession under the order of 9th December 1937 should not be regarded as conclusive. In fact, he says, it should not be regarded as a finding at all in view of the fact

that it occurs in a paragraph of the judgment in which the learned District Judge was giving merely a narration of facts of the case. I have no doubt that the view expressed by the Court below was on appreciation of evidence produced.

[5] I am clear that Brij Lal's right to possession of the property became finally extinguished and it cannot now be resuscitated. His suit, therefore, based upon the title derived from the sale of 3rd October 1936, must fail.

[6] The result is that the appeal is allowed, the decree of the Court below is set aside and the plaintiff's suit is dismissed with costs throughout.

N.S.D. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 24 (1) *[C. N. 8.]*

GHULAM HASAN C. J.

In re Deputy Commissioner, Sultanpur —Applicant.

Raja Mohammad Raza Ali Khan—Appellant v. Kallu Mal—Opposite Party.

Civil Misc. Appln. No. 1054 of 1946, Decided on 17-10-1946.

Civil P. C. (1908), S. 151—Pending appeal Court of Wards assuming superintendence of party's estate—Application to substitute Deputy Commissinor's name in place of party—S. 15, U. P. Court of Wards Act does not apply—Resort should be had to S. 151—U. P. Court of Wards Act (4 [IV] of 1912), S. 15 — Civil P. C. (1908), O. 1, R. 10 and O. 22, R. 10.

Where, during the pendency of an appeal, the Court of Wards assumes superintendence of the estate of a party to the appeal and an application is made for the substitution of the name of the Deputy Commissioner in place of the party, S. 15, U. P. Court of Wards Act has no application and the Court should resort to the provisions of S. 151, Civil P. C. It is doubtful whether O. 1, R. 10 or O. 22, R. 10 will apply to such a case: 22 A. I. R. 1935 Oudh 486, *Not foll.*; 25 A. I. R. 1938 P. C. 49, *Ref.* [Para 3]

('44-Com.) C. P. C., S. 151 N. 4, pt. 21; O. 1, R. 10 N. 10; O 22 R. 10, N. 9 pt. 10.

Cases referred:—

1. ('35) 22 A. I. R 1935 Oudh 486: 156 I. C. 990, Jai Indra Bahadur Singh v. Deputy Commissioner, Kheri
2. ('38) 25 A. I. R. 1938 P. C. 49: 32 S. L. R. 290: 17 Pat. 1: 65 I. A 57: 172 I. C. 643 (P. C.), Braja Sundar Deb v. Rajendra Narayan Bhanj Deo.

H. D. Srivastava for N. U. Beg—for Applicant.

B. K. Dhaon—for Opposite Party.

Order.—This is an application under S. 15, U. P. Court of Wards Act read with O. 1, R. 10, Civil P. C. by the Deputy Commissioner of Sultanpur in charge of the Hasanpur estate praying that the name of the Deputy Commissioner of Sultanpur be substituted in place of the minor Raja of Hasanpur estate.

[2] It appears that the original appeal was filed by Raja Mohammad Ahmad Ali Khan, taluqdar of Hasanpur estate but he died during the pendency of the appeal leaving his minor son, Raja Mohammad Raza Ali Khan as his sole heir and successor. The estate of the minor was taken under the superintendence of the Court of Wards under S. 14, Court of Wards Act and the minor Raja was substituted under the guardianship of the Deputy Commissioner in place of the deceased by an order of the Bench dated 10-12-1945. Subsequently the Court of Wards assumed superintendence of the estate under S. 8 of the Act and this application now seeks the substitution of the name of the Deputy Commissioner, Sultanpur in place of the minor Raja. There is no objection to the substitution by the opposite-party but it is pointed out that the application is made under wrong provisions of the law.

[3] I am of opinion that S. 15, U. P. Court of Wards Act has no application. That section merely relates to notification of the assumption of superintendence and I consider it at least doubtful whether substitution can be ordered under R. 10 of O. 1, Civil P. C. It appears that in A. I. R. 1935 Oudh 486[1] a Bench of this Court applied the provisions of O 22, R. 10 in substituting the Deputy Commissioner in charge of the Court of Wards in place of the disqualified proprietor holding that there was a devolution of interest in certain respects. Ordinarily I should be bound by the decision of the Bench but for the fact that doubt is thrown on the applicability of R. 10 to such a case by their Lordships of the Privy Council in A. I. R. 1938 P. C 49.[2] Under the circumstances I must resort to the provisions of S. 151, Civil P. C. as in my opinion having regard to the provisions of S. 55, Court of Wards Act, a ward cannot continue any proceedings in the civil Court otherwise than by and in the name of the Collector in charge of his property. Accordingly I allow the application as prayed.

V.R. *Application allowed.*

A. I. R. (35) 1948 Oudh 24 (2) *[C. N. 9.]*

MADELEY AND KIDWAI JJ.

Jitendra Nath —Plaintiff—Appellant v. Shinaji Maharaj and others—Defendants—Respondents.

First Appeal No. 52 of 1946, Decided on 28-2-1947, from order of Addl. Civil Judge, Lucknow, D/- 19-12-1945.

Court-fees Act (1870), S. 7 (IV-A) (U. P.)—Suit for declaration that "tamliknama" is invalid and for possession—Separate court-fee is payable on each relief.

A valid deed of gift, such as a "tamliknama" is complete in itself and is an instrument securing property. Hence a suit for a declaration that a tamliknama is invalid and for possession of the property is governed by S. 7 (IV-A) and separate court-fee is payable on each of the two reliefs: 31 A. I. R. 1944 Oudh 118, *Rel. on*; 25 A. I. R. 1938 Pat. 22 (F. B.); 17 A. I. R. 1930 Oudh

104; 26 A. I. R. 1939 Oudh 125 and 29 A. I. R. 1942 Lah. 209, *Disting.* [Paras 5, 8]

Annotation:— ('44-Com.) Court-fees Act, S. 7 (IV-c) Note 26 pt. 14.

Cases referred:—

1. ('38) 25 A. I. R. 1938 Pat. 22 : 16 Pat. 766 : 172 I. C. 840 (F. B.), Ramkhelawan Sahu v. Surendra Sahai.
2. ('30) 17 A. I. R. 1930 Oudh 104 : 5 Luck. 474 : 124 I. C. 420, Deoraj v. Kunj Behari.
3. ('39) 26 A. I. R. 1939 Oudh 125 : 14 Luck. 536 : 180 I. C. 61, Baij Nath Singh v. Sri Nath Kuer.
4. ('42) 29 A. I. R. 1942 Lah. 209 : 202 I. C. 174, Harkishan Lal v. Barkat Ali.
5. ('44) 31 A. I. R. 1944 Oudh 118 : 19 Luck. 54 : 211 I. C. 282, Dhondhey Singh v. Patraj Kunwar.

P. S. Divedi—for Appellant.

Judgment.—This is a court-fee report made by the office in respect of a suit for declaration that a "tamliknama" of a house executed by a Hindu widow governed by the Mitakshara Law is invalid after her death and for possession. The suit was filed during the life time of the widow with a prayer for a declaration that the deed is voidable after her death. While the suit was pending, the widow died and then a plea for possession of the property was added to the plaint. The office report is that since there is a direct prayer for cancellation of the "tamliknama," court-fee must be paid on this as well as on the relief of possession. Since the reversioner does not claim through the widow, the court-fee is payable on 1/5th of the value of the house.

[2] Learned counsel for the appellant cites several rulings which he regards as being in his favour. The first is A. I. R. 1938 Pat. 22.[1] The court-fee report in the present case is based upon an amendment of the Court-fees Act made by the Provincial Legislature which introduced S. 7 (iv-A) into the Act. The Patna decision cannot affect the interpretation of a section which does not exist in the Court-fees Act applicable to the province of Bihar.

[3] A. I. R. 1930 Oudh 104[2] is the second decision he cites. Section 7 (iv-A) was added by the U. P. Court-fees (Amendment) Act of 1938. It was, therefore, no part of the Act when the decision cited was passed and that decision cannot affect the interpretation of the law as it now stands.

[4] A. I. R. 1939 Oudh 125[3] has no application. The question there was the payment of court-fee on an appeal filed in 1936. The Court held that the court-fee was payable under S 7 (iv) (c), Court-fees Act, "to obtain a declaratory decree or order, where consequential relief is prayed." This sub-section no longer exists in its present form in these provinces. The whole of S. 7 (iv) has been re-cast by S. 7 of Act 19 [XIX] of 1938.

[5] A. I. R. 1942 Lah. 209[4] is distinguishable for the same reason as the Patna case. The case is governed by S. 7 (iv-A) as interpreted by A. I. R. 1944 Oudh 118.[5] That case related to a suit for cancellation of a decree and for possession and it was held that court-fee was separately payable upon theso two reliefs as they were based upon distinct and separate causes of action.

[6] The appellant has attempted to escape the result of that decision by arguing that the "tamliknama" is not an instrument securing money within the meaning of S. 7 (iv-A). A "tamliknama" he says is a deed of gift and a gift before it can become binding upon the donor and before it can secure the property to the donee must be accepted by the donee and this acceptance must necessarily take place after the deed of gift has been executed. Therefore a deed of gift cannot by itself, "secure money or other property." We do not find, however, that the appellant's contentions are borne out by the sections of the Transfer of Property Act relating to gifts.

[7] In S. 122, T. P. Act, gift is defined :

"'gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor, to another called the donee and accepted by or on behalf of the donee."

[8] This acceptance by the donee is made part of the essence of the "gift" itself. The act then provides that for the purpose of making a gift of immovable property the transfer must be effected by a registered instrument singed by or on behalf of the donor and attested by at least two witnesses. A valid deed of gift is therefore complete in itself and is an instrument securing property We accept the office report and order that the deficit court-fee be paid by the appellant within two months.

N. S. D. *Order accordingly.*

A. I. R. (35) 1948 Oudh 25 [C. N. 10.]

KIDWAI J.

Bhabuti — Accused — Appellant v. Emperor.

Criminal Appeal No. 218 of 1946, Decided on 18-12-1946, from order of Sessions Judge, Hardoi, D/-30-5-1946.

(a) Penal Code (1860), S. 97 — Right of private defence—Accused attacked by party—One of aggressors not attacking accused—Latter, if deprived of right of private defence.

When a man is being attacked, he is not in a position to distinguish which person in the party of aggressors is his real assailant and which is merely an on looker and he is not deprived of the right of private defence merely because a person in the party of the aggressors has not attacked him. [Para 7]

(b) Criminal P. C. (1898), S. 342—Statement under, containing both incriminating and self-exculpatory statements—Conviction based on former—Legality.

It is not permissible for a Court to dissect the statement made by an accused person under S. 342, Criminal P.C. containing both incriminating and self-exculpatory statements and to reject the self-exculpatory statement and base his conviction solely upon its self-incriminating portion when the Court has already come to the conclusion that the evidence for the prosecution is unworthy of credit. It is only when there is other evidence to support the conviction of the accused that the Court may accept a part of the confession and reject a part. Cr. App. No. 319 of 1946, *Foll.* [Para 7]

Case Referred :—

1. Cr. Appeal No. 319 of 1946, Ram Jiwan v. Emperor

S. D. Misra — for Appellant.

Asst-Government Advocate — for the Crown.

Judgment. — The appellant Bhabhuti was charged under S. 455 and 302/34, Penal Code, and committed for trial to the Court of Session at Hardoi in respect of an incident which occurred at village Birauli in the district of Hardoi on 28-12-1945 at about noon as a result of which one Chitta received injuries to which he succumbed on his way to the police station.

[2] The prosecution case was that the relations between Bhabhuti who is a bania and his neighbour Pirthi, a Barber, had become strained owing to a quarrel beween Pirthi's daughter's son and Bhabhuti's niece both of whom are small children. This quarrel resulted in abuse passing between Bhabhuti's sister-in-law and Pirthi's daughter Mt. Parbati and eventually in Bhabhuti administering two strokes with a cane upon the latter. The prosecution case then proceeded that on the day of the occurrence, Bhabhuti was at his door when Pirthi passed that way and Bhabhuti called out to Pirthi to come and shave him or at least to give him a razor so that he may shave himself A quarrel thereupon ensued in which Bhabhuti received a beating and Pirthi his son Sarju and Chitta the son-in-law of Pirthi went away after the last mentioned had received some injuries. It is alleged that about two or two and a half hours after this incident, while Pirthi and Sarju were absent from their house and were at the house of one Bandi Din, the lambardar of the village, Bhabhuti, his brother Hazari, Rokar son of Hazari, Daryai, brother-in-law of Bhabhuti, Ram Adhar and Tulsi Ram invaded the house of Pirthi, broke open his door and assaulted Chitta in such a way that he succumbed to his injuries very shortly afterwards. At the time of the assault only Mt Parbati wife of Chitta was present in the house.

[3] Mt. Parbati reported the incident at police station Kashimpur on the same day at 4-30 p. m. The report is Ex 2 and it substantially gives the prosecution version as it has been given in Court On the same day Bhabhuti had also lodged a first information report at the same police station at 4.15 p. m complaining that Pirthi, Sarju and Chitta had assaulted him with lathis This report is Ex. 6. Bhabhuti and his brother Hazri who were at the police station when Ex. 2 was recorded were immediately taken into police custody and Bhabhuti was sent for medical examination of which the report is Ex 12 His mother Mt Radha had also been injured and her medical examination took place The report is Ex. 13. The body of Chitta was sent for post mortem examination and it reveals that he had several injuries caused by a lathi one of which was on the head and was a fracture of the skull. The post mortem report reveals that Chitta had a very much enlarged spleen which was ruptured as a result of the assault The doctor was of the opinion that the injury on the head as well as the rupture of the spleen caused the death of Chitta.

[4] Bhabhuti in his defence pleaded that the entire incident took place at one time at his own door and that it was he who was attacked by Pirthi, Sarju and Chitta. He alleged that Pirthi had a spear with which he caused injuries to Mt. Radha, his mother He also pleaded the right of self-defence in inflicting injuries upon Chitta who he said had also struck him with a lathi. He pleaded that he alone participated in the quarrel on his side and that the names of the five other persons had worngly been given.

[5] As a result of the police investigation Bhabhuti, Hazari and Rokar were prosecuted. The last two have been acquitted and Bhabhuti has been convicted under para. 2 of S. 304, Penal Code, and sentenced to rigorous imprisonment for four years. He has now come up in appeal

[6] On the findings which have been arrived at by the learned Sessions Judge, Bhabhuti is clearly entitled to an acquittal. Briefly stated the Sessions Judge has found (1) That there was only one marpit as alleged by Bhabhuti and that the prosecution case that there was a separate incident which resulted in Chitta's death is false. (2) That the whole marpit took place in front of Bhabhuti's house and Chitta received his injuries at that place. (3) That it is false that Bhabhuti entered the house of Pirthi after breaking open his door. (4) That Bhabhuti did not possess a spear and that the case that the injury to Mt. Radha was caused by her catching it in order to prevent Bhabhuti from using it was not substantiated. (5) That Pirthi and Sarju had attacked Bhabhuti and he and his mother had received injuries in the course of that assault. (6) The learned Sessions Judge was of the opinion that in this village there are two parties, one of Bandi Din who is a partizan of Pirthi and the other of Gaya Din who is a supporter of Bhabhuti. The learned Sessions Judge considered all the evidence and came to the conclusion that P. W. 10 Jit Bahadur, P. W. 12 Sital

Prasad, P.W.14 Bishambhar, P.W.15 Kallu and P.W.16 Ajaipal belonged to Bandi Din's party and for this reason as well as by reason of other discrepancies which occur in their evidence, they were unworthy of credit. With regard to P.W. 7 Pirthi, P.W. 8 Sarju and P.W. 9 Bandi Din, he held that they themselves state that they were not eye-witnesses to what they call the second incident which resulted in the death of Chitta and they cannot depose anything about it. He has also come to the conclusion that P.W.11 Dhani Ram was not present when the incident occurred and that the evidence of P.W. 3 Parbati cannot be believed.

[7] This is all the evidence that was led by the prosecution to bring home the guilt to the accused and when the learned Sessions Judge had come to the conclusion that their evidence was unreliable he should have acquitted the accused. He, however, came to the conclusion that Bhabhuti's own statement as an accused was sufficient for his conviction because though Bhabhuti was attacked Chitta was not an attacking party and so Bhabhuti had no right of private defence as against Chitta. This reasoning is open to two objections. Firstly, according to the evidence of the prosecution witnesses, Chitta came to the scene along with Sarju who came armed with a lathi and he was injuried while he was standing by the side of Sarju at Bhabhuti's door. Chitta was Pirthi's son in-law and it was his wife who was principally aggrieved by Bhabhuti's conduct since it was she who had been caned. In such circumstances Bhabhuti had no reason to suppose that Chitta was not taking part in the assault and had come to the scene merely as an onlooker. When a man is being attacked, he is not in a position to distinguish which person in the party of aggressors is his real assailant and which is merely an onlooker and he is not deprived of the right of private defence merely because a person in the party of the aggressors has not attacked him. The second ground why this reasoning of the learned Sessions Judge cannot be accepted is that it is not open to a Court in such a case to accept a part of the statement of the accused and reject the rest. In his statement the accused clearly stated that Chitta had also beaten him and that he had struck him in self-defence. The statement of Bishamber, P.W. 14, also shows that the accused had taken up a danda in self-defence and that Chitta had come up to the door of the accused and was standing at the door of the accused by the side of Sarju who was actually striking the accused with a lathi. It has recently been laid down by a Bench of his Court of which I was a member in Cri. Appeal No. 319 of 1946,[1] which was an appeal against a conviction by same learned Sessions Judge that it is not permissible for a Court to dissect the statement made by an accused person under S. 342 Criminal P.C. containing both incriminating and self-exculpatory statements and to reject the self-exclupatory statement and base his conviction solely upon its self-incriminating protion when the Court has already come to the conclusion that the evidence for the prosecution is unworthy of credit. In that case it was also laid down that it is only when there is other evidence to support the conviction of the accused that the Court may accept a part of the confession and reject a part. The present case is on all fours with that case and in view of the law there laid down the action of the learned Sessions Judge basing the conviction purely on the self-incriminating part of the statement of the accused cannot be sustained.

[8] I accordingly allow the appeal, set aside the conviction of Bhabhuti and direct that he be released unless he is required in connection with some other case.

N.S.D. *Conviction set aside.*

A. I. R. (35) 1948 Oudh 27 *[C. N. 11.]*

KIDWAI J.

Sabharaj and others —*Plaintiffs*—*Appellants* v. *Mahesh Narain and others* — *Defendants*—*Respondents.*

Second Appeal No. 399 of 1941, Decided on 6-2-1947, against order of Civil Judge, Sultanpur, D/- 5-9-1941.

Civil P. C. (1908), O. 20, R. 4 (2) – Reasons for decision—Failure to give—Effect —Interference in second appeal with finding of fact—Civil P. C. (1908), S. 100.

In the case of findings of fact arrived at by the Court of first appeal, giving of reasons for its conclusions is all the more necessary as the findings are binding on the Court of second appeal and it is necessary that, if such a matter comes before a Court of second appeal that Court should be able to judge whether the first appellate Court has applied its mind to a consideration of the evidence or not. Where the judgment of the lower appellate Court gives no reasons whatsoever why the evidence of one set of witnesses is accepted and that of the other set rejected and does not even mention the evidence supporting its finding, the Court of second appeal can go through the evidence. [Paras 4 and 5]

('44-Com.) C. P. C., O. 20 R. 4, Note 9, Pts. 3 and 4; S. 100 Note 53 Pts. 2 and 18.

R. B. Lal and M. M. Lal—for Appellants.
Naim Ullah—for Respondents Nos. 1, 2, 3 and 4.

Judgment.—The last male holder of the property in suit was Gajadhar, who died sometime before 1881, without leaving any issue He was succeeded by his widow, Mst. Batasi, who died in 1935 The plaintiffs instituted the suit out of which this appeal arises in the Court of the Munsif, North Sultanpur, on 30-7-1940, claiming possession of the properties as well as mesne profits. They alleged that they were the next reversioners of Gajadhar snice all the nearer heirs were dead and Gajadhar left no sister or sister's

son. The defendants pleaded that the properties did not belong to Gajadhar, that the plaintiffs were not the next reversioners, that Gajadhar had a sister whose son is still alive and that they were transferees of the property from Mst. Batasi, Mst. Ramna and Bhikha, grandfather of the plaintiffs 2 and 3, who had executed the sale deed in their favour for legal necessity.

[2] The trial Court framed a large number of issues of which only the first and the third are material. They are as follows:

(1) Is the pedigree given in the plaint correct?

(2) Are the plaintiffs the nearest reversioners of Gajadhar?

[3] The learned Munsif, after a consideration of the evidence came to the conclusion that the witnesses produced by the plaintiff on the question of the absence of the sister and sister's son of Gajadhar could not be believed and that the evidence of Rameshwar (D. W. 2) who stated that he was the sister's son of Maheep should be accepted. He accordingly came to the conclusion that the pedigree given in the plaint was not complete and that it was proved that the plaintiffs were not the next reversioners since Gajadhar's sister's son is alive. He accordingly dismissed the suit.

[4] The plaintiffs went up in appeal and the lower appellate Court accepted the findings of the Munsif and dismissed the appeal. The judgment of the lower appellate Court is not at all satisfactory. It contains a full recital of the facts and the pleadings but it gives no reasons whatsoever why the evidence of one set of witnesses is accepted and that of the other set rejected. Its findings are given in two brief paragraphs which read as follows:

"I think the lower Court has rightly believed the evidence of the defendants and was perfectly justified in rejecting the testimony of the plaintiffs. The plaintiffs had no doubt concealed the name of Sita daughter of Mahip and their denial of the daughter of (Sic) Sita and her son shows their guilty mind".

"I agree with the lower Court and hold that Gajadhar had a sister and her son is Rameshwar (D. W. 2). Therefore the plaintiffs in view of the amendment in Hindu Law cannot be the nearest reversioners of Gajadhar."

This is a very unsatisfactory judgment since it gives no reasons whatsoever for the conclusions at which the Court has arrived. Order 20 Rule 4, sub-rule (2) requires a Court not only to state the points for determination and the decision thereon but also to give the reasons for such a decision. In the case of findings of fact arrived at by Courts of first appeal this is all the more necessary because those findings are binding on the Court of second appeal and it is necessary that, if such a matter comes before a Court of second appeal, that Court should be able to judge whether the first appellate Court has applied its mind to a consideration of the evidence or not. The learned Civil Judge has not even mentioned what is the evidence supporting the finding at which he has arrived or why he has rejected the evidence of the plaintiffs.

[5] In these circumstances I have been through the evidence of all the witnesses and I have come to the conclusion that the consideration of that evidence by the trial Court is full and complete and that it has given sufficient reasons for rejecting the statements of the plaintiffs' witnesses. Ram Sarmukh (P. W. 1) has clearly stated in his examination-in-chief that he does not know anything about women. His evidence, therefore, cannot prove that Gajadhar did not leave a sister. Sabaraj (P. W. 2), who is plaintiff 1, has no doubt stated that Gajadhar left no sister but his evidence, apart from being interested, cannot be accepted because he also states that Maheep left no daughter although the documentary evidence on the record, EX. A3, shows that Maheep left a daughter, Mst. Sita. The Munsif was quite right in coming to the conclusion that P. W. 2 was concealing the existence of females and his evidence on the question of the existence of a sister of Gajadhar could not be accepted. This is the only evidence produced on behalf of the plaintiffs and it is not sufficient to discharge the burden which lay upon them not only to prove their own pedigree but also to establish that there are no nearer heirs in existence. This is, however, not the only evidence because the defendants have produced Rameshwar who states that he is the son of Gajadhar's sister. His evidence has been accepted by the learned Munsif and there does not appear any reason why it should be rejected. That being so there is evidence to establish that, as a matter of fact, Gajadhar had a sister and that sister's son is still alive.

[6] The result is that the plaintiffs have failed to substantiate their claim of being the nearest reversioners of Gajadhar and their suit was rightly dismissed by the learned Munsif.

[7] This appeal fails and is dismissed with costs.

D.H. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 28 *[C. N. 12.]*

GHULAM HASAN C. J.

Chandrika Prasad and another — Defendants — Appellants v. *Mohd. Amir Ahmad Khan — Plaintiff — Respondent.*

Second Appeal No. 355 of 1946, Decided on 20-1-1947, against decree of Dist. Judge, Sitapur, D/-5-7-1946.

Landlord and tenant—Tenant's right to put up structure on sahan darwaza in Oudh village.

A tenant residing in a village in Oudh, who has been in possession of the land lying in front of his house as his *sahan darwaza* has no right, according to custom, to put up any structure thereon without the express permission of the landlord. The fact that the tenant

wants to secure privacy for the court-yard does not absolve him from obtaining the necessary permission: 13 A. I. R. 1926 Oudh 393 and 14 A. I. R. 1927 Oudh 37, *Rel. on*; 24 A.I.R. 1937 Oudh 449; 1938 O.W.N. 285; 29 A. I. R. 1942 Oudh 306 and 34 A.I.R. 1947 Oudh 131, *Ref.* [Para 3]

Cases referred :—

1. ('26) 3 O. W. N. 475 : 13 A. I. R. 1926 Oudh 393 : 1 Luck. 469 : 94 I. C. 1034, Hulas v. Barakatunnisa Begam.
2. ('26) 3 O. W. N. 937 : 14 A. I. R. 1927 Oudh 37: 98 I. C. 1044, Raj Krishna v. Saheb Baksh Singh.
3. ('37) 1937 O. W. N. 764 : 24 A.I.R. 1937 Oudh 449: 13 Luck. 442 : 170 I. C. 518, Chandi Prasad v. Shyam Behari.
4. ('38) 1938 O. W. N. 285, Hanuman Pershad v. Indra Bikram Singh.
5. ('42) 1942 O. W. N. 113 : 29 A. I. R. 1942 Oudh 306 : 17 Luck. 610 : 199 I. C. 12, Birendra Bikram Singh v. Hanuman Prasad.
6. ('46) 1946 O.W.N. 364 : 34 A. I. R. 1947 Oudh 131: 22 Luck. 79 : 228 I. C. 382, Mahadeo Prasad v. Madho.

S. C. Dass and J. Chandra — for Appellants.

Ghulam Imam — for Respondent.

Judgment.—This second appeal arises out of the decree passed by the Courts below against the appellants. The respondent, who is the taluqdar of the Mahmudabad estate, sued the appellants, husband and wife, for demolition of a new wall they had constructed in the open space in front of their house in Sheikhupur, a hamlet of Bilauli Bazar, pargana Mahmudabad. The defence was that the land was the joint *sahan* of the defendants and one Bisheshwar, not a party to the suit.

[2] The trial Court held that the land on which the wall had been raised was not the *sahan darwaza* of the defendants and decreed the suit. The learned District Judge differed from this finding and held that it was the joint *sahan darwaza* of the defendants and Bisheshwar. He, however, took the view that it was not their exclusive door yard (*sahan darwaza*). It is difficult to understand the significance of this finding. The map prepared by the commissioner shows that the defendants' house is to the south and the land which was used as *sahan darwaza* by them is to the north. To the west of this land is the house of Bisheshwar. It is obvious from a look at the map and the land lying to the east of Bisheshwar's house and to the north of the defendants' house was used jointly by the owners of the two houses as their *sahan darwaza*. The other finding at which the learned Judge arrived is that the construction of the wall 5 feet high does not conduce to the better enjoyment of *sahan darwaza*, and consequently the defendants were not entitled to construct this wall without the permission of the zamindar. Reliance was placed on Ex. 2 by the defendants as showing that having accepted Rs. 10 as damages, the plaintiff was estopped from suing for the demolition of the wall. The learned Judge held that it was merely a fine in the nature of illegal exaction for constructing the wall without the permission of the zamindar but it did not amount to a condonation of the unauthorised act and created no estoppel.

[3] In appeal it has been contended before me that the wall was necessary for the better enjoyment of the *sahan darwaza* in that it secured privacy to the inmates of the house as against Bisheshwar's house. The map shows that there is a thatched *chabutra* to the north of the defendants' house and in front of this is the *sahan darwaza*. From the point at which the *chabutra* ends the wall from south to north is 31 feet 5 inches long, 1 foot 2 inches wide and 5 feet high. On the west of this wall is a drain running across the wall. The distance between Bisheshwar's house and this wall at the southern point is reduced to 4 feet and 3 inches while at the northern point it is 7 feet 5 inches. This has probably given cause for dissatisfaction to Bisheshwar who, according to the defendants, is the cause for the institution of the present suit. This may or may not be so, but the fact remains that the construction of the wall has left a large portion for use as *sahan darwaza* to the defendants and comparatively very little to Bisheshwar. The fact that the defendants wanted to secure privacy for this courtyard is no ground for holding that they could raise the wall without the permission of the zamindar. In 3 O. W. N. 475,[1] Gokaran Nath Misra J., held that where a tenant has been in possession of land lying in front of his house as his *sahan darwaza* for over 30 years, this long enjoyment gives him a right to retain the land in his possession for being enjoyed as such and the proprietor is to be deemed in proprietary possession but not entitled to eject the tenant by taking actual possession, though the tenant has no right to put up any structure thereon without the express permission of the landlord. At page 481 of the report the learned Judge observed:

"It is one thing for a tenant to remain in enjoyment of the land as open space in front of his house and it is quite a different thing to put up structures on it or *to enclose it by means of walls*. The landlord may not object to his use of the open land situate in the *abadi* of a village, of which he happens to be the proprietor, but that would not give a right to the tenant to put up structures upon that piece of land and the landlord would be legitimately entitled to his remedy if he claimed it by coming to the Court for a relief to the effect that the structures complained of may be demolished."

At the conclusion of the judgment, the learned Judge observed as follows:

"She (the zamindar) will however be deemed to be in proprietary possession of the land and the defendant will have no right to put up *any* structures thereon without the express permission of the plaintiff."

This case was followed by a Bench of which the leaaned Judge was a member in 3 O. W. N. 937.[2]

[4] These cases were not referred to by Bisheshwar Nath Srivastava C. J. in 1937 O. W. N. 764[3] when he held that a *kachcha chabutra* built by a tenant on the land used by him as *sahan darwaza* did not constitute any infringement of the rights of the proprietor and did not give him any cause of action to recover possession of the land. In that case the defendant who had built a *chabutra* also relied on the words of the permission granted by the zamindar and it was held by the learned Chief Judge that the words "*makan waghaira*" might well include the construction of a *chabutra* for the better enjoyment of the *sahan*.

[5] The learned counsel for the appellants referred to a decision of Ziaul Hasan J. in 1938 O. W. N. 285,[4] where the learned Judge allowed a verandah built by a tenant without permission of the zamindar to stand on condition of paying compensation and did not order demolition as a matter of equity. This decision was, however, reversed in appeal: *vide* 1942 O. W. N. 113.[5]

[6] Reliance has been placed on a decision of Kidwai J., reported in 1946 O. W. N. 364.[6] There the suit was brought by the plaintiffs for demolition of the constructions made by the defendants on their (plaintiffs') *sahan darwaza*. The learned Judge relying on a number of cases, including the decision of Gokaran Nath Misra J., held that the plaintiffs were entitled to the relief. In the course of the judgment the learned Judge observed that a tenant may be in possession of land greatly in excess of his requirements or for enjoyment of his house, but that does not mean that he can raise any structure upon the land. As was rightly pointed out by the learned Judge, the question is not whether he has a large or small piece of land in his possession but the question is whether he has been in the enjoyment of the land, large or small, for 12 years. This case, therefore, does not help the appellants.

[7] Lastly it was urged that EX. 2, the inspection note prepared by the manager of the estate, amounted to a condonation of the defendants' act. I cannot agree. I have examined the contents of the note and find that RS. 10 were realised as a sort of fine for building the wall without permission, but there is nothing whatever to suggest that the manager acquiesced in the construction upon payment of that amount. Indeed this very note shows that Chandrika Prasad had apologised for his mistake and had undertaken to have the wall demolished. This note further shows that Bisheshwar who had built a room without permission paid a heavier amount and was allowed to retain the room. I quite agree with the Courts below in holding that EX. 2 creates no estoppel.

[8] The result is that the appeal fails and is dismissed with costs.

[9] As the appeal has been dismissed, stay order dated 15-11-1946, passed on civil miscellaneous application NO. 713 of 1946, is hereby vacated.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 30 *[C. N. 13.]*

KIDWAI J.

Ram Narain and others — *Plaintiffs* — *Appellants* v. *J. W. Peters* — *Defendant* — *Respondent.*

Second Appeal No. 263 of 1947, Decided on 7-5-1947, from decree of Addl. Civil Judge, Lucknow, D/- 8-1-1947.

Defence of India Rules (1939), R. 81 (2) (c) (ii)— Rules under framed by District Magistrate, Lucknow, Rr. 6 and 7— Scope and effect.

Rule- 6 and 7, unlike S. 3, U. P. (Temporary) Control of Rent and Eviction Act, 1947, do not prohibit the institution of a suit for ejectment but only prohibit the actual ejectment. In other words, a decree may be passed in a suit for ejectment but at the time the decree-holder seeks to execute his decree the Court will consider the provisions of these rules and will not evict if the conditions laid down in them are fulfilled: 1944 O. W. N. (H. C.) 272, *Foll.* [Para 3]

Case referred:—

1. ('44) 1944 O. W. N. (H. C.) 272, Makhan Lal v. Shankaral.

Hyder Husain and *Govind Behari Lal*— for Appellants.

N. Banerji— for Respondent.

Judgment.—The appellants are the owners of a house situated on Capper Road, Lucknow, of which the respondent is in possession as a tenant paying a monthly rent of Rs. 69/-. The rent of the house for the period beginning with 1st September 1945 and ending with 31-3-1946, was in arrears. Consequently, on the 23-4-1946, the appellants issued a notice on the respondent under section 111, clause (h), T. P. Act, determining the lease and asking the respondent to vacate the house by 31-5-1946 (*vide* EX. 1). Thereafter they instituted a suit for the arrears of rent due, in the Court of Small Causes at Lucknow, on 26-4-1946, and their suit was decreed on 17-5-1946. The decree allowed monthly instalment of Rs. 69/-, the first instalment falling due on 17-6-1946.

[2] The plaintiff instituted the suit out of which the present appeal arises on 1st June 1946, for possession of the house by ejectment of the defendant. The defendant pleaded that the arrears had merged in the decree of the Small Cause Court and that consequently, he was not in arrears with regard to the rent at the date of the suit. He, therefore, pleaded that the suit should not have been instituted without the per-

mission of the District Magistrate as provided for in the rules made under the Defence of India Act. The Munsif, South Lucknow, overruled this plea and decreed the suit. The defendant went up in appeal and the learned Additional Civil Judge of Lucknow accepted his plea in the appeal and set aside the decree of the Munsif.

[3] The plaintiffs have now come up in second appeal and two points are raised on their behalf: Firstly, that the question of permission of the District Magistrate does not arise at this stage, and, secondly, that the opinion of the lower appellate Court that arrears of rent in respect of which a decree had been passed ceased to be arrears is not justified in law. The rules upon which the respondent relies for his contention that no suit can be brought for eviction unless there are arrears due for more than fifteen days at the date of the institution of the suit are rules 6 and 7 made by the Deputy Commissioner of Lucknow on 24-4-1944. These rules unlike S. 3, U. P. Temporary Control of Rent and Eviction Act, 1947, do not prohibit the institution of a suit for ejectment but only prohibit the actual ejectment. This has been held by the Allahabad High Court in 1944 O. W. N. 272[1] to mean that a decree may be passed in a suit for ejectment but that at the time that the decree-holder seeks to execute the decree the Court will consider the provisions of these rules and will not evict if the conditions laid down in them are fulfilled. I see no reason to doubt the correctness of this view and, following the decision in that case, I have come to the conclusion that the learned Additional Civil Judge has erred in not decreeing the suit for ejectment. His judgment must, therefore, be set aside

[4] In this view of the law it is not necessary for me to consider whether an arrear which has merged in a decree still remains an arrear or not. That is a question which the Court executing the decree for ejectment will, no doubt, consider if it is called upon to do so Moreover, a new law, viz., The United Provinces (Temporary) Control of Rent and Eviction Act, 1947, has been passed dealing with such matters and the Court executing the decree will also have to consider the provisions of this Act.

[5] I, therefore, allow the appeal, set aside the decree of the lower appellate Court and decree the suit of the plaintiffs for ejectment. The appellants will get their costs throughout.

K.S. *Appeal allowed.*

A. I. R (35) 1948 Oudh 31 *[C. N. 14.]*

MADELEY AND WALFORD JJ.

Raghavendra Pratap Singh and others—*Defendants 3 to 5*—*Appellants* v. *Ram Lal Das and others*—*Plaintiffs, Defendants 1 and 2*—*Respondents.*

First Appeal No. 11 of 1941, Decided on 8-11-1946, from order of Addl. Civil Judge, Gonda, D/- 21-12-40.

(a) Civil P. C. (1908), S. 92—Proper parties—Constructive trustees of trust properties.

Where a person who had no title to the property of an Asthan coerced the two mahants who had entered a contest for the succession to the *gaddi* and succeeded in getting them to transfer the trust property and dedicate it to two of his private temples and had himself appointed trustee of the property so transferred:

Held that he and his successors were clearly constructive trustees of the property which belonged to the Asthan and were proper parties to a suit under S. 92 in respect of the Asthan. 22 A.I.R. 1935 Cal. 805, *Approved;* 15 A.I.R. 1928 P.C. 16, *Disting.*; 19 A.I.R. 1932 Rang. 132, *Dissent.*; *Case law referred.* [Para 21]

Annotation :—('44-Com.) C P. C., S. 92. N. 28, Pt 10.

(b) Civil P. C. (1908), S. 92—Suit under—Proper reliefs—Declaratory relief against third party.

No doubt a declaratory relief simpliciter against a third party cannot properly be granted in a suit under S. 92, but there may be cases in which some of the reliefs properly claimed may be implicit and inevitable. For example, a Court framing a scheme for management of the trust property cannot properly do so without first determining what is or is not the trust property to be administered. Consequently declaratory relief to that extent is implicit in such an enquiry. [Para 23]

Annotation :—('44-Com.) C. P. C., S. 92, N. 12.

Cases referred :—

1. ('32) 10 Rang. 342: 19 A. I. R. 1932 Rang. 132: 140 I.C. 317, Johnson D. Po Min v. U Ogh.
2. ('28) 55 I.A 96: 15 A.I.R. 1928 P.C. 16: 55 Cal. 519: 108 I. C. 361 (P.C.), Abdur Rahim v. Abu Mahomed Barkat Ali
3. ('25) 47 All. 867: 12 A.I.R. 1925 All. 759: 89 I.C. 639, Lachman Prasad v. Munia.
4. ('21) 19 A L.J. 236: 8 A.I.R 1921 All. 116: 62 I.C. 744, Muhammad Baksh v. Mt. Piari.
5. ('14) 41 Cal 749: 1 A.I.R. 1914 Cal. 356: 22 I.C. 677, Ayatunnesa Bibi v. Kulperkhalifa.
6. ('11 33 All. 660: 11 I.C. 36, Dasondhay v. Mohammad Abu Najar.
7. ('11) 35 Bom 470: 12 I.C. 30, Collector of Poona v. Bai Chanchalbai.
8. ('35) 39 C.N.W. 1103: 22 A.I.R. 1935 Cal. 805 : 159 I.C. 893, Abdul Majid v. Akhtar Nabi.
9. ('36) 23 A .I. R. 1936 Mad 449: 164 I. C. 615, Anjaneya Sastri v. Kothandapani Chettiar.

M. Wasim, H.D. Srivastava and Shafiqur Rahman —for Appellants.

S. C. Dass and H K. Ghose—for Respondents 1 to 3 and 1 and 2, respectively.

Judgment. – This appeal arises out of a suit under S. 92, Civil P. C. It was instituted by Ram Lal Dass and Radhika Dass, Bairagis, against Mahant Moti Dass, Shyam Raj Dass and Raja Ambika Prasad Narain Singh of Mankapur. The said Raja died during the pendency of the suit and his legal representative Raja Raghvendra Pratap Singh was substituted in his place.

[2] The plaintiffs based their suit upon the allegation that defendants 1 and 2 were the managing mahants and had mismanaged the trust and that defendant 3, the Raja of Mankapur was impleaded because he was in wrongful possession of two villages, namely, Baikunthpur and Kaharjot,which according to the plaintiffs are property dedicated to the Asthan the subject-matter of the suit. The Raja of Mankapur in para. 27 of his written statement, pleaded than the villages Baikunthpur and Kaharjot are it possession of Sri Radha Krishna and Ram Janki of Ajodhya and Mankapur temples, who were necessary parties to the suit and that he himself was only a *sarbarakar* on behalf of the said temples and had nothing to do with the property. Consequent upon this pleading defendants 4 and 5 were brought on the record as defendants, who are now appellants 2 and 3. The plaintiff sought the following reliefs: (1) That defendants 1 and 2 the existing mahants be removed from the office of mahant and the plaintiffs or any of them be appointed in their place. (2) That all the trust properties mentioned in list A attached to the plaint be vested in the new mahant and the defendants be directed to make over their possession to him. (3) That a scheme be drawn up and settled for the due management of the entire trust properties mentioned in list "A" attached to the plaint including villages Baikunthpur and Kahariot as appertaining to Asthan Madhsagar and Govardhan situate in Gonda City and also for the due performance of the worship and other religious ceremonies connected with the temple mentioned above. On the pleadings of the parties the learned Additional Civil Judge, Gonda, who tried the case, framed the following issues: (1) "Are ths villages, Baikunthpur and Kaharjot dedicated to Asthan Madhsagar, Gonda, and is the compromise (Ex. 5) for that reason invalid? (2) Have defendants 1 and 2 mismanaged the dedicated property and made defalcations as alleged? (3) Can the suit for recovery of possession of village Baikunthpur and Kaharjot as brought against defendants 3 to 5 be joined in this suit which is primarily against defendants 1 and 2 under S. 92, Civil P. C.? (4) Does the sanction of the Advocate-General as obtained by the plaintiffs, entitle them to sue defendants 4 and 5? (5) Is the suit for recovery of possession of village Baikunthpur and Kaharjot barred by time? (6) To what relif, if any, are the plaintiffs entitled, and against which defendants. and which party?"

[3] With regard to issue No. 2, defendants 1 and 2, who were affected by it, put up no contest. Defendant 2 disclaimed all interest in the management of the Asthan and defendant 1 agreed that the new scheme of management be drawn up under S. 92, Civil P. C. The main contest in the suit was confined to the subject-matter of issues 1 and 3.

[4] Before we deal with the controversy raised, it is necessary to state briefly the facts in the case. The subject-matter of the trust relates to a temple known as Asthan Madhsagar Govardhan. Admittedly this is a very old temple and the Asthan possesses considerable property which is managed by the presiding Mahant of the Asthan. It is established that village Baikunthpur was conveyed by Thakurain Gajraj Kuer, wife of Bhaiya Chandrika Bakhs Singh, by two *shankalapnamas*, EX. 8 and EX. 9, and has ever since been in the possession of the Mahants of the Asthan till shortly after the death of Mahant Priya Dass. A reference to the pedigree on page 38 of PART III of the Paper-Book shows that Thakurain Gajraj Kuer's husband, Bhaiya Chindrika Baksh Singh, was connected with the Raja of Mankapur by virtue of descent from a common ancestor, namely, Raja Azmat Singh, in other words, he was a distant cousin some three or four degrees removed of Raja Raghuraj Singh of Mankapur. The other property, namely, Kaharjot, had been in possession of the Mahants of the Asthan for over a centuary and a half.

[5] After the death of Thakurain Gajraj Kuer, Raja Raghuraj Singh and his wife Jageshar Kunwar instituted a suit against the then presiding Mahant and others for recovery of the property, subject-matter of the *shankalapnama* on the ground that Thakurain Gajraj Kuer had only a life estate in the property in suit and therefore the transfer thereof after her lifetime was of no effect. This suit was dismissed, *vide* EX. 16, the judgment of the Judicial Commissioner wherein Thakurain Gajraj Kuer, was held to possess proprietary rights. It also appears that at one time Raja Pirthipat Singh one of the ancestors of defendant 3 had also laid claim but unsuccessfully, to village Kaharjot.

[6] On the death of Mahant Priya Dass, the last undisputed Mahant of the Asthan in the suit in the year 1927, a dispute arose between defendant 1 and Mahant Oudh Behari Dass whose *chela* is defendant 2. It is alleged that Oudh Behari Dass had been put up to claim succession to the *gaddi* by Raja Raghuraj Singh, the predecessor-in-interest of defendant 3. In the mutation proceedings which ensued not only the two rival Mahants who claimed succession to the gaddi, asked for mutation in their favour, respectively, but Raja Raghuraj Singh also claimed mutation of villages Baikunthpur and Kaharjot in his name. The claim of Raja Raghuraj Singh was rejected by the mutation Court and his appeal against that order was also rejected by the Commissioner.

[7] It appears that when the appeal between the two rival Mahants came up for hearing before the Commissioner, Fyzabad Division, a compromise was submitted to the learned

Commissioner to which Raja Raghuraj Singh was also a party. The learned Commissioner rejected the compromise because in his opinion the effect of the compromise would have been the transfer of the two villages, namely, Baikunthpur and Kaharjot, to the Raja ; whereupon the parties to that appeal withdrew the appeal and later submitted a compromise in the mutation Court on the basis of which the names of both the Mahants were entered in respect of the property of the Asthan, and villages Baikunthpur and Kaharjot were entered in the name of Raja Raghuraj Singh. It appears that by the petition of compromise, EX. 5, the two properties in dispute were dedicated to defendants 4 and 5, the temples in Mankapur and Fyzabad, respectively, and Raja Raghuraj Singh was constituted the *sarbarakar* of the two temples. It may be mentioned that both these temples are private temples of the Raja of Mankapur. The matters stood thus till the present suit was instituted, and the transfer of the trust property by the two Mahants to Raja of Mankapur is one of the misfeasances alleged in the suit. The learned Judge in the trial Court held that all the property mentioned in the list annexed to the plaint, including villages Baikunthpur and Kaharjot, were trust property and drew up a scheme for future management of the trust property. He further held that in a suit framed under S. 92, Civil P. C., a decree for possession of trust property in the hands of a third person could not be granted.

[8] In the present appeal the learned counsel for the appellant has raised only two contentions. The first is that the property in dispute was not dedicated to Asthan Madhsagar Govardhan but was the private property of the presiding Mahant and consequently the successors of the Mahant Priya Dass were within their right to transfer the property to anyone whom they liked and therefore the compromise whereby these properties had been transferred was valid. The second contention is that in a suit under S. 92, Civil P. C., strangers to the trust were not necessary or proper parties, nor can any relief in the nature of declaration or possession can be granted in such a suit. These two contentions are therefore to be examined with reference to the evidence on the record.

[9] The answer to the first contention depends upon the interpretation of the two *shankalapnamas*, EX. 8 and EX. 9. By EX. 8, Thakurain Gajraj Kuer purported to transfer 75 bighas and 18 biswas of land in village Baikunthpur to "Baba Baldeo Dass, Chela of Mahant Ranchhor Dass, caste Faqir Bairagi occuption poojapat, resident of Asthan Modhsagar, situate in Gonda City, for the purposes of meeting the expenses of worship of Sri Gobardhan Nathji." This *shankalapnama* EX. 8, was executed on 22-2-1888, and registered. Later Thakurain Gajraj Kuer executed the *shankalapnama*, EX. 9, on 16-9-1890 and registered it, whereby she transferred the entire village Baikunthpur to "Mahant Baldeo Dass aforesaid for *bhog* of Sri Thakurji Gobardhan Nath Asthan Madhsagar." In both these deeds after declaring the purpose for which the transfers were being made the following words occur :

"and put the said Mahant in proprietary possession like myself from today the date of the execution of the said deed and shall get the mutation effected after the completion of the registration. If there be any objection on my part then Babu Mahant Baldeo Dass shall be authorised to get mutation effected in his name by a competent Court and having entered into possession and occupation of the entire said muafi with the exception of the land which has been exempted may always remain in possession and occupation as muafidar till the lifetime of me the executant and may appropriate all the collections and after the death of me the declarant executant whatever arrangement in respect of the muafi land be made by the Government (by way of assessment) he should pay it and bring the collections in his use. The said Mahant has now obtained proprietary right and became responsible for the entire loss and profits."

[10] It must be explained that the words "with the exception of the land which has been exempted" refer to the entire property exempted from Government revenue. It appears that the settlement Court had declared the village to be free from revenue during the lifetime of Thakurain Raghuraj Kuar.

[11] It is strenuously contended by the learned counsel for the appellant that notwithstanding the declaration of the purpose for which the transfer was being made, namely, in EX. 8, "for the purposes of meeting the expenses of worship of Sri Gobardhan Nathji" and in EX. 9 "for bhog of Sri Thakurji Gobardhan Nath Asthan Madhsagar" both these deeds purport to convey full proprietary rights personally to the Mahant, and therefore the property in suit cannot be held to be dedicated to the Asthan. It is argued that as Mahant Baldeo Dass's occupation in life was the worship and service of the temple the lady thought that the income from the property would be devoted to the temple; and she did not intend to dedicate the property to the Asthan but intended that the Mahant should use it as his own in any manner he pleased.

[12] We find ourselves unable to accept this contention. If the intention of the lady had been as interpreted by the learned counsel for the appellant, she would never have used the words in EX. 8, "for the purposes of meeting the expen-

ses of worship of Sri Gobardhan Nathji" or in Ex. 9, "for bhog of Sri Thakurji Gobardhan Nath Asthan Madhsagar." Upon a reasonable construction of these two documents we are of the opinion that she clearly intended to dedicate the property to the Asthan and as the management of such property had to be carried on through some human agency she used the words that she was conferring proprietary rights upon the Mahant. We are clearly of the opinion that notwithstanding the words of limitation upon which the learned counsel for the appellant has laid so much stress the lady intended to create a trust in favour of the Asthan. In Ex. 8, the words "in time of need he may make a transfer of it to another person" would never have been inserted if the lady had not intended to create a trust. We are in complete agreement with the finding of the Court below and hold that village Baikunthpur was trust property.

[13] With regard to village Kaharjot, the contention of the learned counsel for the appellant is even less plausible. There is no dispute that this property had been held by the Mahants of Asthan Madhsagar Gobardhan for over a century and a half. Exhibit 17 is a copy of the plaint filed by Mahant Ranchhor Dass in the settlement Court in 1871. The parties to that suit were Ranchhor Dass versus Raja Pirthipat Singh of Mankapur and his wife. Mahant Ranchhor Dass, in that suit, claimed the property in village Kaharjot on the allegation that it had been given by Nawab Shujauddaula as *muafi* for the expenses of the Thakurdwara. Exhibit 18 is the statement of Mahant Ranchhor Dass in that suit; its translation in the Paper Book is somewhat confusing. We, therefore, propose to retranslate it in this judgment. It is as follows:

"My name is Ranchhor Dass Bairagi, Guru's name Narain Dass, caste Bairagi, resident of Gonda proper, aged 40 years. I state that the above named property had been held in an enquiry in 1859 to be revenue free during my lifetime and that it is a gift by Nawab Shujauddaula Bahadur for the expenses of Thakurdwara situate in Gonda, which is subject matter of a *shankalap* and is a *muafi*, and up till today my predecessors-in-interest and I have been in possession of this property without payment of rent. Now that permanent settlement is taking place I pray that my name should be entered in the papers as a proprietor and that after my death, whatever revenue is assessed, my successors will pay from the income of the property and after payment of such Government dues they will continue to utilize or spend the remaining profits on the Thakurdwara."

The settlement Court accepted the claim of Mahant Ranchhor Dass and passed a decree in his favour. The judgment, Ex. 2, of the settlement Court shows that that decree was passed on the statement of Ranchhor Dass, which is virtually embodied in the judgment.

[14] The learned counsel for the appellant has argued that it is impossible that Nawab Shujauddaula, who was a Muhammadan ruler, would dedicate any property to a Hindu deity; it must, therefore, have been a personal gift to the Mahant of the Asthan and as much it was the property of the Mahants and not the subject-matter of the trust. We do not find ourselves impressed by this argument. Whatever may have been the nature of the gift by Nawab Shujauddaula it is beyond any doubt that the gifted property was, from the outset, regarded as trust property dedicated to the Asthan by all the succeeding Mahants. Were it not so, Mahant Ranchhor Dass would not have made the statement to which reference has already been made. But even if the argument, that a Mohammadan ruler in the 18th century would not have dedicated property to a Hindu deity, because such an act is repugnant to Islamic concepts, be accepted it does not, in our opinion, affect its present character. The property was admittedly given by Nawab Shujauddaula to the original donee for charitable purposes, who could and in fact did dedicate it to the temple. This is evidenced by the fact that every succeeding Mahant had dealt with it as a trust property and there is not the slightest suggestion that at any time any of the Mahants had used it in a manner inconsistent with it being a trust property. This being so, the strongest possible presumption arises that the property in question was dedicated to the Asthan. But assuming, however, that the property in dispute until the time of Mahant Ranchhor Dass though treated as trust property, was in fact the private property of the Mahants, we are of the opinion that the statement and declaration in the Settlement Court by Ranchhor Dass in 1871 on the basis of which he obtained a decree constituted a trust and dedication to the Asthan; and all his successors were bound to hold it as such. It may be noted that the defendants 1 and 2 admitted in the trial Court that both the properties which they allowed to go out of their possession by compromise are dedicated to the Asthan Madhsagar Govardhan. For the reasons given above we are of the opinion that the property in village Kaharjot was the property of the Asthan at the time when the dispute arose on the death of Mahant Priya Dass.

[15] With regard to the second contention relating to the misjoinder of parties and the relief sought, the learned counsel for the appellant has mainly relied on two rulings. One of them is reported in 10 Rang. 342[1] wherein it was held that:

"The scope and effect of S. 92, Civil P. C., is to provide means for obtaining the directions of the Court in connection with matters relating to the administration of

public trusts, and for exposing the malpractices of defaulting or fraudulent trustees. Issues relating to the rights of third parties are outside its scope, and the plaintiffs in a suit framed under S. 92 are not entitled to claim against strangers to the trust either a declaration of title or possession or any other relief. Such persons are not necessary or proper parties to a suit framed under this section."

The other case upon which great reliance is placed by the learned counsel for the appellant is reported in 55 I. A. 96.[2]

[16] The ruling of the Rangoon High Court undoubtedly supports the contention of the learned counsel for the appellant, but the ruling of their Lordships of the Privy Council reported in 55 I. A. 96,[2] in our opinion, does not decide the point at issue. The facts in the latter case were that in the year 1910 a suit was filed in the Court of the District Judge of the 24 Parganas with the sanction of the Advocate-General under S. 92, Civil P. C., by some Mohammadan plaintiffs against one Rukia Bibi as defendant on the allegation that Rukia Bibi was *mutwalli* of certain properties which had been dedicated to a mosque, and prayed for her removal and for settlement of a scheme for the management of the said properties. The plaint in that suit was subsequently amended by the addition of all the heirs of Mohammad Jan who, it is said, had made a *wakf* of the properties in suit, and a further prayer for declaration that the property in suit was wakf property and not the property in suit of the defendants. No sanction of the Advocate-General was obtained for these amendments. Some time later a petition of compromise was filed in the suit on behalf of six out of the seven plaintiffs the effect of which was that the mosque and some portion of the property was to be held *wakf* and the remaining property in suit was allowed to be retained by some of the heirs of Mohammad Jan, the original *wakif*. The rest of the petition dealt with the admission of new *mutwallis* and future succession of *mutwallis*. In the year 1918 some five Mohammadans of the neighbourhood again agitated the matter by filing a suit for declaration that the property, subject matter of the suit of 1910, was *wakf* property and the defendants be restrained from obtaining possession either directly or from realizing rents of the said lands. The defence in the suit was (1) that the lands in suit were not *wakf*; (2) that the suit was not maintainable by virtue of S. 92, sub-s. (1), as no sanction of the Advocate-General had been obtained and the suit was not instituted in the District Judge's Court, and (3) that the plaintiffs were barred by the rule of res judicata in view of the suit filed in the year 1910.

[17] Their Lordships of the Privy Council, as indicated in the head-note, held that:

"A suit for a declaration that property belongs to a *wakf* can be maintained by Mohamedans interested in the wakf without the sanction of the Advocate-General. Section 92, Civil P. C., 1908, makes the sanction of the Advocate-General necessary only in the case of a suit claiming any of the reliefs specified in sub-s. (1) under heads (a) to (g). Upon general principles of construction the words as to "further and other relief" in head (h) are used in connection with the specified heads (a) to (g), not in connection with the words "in the case of any alleged breach, etc.," at the beginning of the sub-section. Further, the contrary construction would cut down substantive rights which existed before the enactment of 1908, and a Code regulating procedure should not be construed as having that effect in the absence of express words.

Where in a suit, brought with the sanction of the Advocate-General, to remove the mutwalli of a wakf, there has been added (without sanction) a claim to a declaration that certain property belongs to the wakf and not to strangers to the trust then added as defendants, a compromise decree declaring that part of the property is wakf does not bar by res judicata a subsequent suit by persons not parties to the former suit for a declaration that the whole property is wakf; the additional relief prayed not being within S. 92, the suit ceases to that extent to be one of a representative character, and S. 11, Explanation 6, of the Code does not apply."

[18] From the foregoing it is clear that the issues involved in the case had no resemblance to the issues raised in the present case, nor do we understand from the judgment of their Lordships of the Privy Council that where a person is in possession of trust property, which he does not claim to have come by bona fide and for valuable consideration without notice of the trust he cannot be made a party to the suit. We are therefore of the opinion that the case reported in 55 I. A. 96[2] does not help the appellants' case. It is true that there has been considerable divergence of views among the various High Courts in India on the question whether a third party, not in any way connected with the trust, can be properly made a party in a suit framed under S. 92, Civil P. C., but in our view the rulings supporting the law propounded by the learned counsel for the appellants are based on the facts in those particular cases. There are several recent authorities which have expressed the contrary view and which may now be examined.

[19] In 47 ALL. 867[3] a Divisional Bench consisting of Sulaiman and Daniels JJ. have held that:

"Where in a suit instituted according to the provisions of S. 92, Civil P. C., it is found that the persons named as defendants are mere trespassers having no claim to be considered as trustees of any sort, it is still the duty of the Court to go on with the suit, and if it finds that the property in suit is trust property it can appoint new trustees; but it cannot, in a suit under S. 92 of the Code, pass a decree for the ejectment of the defendants as trespassers."

The learned Judges of the Allahabad High Court in arriving at this decision referred to several rulings: 19 A. L. J. 236,[4] 41 Cal. 749[5], 33 ALL. 660[6] and 35 Bom 470.[7]

[20] In 39 C. W. N. 1103 : A. I. R. 1935 Cal. 805[8] a Divisional Bench of the Calcutta High Court consisting of D. N. Mitter and Rau JJ. held that:

"In a suit under S. 92 it is competent for the Court to decide the question as to whether the trust in respect of which the suit is brought is a public charitable trust or not so as to attract the application of S. 92 and a separate suit for the declaration that the property is a trust property is not necessary."

and their Lordships further held that:

"Though a stranger to a trust is not a necessary nor a proper party to a suit under S. 92, where the stranger receives money or property from the trustee which he knows to be part of the trust estate and to be paid and handed to him in breach of the trust, he is a constructive trustee of the trust property for the persons equitably entitled and therefore relief against him can be claimed in a suit under S. 92."

[21] To our mind this decision is applicable to the present case. Raja Raghuraj Singh had not a shadow of title to the villages he claimed. His application for mutation had been rejected and later by coercing the two Mahants, who had entered a contest for the succession to the *gaddi*, he succeeded in getting them to transfer the trust property and dedicate it to two of his own private temples and had himself appointed a trustee of the property so transferred. In our opinion Raja Raghuraj Singh and his successors were clearly constructive trustees of the property which belonged to the Asthan Madhsagar Govardhan and he and defendants 4 and 5 were proper parties to the present suit. It may be mentioned that the learned Judges of the Calcutta High Court inter alia considered the case in 55 I. A. 96[2] and were of the opinion that the decision of their Lordships did not cover the point at issue and was therefore no authority for the proposition propounded.

[22] The next case to be considered is reported in A. I. R. 1936 Mad. 449.[9] This was a decision of a Divisional Bench of the Madras High Court consisting of Varadachariar and Stoddart JJ. The learned Judges held that:

"A distinction ought to be drawn between a case when an absolute stranger in possession of property alleged to belong to the trust either denies the trust or pleads adverse possession against the trust and one in which a person who has come into possession of the alleged trust property through or in the right of the settlor or of a trustee, denies the existence of the trust or the title of the trust to the property in his possession; it is not right to assimilate the position of the latter to that of a trespasser. The mere fact of a trustee de jure or de facto denying the existence of the trust or the title of the trust to the property in his possession does not oust the jurisdiction of the Court under S. 92, Civil P. C."

In this case too 55 I. A. 96[2] was considered and distinguished.

[23] In view of the authorities noticed above we are constrained with due respect to dissent from the law as laid down in 10 Rang. 342.[1] In our opinion the principle enunciated in that case is too narrow and cannot be said to be of general application. Each case must be decided on its own facts and a ruling given on the basis of different sets of facts and circumstances cannot always be held to be applicable to all cases. In a case like the present the impleading of defendants 3 to 5 cannot be said to be improper so as to render the suit bad for misjoinder of parties. With regard to the contention that no relief of declaration could be granted in a suit under S. 92, Civil P. C., it may be conceded that declaratory relief simpliciter in such a suit against a third party cannot be properly granted, but there may be cases in which some of the reliefs properly claimed, declaration as to nature of the property may be imlpicit and inevitable. For example, a Court framing a scheme for management of the trust property cannot properly do so without first determining what is or is not the trust property to be administered; consequently declaratory relief to that extent is implicit in such an enquiry. This is what has happened in the present case and we do not think that the learned Judge in the trial Court has intended to go any further.

[24] We are of the opinion that the decision of the learned Additional Civil Judge in the Court below is correct, and we accordingly dismiss the appeal with costs.

[25] The respondents have preferred cross-objections against the order of the Court below not granting costs against the defendants. The reason upon which the learned Judge in the trial Court refused to grant costs against defendants 1 and 2 was that they had not entered any contest and had admitted the plaintiffs' claim and with regard to defendants 3 to 5 the learned Judge was of the opinion that in the circumstances of the case it will be fair to order that the parties will bear their own costs. We have heard the learned counsel for the cross-objectors and we are of the opinion that the view taken by the Court below is not such as to warrant an interference by us. The cross-objections are dismissed without costs.

N.S.D. *Appeal and cross-objections dismissed.*

A. I. R. (35) 1948 Oudh 36 *[C. N. 15.]*

GHULAM HASAN C. J. AND KAUL J.

Mirza Mohammad Taqi Khan—*Plaintiff*—*Appellant* v. *Mohammad Shafi*—*Respondent.*

Second Rent Appeal Nos. 18 and 19 of 1941, Decided on 16-1-1947, from order of Dist. Judge, Lucknow, D/- 20-2-1941.

(a) U. P. Tenancy Act (17 of 1939), S. 227 and Sch. 4, Entry 12—Suit under S. 227—Cause of

action arising under old Oudh Rent Act—Period of limitation applicable.

No one has a vested interest in the procedural law. The law of limitation applicable to any particular suit or proceeding is the law which is in force on the day on which such suit or proceeding is instituted notwithstanding that the cause of action may have arisen before such Act came into force. [Para 3]

Where a suit is brought under S. 227 of U. P. Tenancy Act for recovery of arrears of revenue, the suit will be governed by the specific period of limitation provided for such suit by that Act. It is not open to the plaintiff to avail himself of the period of limitation provided by the old Oudh Rent Act even if the cause of action has arisen under the old Oudh Rent Act. [Para 8]

Annotation:—('42-Com.) Lim. Act, Preamble, Note 15.

(b)Interpretation of Statutes—Retrospective effect.

Even an enactment relating to procedure will not operate retrospectively so as to destroy vested rights, whether substantive or remedial. [Para 7]

Annotation —('42-Com.) Lim. Act, Preamble, N. 15.

(c) U. P. Stay of Proceedings (Revenue Courts) Act (4 of 1937), S. 3—Applicability—Suit under S. 108 (18), Oudh Rent Act.

A suit under S. 108 (18), Oudh Rent Act, does not belong to any of the classes specified in the Schedule of the U. P. Stay of Proceedings (Revenue Courts) Act and in such a suit the plaintiff cannot rely on the provisions of that Act. [Para 9]

Cases referred:—

1. ('21) 45 Bom. 365: 8 A. I. R. 1921 Bom. 40: 59 I. C. 790, Gopal Das Ganpat Das v. Tribhowan.
2. ('28) 50 All. 865: 15 A. I. R. 1928 All. 708: 110 I. C. 719, Baijnath v. Dulari Hajjam.
3. ('29) 56 Cal. 1117: 17 A. I. R. 1930 Cal. 34: 122 I. C. 201, Mahomed Saleh v. Chandra Kumar.
4. ('40) 67 I. A. 251: 27 A. I. R. 1940 P. C. 116: I.L.R. (1940) Kar P. C. 251: I. L. R. (1940) Lah. 493: 189 I. C. 1 (P. C.), Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar.
5. ('13) 40 I. A. 74. 35 All. 227: 19 I. C. 291 (P. C.), Soni Ram v. Kanhaiya Lal.

Akhtar Hussain and S. M. Rafi—for Appellant.
H. D. Srivastava—for Respondent.

Judgment.—These two rent appeals arise out of two suits brought by the plaintiff Mirza Mohammad Taqi Khan against Mohammad Shafi for recovery of the arrears of revenue in respect of villages Jalalpur and Deopur in the district of Lucknow for the years 1344 to 1347F. under S. 227, U. P. Tenancy Act. The only question which arises for consideration in these appeals is whether the claim in respect of the arrears for 1944F. was within time on the date of the suits. Both the Courts below have found against the plaintiff, hence these appeals.

[2] The two suits were instituted on 24-6-1940. It is not disputed that the arrears claimed were due. The only question is whether the suits for their recovery were or were not barred by the law of limitation. Section 143, Land Revenue Act, provides that the revenue for any village shall be paid in such instalments to such persons and at such times and places as may be prescribed by rules made under S. 234, and any sum not so paid becomes an arrear of revenue and the persons responsible for it, whether as cosharers or as lambardars, become defaulters. It was admitted that the revenue for these villages was payable in respect of Kharif on 15-11-1936, and for Rabi on 1-5-1937 As already stated, the suits were brought under S. 227, U. P. Tenancy Act. According to entry NO. 12 of the Fourth Schedule of the U. P. Tenancy Act, a suit by a muafidar or assignee of revenue for arrears of revenue due to him as such can be brought within three years from the time when the arrears become due. Thus the claim for arrears due for the Kharif season of 1344F became barred on 16-11-1936, and that for the Rabi season on 2-5-1937.

[3] It was contended, however, that the cause of action having arisen under the Oudh Rent Act, even though the suits were brought under the U. P. Tenancy Act, the period of limitation governing the suits should be that which was available to a plaintiff claiming arrears of revenue under the old Act. Section 132, Oudh Rent Act, provides that a suit for the recovery of an arrear of rent . . . . shall, except in the case mentioned in S. 16, be instituted within three years from the last day of the month of Jeth of the Fasli year in which the arrears fell due. The last day of Jeth of the year 1344F. corresponded to 23-6-1937 and that being a holiday, the suit instituted on the next day, that is 24-6-1937, it was argued, would be within time. It is well settled, however, that no one has a vested interest in the procedural law: *see* 45 Bom. 365[1] at p 375, 50 ALL. 865[2] and 56 Cal. 1117.[3] It has been held in numerous cases that the law of limitation applicable to any particular suit or proceeding is the law which is in force on the day on which such suit or proceeding is instituted notwithstanding that the cause of action may have arisen before such Act came into force. We will, however, content ourselves with referring only to two cases: 67 I. A. 251[4] and 40 I. A. 74[5] at p. 84. Chitaley and Annaji Rao in their Limitation Act, Vol. 1, at p. 136 have discussed the questions which might arise where a particular provision relating to the law of limitation is repealed by another Act. According to them the following positions may arise:

(1) "Where at the time of the new Act, a suit is barred according to the repealed Act;

(2) Where the suit is within time according to the old Act, but the new Act prescribes a shorter term of limitation than the former Act;

(3) Where the suit is within time according to the old Act but barred according to the new Act and a future date is fixed for its coming into operation and

(4) Where the suit is within time according to the old Act but barred by the new Act, and the new Act comes into force at once."

They refer to the provisions of the General Clauses Act under which where an Act is repeal-

ed, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment so repealed; or remedy in respect of any such right, privilege, obligation as aforesaid.

[4] The reference in the work just mentioned is to the General Clauses Act 10 [X] of 1897, but the provisions of the U. P. General Clauses Act do not differ materially from the Central Act in this respect.

[5] It was pointed out that in the first case the right of action which is barred by limitation at the time when the new Act comes into force cannot be revived by the change in the law subsequently. In the second case, the general rule stated above with regard to the law of limitation applies, namely, the new Act applies to the proceeding notwithstanding that the period of limitation is shortened by the new Act. The learned Authors proceed to observe:

"The reason is, as has been seen already, that no one has got a vested right in a period of limitation which is but a rule of procedure. When, therefore, at the time the new Act comes into force there is time even according to the new Act within which the suit can be instituted, the new Act will apply."

[6] In the third case the fact that the Legislature has postponed the operation of the new Act shows that it has provided for all possible hardships and consequently the rule is that the new Act applies from the date of its taking effect.

[7] In the fourth case the result of applying the new Act would be to destroy the right to sue which was vested in the plaintiff on the date the new Act came into force. But even an enactment relating to procedure will not operate retrospectively so as to destroy vested rights, whether substantive or remedial. It follows therefore that a suit in such cases can be filed within the time fixed by the old Act.

[8] It will be noted, however, that in the case before us the plaintiff brought the suit under the U. P. Tenancy Act and not under the Oudh Rent Act. Having done so, it is not open to him to avail himself of the period of limitation provided by the Oudh Rent Act, when there is a specific period provided for such a suit by the new Act. It will further be noticed that the U. P. Tenancy Act was passed by the U. P. Legislative Assembly on 24-4-1939, and by the U. P. Legislative Council on 16-9-1939, with certain amendments which were agreed to by the U. P. Legislative Assembly on 3rd and 4th October 1939. The Act received the assent of the Governor of the United Provinces on 6-12-1939, and was published in the U. P. Government Gazette on 16-12-1939. Section 1 (3) of the Act provides that it shall come into force on such date as the Provincial Government may, by notification in the official Gazette, appoint in this behalf. The date fixed for the coming of the Act into force was 1-1-1940. Thus, it will be seen that it did not come into force at once, and the present case is one falling under the third head referred to above. We are, therefore, clear that the decision of the Courts below on the question of limitation cannot be successfully challenged.

[9] Another argument addressed by Chaudhry Akhtar Husain on behalf of the appellant was that his client should get the benefit of Act 4 [IV] of 1937, U. P. Stay of Proceedings (Revenue Courts) Act. Under S. 3 of the said Act in computing the period of limitation for any suit or application of the classes specified in the schedule appended to the Act, instituted or presented after the expiry of that Act, which might have otherwise been instituted or presented during the period that Act remains in force, the period during which the Act remains in force shall be excluded. If the suit had been brought under the Oudh Rent Act it would have been one under S. 108 (18), a suit by muafidars of assignees of revenue for arrears of revenue. Such a suit does not belong to any of the classes specified in the schedule of that Act. No reliance, therefore, can be placed by the appellant upon the provision of that Act. The result, therefore, is that the appeals fail and are dismissed with costs.

D.S. *Appeals dismissed.*

A. I. R. (35) 1948 Oudh 38 [C. N. 16.]

KIDWAI J.

Krishna Murari and others — *Defendants* — *Appellants* v. *Suraj Bali* — *Plaintiff* — *Respondent.*

Second Rent Appeal No. 93 of 1943, Decided on 24-1-1947, from order of Civil Judge, Pratabgarh, D/- 21-8-1943.

U. P. Tenancy Act (17 [XVII] of 1939), S. 272— Remand by Civil Judge—Appeal.

Under the Tenancy Act no appeal lies against an order of remand passed under O. 41, R. 23 or under S. 151, Civil P. C, by the District Judge or Civil Judge in appeal: 32 A. I. R. 1945 Oudh 58; 31 A. I. R. 1944 Oudh 130 and 32 A. I. R. 1945 Oudh 133, *Rel. on.* [Paras 4, 8]

Cases referred:—

1. ('44) 1944 O.W.N. 189 : 32 A.I. R. 1945 Oudh 58 : 20 Luck. 51 : 215 I.C. 171, Mathura Singh v. Ram Singh.
2. ('45) 1945 O. W. N. 85:32 A. I. R. 1945 Oudh 250 : 222 I. C. 16, Deputy Commr. Rae Bareli v. Ali Nabi.
3. ('44) 1944 O. W. N. 50:31 A. I R. 1944 Oudh 130: 20 Luck. 45:215 I. C. 295, Hari Saran Das v. Rudra Pratap Narain Singh.
4. ('44) 1944 O. W. N. 390: 32 A. I. R. 1945 Oudh 133, Jagdish Singh v. Kateshar Singh.

H. Hussain, Baldeo Sahai and S. N. Srivastava— for Appellants.

K. P. Misra— for Respondent.

Judgment.— There has been a very lengthy litigation between the parties into the details of which it is not now necessary to enter. The suit out of which the present appeal arises was instituted in the revenue Court under S. 183, U. P. Tenancy Act, on the allegation that the plaintiff (respondent) is a statutory tenant of the plot in suit and the defendants had unlawfully dispossessed him from it. The learned Revenue Officer found that the plaintiff's allegations were not established and on 30-9-1942, he dismissed the suit. The plaintiff filed an appeal in the Court of the Commissioner, Fyzabad Division, on 14-11-1942. It is conceded that 27 days had been spent in obtaining a copy of the judgment from which the appeal was filed and that, consequently, the appeal would have been in time had it been filed in the District Judge's Court in the first instance.

[2] In the Court of the Commissioner it was objected that the appeal lay to the District Judge. After hearing arguments on this point, the Commissioner, on 1st February 1943 ordered the memorandum of appeal to be returned for presentation to the proper Court. The plaintiff did not take back the memorandum till 24-2-1943, and he filed it in the District Judge's Court the next day. The memoandum of appeal was not accompanied by any application for extension of time under S. 5, Limitation Act but on 4-8-1943, after the appeal had been fixed for hearing on two dates, an objection was taken that it was barred by time and then an application under S. 5, Limitation Act, accompanied by an affidavit, was filed. The proceedings disclose that the learned Civil Judge heard arguments on the question of limitation and thereafter adjourned the case to 9th August for "reply on limitation". On 9th August it is noted "Heard arguments. Judgment reserved". The judgment was delivered on 21-8-1943, and by it not only the question of limitation but the whole case was decided on the merits. The judgment of the trial Court was set aside and the case was remanded with directions to send particular issues to the civil Court for findings. It is this order which is challenged in appeal.

[3] A preliminary objection has been taken that no appeal lies in view of the law laid down in the U. P. Tenancy Act as interpreted by this Court. I have heard the arguments of the learned counsel for the parties, both on the preliminary point and on the merits, and I have come to the conclusion that no matter what my opinion as to the merits of the appeal might be, the preliminary objection must be sustained.

[4] The order which has been passed by the learned Civil Judge may be considered to be an order either under O. 41, Civil P. C. or under S 151, Civil P. C. In either view no appeal lies to this Court. If the order is considered as one passed under O. 41, R. 23, Civil P. C., though it is difficult to see how the order in appeal can be so considered, then it is only under O. 43, R. 1 (u), Civil P. C., that an appeal lies. In 1944 O. W. N. 189[1] this Court has held that, under the Tenancy Act O. 43, R. 1 (u), Civil P. C. only permits appeals from orders passed by an Assistant Collector of the first class or a Collector and not from orders passed by a District Judge or a Civil Judge. The learned counsel for the appellant doubted the correctness of this decision but it is a decision of a Bench of this Court and, if I may say so with respect, I consider that it was rightly decided. Section 271(2), U.P. Tenancy Act, permits an appeal from an order of the nature mentioned in the clause, passed by an Assistant Collector of the first class or a Collector. The existence of a right of appeal from the kind of orders mentioned in this clause generally is clearly inconsistent with the provisions of the Act, and consequently, by reason of S. 243 of the Act, O. 43, R. 1, Civil P. C. can only be applied to the limited extent laid down in S. 271 (2). The learned counsel then urged that the last sentence of the penultimate paragraph of the judgment distinguished that case from the present case because that sentence says: "We also think that the present order is not covered by the word, 'decree' mentioned in S. 269." It is urged that in the present case the decision of the learned Civil Judge amounts to a decree within the meaning of S. 2, (2), Civil P. C., and that, therefore, an appeal does lie from it under S. 269, Civil P. C.

[5] The sentence quoted from the judgment cannot be detached from the context. It only gives an additional reason for the decision as is made clear by the use of the word, "also" and it should not be taken to mean that if an order of remand amounts to a decree an appeal should lie from it. Immediately before that sentence the learned Judges had distinctly said: "The enactment thus draws a distinction between decrees and orders which are mentioned in Ss. 104, 144 or O. 43, R. 1, Civil P. C." This signifies that, although a decision may technically come within the definition of decree contained in S. 2, cl. (2), Civil P. C., if it is of the nature mentioned in S. 47, S. 104, S. 144, or O. 43, R. 1, Civil. P. C., it must be treated as an order and not as a decree for the purposes of an appeal under the U. P. Tenancy Act.

[6] In 1945 O. W. N. 15,[2] with regard to a decision under S. 47, exactly the same argument, as has been advanced in this case, was advanced for the appellant and it was repelled by the learned Chief Judge, who said (at page 86):

"It is argued on behalf of the appellant that the appellate order passed by the District Judge must be taken to be a decree within the meaning of S. 2 (2) Civil P. C. as it was an order on the merits and involved the determination of the question under S. 47. Section 272 clearly forbids an appeal against any order passed in appeal under S. 271, while S. 269 permits an appeal against an appellate decree of the District Judge. I am of opinion that the U. P. Tenancy Act is self-contained in the matter of appeals and draws a distinction between decrees and orders."

(7) Indeed, if the contention of the appellants' learned counsel were accepted every order of remand under O. 41, R. 23, Civil. P. C. would be a "decree" because it is only when the decision of the trial Court is reversed on appeal that a remand takes place and the reversal can only be if the appellate Court decides the question on the merits, i. e., gives an adjudication on one or more of the matters in controversy in the suit. This position is obviously untenable.

(8) Coming now to a consideration of the right of appeal on the assumption that the order of remand is one under S. 151, Civil P. C, it is the decided view of this Court that no appeal lies from such an order. It is only necessary to refer to decisions in 1944 O.W.N. 50[3] and 1944 O.W.N 390,[4] both of which are decisions by Divisional Benches Here again the learned counsel for the appellant sought to draw a distinction between an order of remand pure and simple and an order of remand which decides some point raised. He contends that the latter amounts to a decree. For the reasons which I have given above, I cannot accept this contention.

(9) The result is that the preliminary objection prevails and the appeal must be, and is hereby, dismissed with costs.

G.B. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 40 *[C. N. 17.]*

KIDWAI J.

Mt. Chandra Kuar and another—Appellants v. *R. B. Bishun Sarup—Respondent.*

Misc. Appeal No. 36 of 1945, Decided on 14-2-1947, against decree of Dist. Judge, Hardoi. D/- 15-12-1942,

U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 45 (2) — Scope of — Order under S. 151, Civil P. C. (1908).

In the case of the Encumbered Estates Act proceedings the scope of S. 45 (2) is very wide and it allows an appeal against any decree or order. These terms are wide enough to include an order under S. 151, Civil P. C. passed in proceedings under the Encumbered Estates Act : 30 A. I. R. 1943 Oudh 214, *Disting.* [Para 4]

Case referred:-

1, ('43) 1943 O. W. N. 83: 30 A. I. R. 1943 Oudh. 214: 205 I. C. 456, Mt. Raj Kunwar v. Gaya Prasad.

H. Husain—for Appellants.

S. N. Roy—for Respondent.

Judgment.—Gaya Singh and Rajendrapal Singh applied on 27-10-1936 under S. 4 of the Encumbered Estates Act to the Sub-divisional Officer, Hardoi. The application was in due course transferred to the Special Judge 2nd Grade, Hardoi. There were only two opposite parties, the present respondent and one Mt. Chandra Kuar, wife of Thakur Gaya Singh applicant. On 4-3-1937, a compromise was arrived at between the applicants and the creditor Rai Bahadur Babu Bishun Sarup by which it was agreed that a decree for Rs. 11,500 in all be passed in favour of Babu Bishun Sarup in accordance with the terms of the compromise. The Court passed a decree in terms of the compromise and discharged Mt. Chardra Kuar from the array of parties. It appears that although no proceedings under Ss. 11 and 14, Encumbered Estates Act had been taken up till then nor had any property of the applicants been published in the Gazette, the Special Judge forwarded the decree to the Sub-divisional Officer and also entered in the *rubkar* some property as being liable to attachment, sale and mortgage in satisfaction of the debts of the landlords applicants. Thereafter Babu Bishun Sarup applied under S. 151, Civil. P. C. and S. 19, Encumbered Estates Act, to the Special Judge pointing out the defects that had occurred and praying either that the decree passed under S. 11 on the basis of the mortgage should be set aside or that it should be declared by the Court what property is liable to attachment, sale or mortgage in satisfaction of the debts of the landlords applicants. The learned Special Judge held that he had no power to entertain this application and he accordingly dismissed it although he thought that the ends of justice required him to interfere. He suggested that the Liquidation Officer might order the creditor to move the Special Judge for clarification and for determination of every point mentioned in S. 19. It appears that Mr. Bishan Sarup appealed to the District Judge of Hardoi and that he also made a second application under S. 151, Civil P. C. to the Special Judge praying that the *rubkar* sent to the Liquidation Officer showing some property as being liable to attachment and sale be amended. On 16-9-1942 the learned Munsif granted this application and amended the *rubkar* as prayed. Surprisingly the landlords applicants went up in appeal to the District Judge from this order.

(2) The learned District Judge heard both the appeals together and by two orders of 15-12-1942 he allowed the appeal of the landlords applicants as well as of the creditor and remanded the whole proceedings to the Special Judge to take proceedings under Ss. 9 and 11 of the Encumbered Estates Act and then to pass a decree in accordance with the terms of the compromise.

(3) The landlords-applicants have now come

up in appeal to this Court. Gaya Singh died during the pendency of the appeal and his widow Mt. Chandra Kuar has been brought on the record as one of his heirs, the other heir, Rajendrapal Singh, son of the deceased being already on the record as appellant 2. In appeal it is contended that the order of the learned Special Judge having been passed under S. 151, Civil P. C. it was not open to appeal and the lower appellate Court had no jurisdiction to entertain an appeal under S.45 (2), Encumbered Estates Act. The argument was that an order under S. 151, Civil P. C. is an order not under the provisions of the Encumbered Estates Act, but one under the provisions of the Code of Civil Procedure and the right of appeal is, therefore, governed by that Code The learned counsel for the appellants relied upon 1943 O. W.N. 83[1] for this proposition. That case, however, stands on an entirely different footing. In that case an application was made for review of judgment and the application was disallowed. The party which had applied for review, thereupon, desired to appeal. It was held that since O. 47, Civil P. C. had been applied to proceedings under the Encumbered Estates, R. 7 of that Order was no less applicable than R. 1; and therefore, it was only on the grounds mentioned in R. 7 that appeals could lie. There are some sentences used in the judgment which lend support to the argument of the appellants' learned counsel but they cannot be taken out of the context and made applicable to an entirely different set of facts. The principal ground for holding that R. 7 was applicable was that it was not inconsistent with Encumbered Estates Act.

[4] An order under S. 151, Civil P C., passed in proceedings under the Encumbered Estates Act, is no doubt an order passed under the Code of Civil Procedure but that is so only because, by reason of the provisions of the Encumbered Estates Act, the Code of Civil Procedure has been made applicable. It cannot, therefore, be said that such an order is not passed under the Encumbered Estates Act also and is not appealable under the provisions of that Act. If that was so, then hardly any order in the course of proceedings under the Encumbered Estates Act would be an order passed under that Act. At every stage there would be orders under the Code of Civil Procedure and, in that state of affairs it is hardly necessary to incorporate in the Encumbered Estates Act, provisions for appeal and revision except in so far as they determine the forum of appeal. The Encumbered Estates Act does not restrict the right of appeal to the cases mentioned in S. 96 or any other section or Order of the Code of Civil Procedure. It lays down in S. 45, its own scheme of appeals in much wider terms than those contained in the Code of Civil Procedure. In so far as anything in the Code of Civil Procedure conflicts with that scheme it cannot have effect. In 1943 O. W. N. 83[1] it was held that there was nothing in R. 7 of O. 47 which was inconsistent with the provisions of S. 45 and it was for that reason that that rule was made applicable to the cases of appeals from an order rejecting an application for review. An order under S. 151, Civil P. C. is not appealable in civil cases because while S. 96, which provides for appeals from decrees, and S. 104, which provides for appeals from orders, do not contain any provision for appeals from orders passed under S. 151, Civil P.C. A right of appeal being created by statute, it does not exist where it is not conferred by statute. In the case of the Encumbered Estates Act proceedings the scope of S. 45 (2) is very much wider and it allows an appeal against *any decree or order*. These terms are wide enough to include an order under S. 151, Civil P C., and no reason appears why they should be understood in a restricted sense. I have, therefore, come to the conclusion that an appeal did lie from the order of the Special Judge, 2nd Grade, to the District Judge and he committed no error of law in entertaining that appeal. The remand was required to do justice between the parties and there is nothing in conflict with any law in the District Judge having remanded the case.

[5] I accordingly uphold his order and dismiss this appeal with costs. The stay order dated 20-7-1934, is vacated.

D.H. *Appeal dismissed.*

A. I. R (35) 1948 Oudh 41 *[C. N. 18.]*

KIDWAI J.

Hira Lal — Plaintiff — Applicant v. *Chheda — Defendant — Opposite Party.*

Civil Revn. Appln. No. 83 of 1942, Decided on 21-10-1946, from order of Civil Judge as Sm C. C. J., Baraich, D/- 3-6-1942.

Provincial Small Cause Courts Act (1887), S. 17 Proviso —Meaning of—Extension of time—Power of Court.

The proviso to S. 17, Cl. (1) means not only that the application for leave to file a security bond should have been presented before but that the security itself should be filed at the same time as the application for setting aside the ex parte decree. [Para 2]

Under the amended proviso the Court has no jurisdiction to grant any extension of time either for making the deposit or for filing the security: 195 I. C. 103 (Oudh) *Foll*; *Case law referred.* [Para 2]

Cases referred :—

1. ('30) 5 Luck. 294: 17 A.I.R. 1930 Oudh 1 : 122 I. C. 328, Narain v. Kundan.
2. ('41) 1941 O. A. C. C. 151: 195 I. C. 103, Jagannath Prashad v. Sukhdeo Prasad.
3. ('43) 1943 O A. 321: 31 A. I. R. 1944 Oudh 104: 211 I. C. 97, Roshan Lal v. Brij Lal Amba Lal.

4. ('37) 1937 O. W. N. 53: 24 A. I. R. 1937 Oudh 206 166 I. C. 137, Din Mahomad v. Darbari Lal.
5. ('36) 1936 O. W. N. 688: 23 A. I. R. 1936 Oudh 407: 12 Luck. 287: 164 I. C. 470, Mahabir v. Sheo Saran.

B. K. Dhaon—for Applicant.
S. M. Yousuf—for Opposite Party.

Order.— Hiri Lal, the applicant, brought a suit against Chheda, defendant opposite-party, for recovery of Rs. 80 on the basis of a parole debt. On 15-10-1941 the suit was decreed *ex parte* Chheda applied on 30-10-1941 for setting aside the *ex parte* decree. On the same day he applied for permission to file a security bond. The permission was granted to him but it cannot be said with certainty whether the Court's order was passed on 30-10-1941 or on the next day. The point, however, is immaterial in view of what followed. Chheda was permitted to file a bond within a week but he got extensions from time to time and eventually filed a bond on 24-11-1941, which was more than 30 days after the order of the Court decreeing the suit After the filing of the bond notice was issued to Hira Lal but he contended that the provisions of S. 17, Small Cause Courts Act, had not been complied with inasmuch as leave for filing the security bond had not been obtained prior to the making of the application for setting aside the *ex parte* decree. The trial Court found that the application was made on the same day as the application for setting aside the *ex parte* decree and that permission might well have been granted at the same time. It therefore held that the application for setting aside the *ex parte* decree had been validly presented. It accordingly set aside the *ex parte* decree and proceeded to try the suit *de novo* and dismissed it. Hira Lal has come up in revision and the only point taken by the learned counsel is that the trial Court had no jurisdiction to set aside the *ex parte* decree since the application for setting it aside was not validly presented.

[2] The proviso to S. 17, Cl. (1), Provincial Small Cause Courts Act stipulates that the application for setting aside an *ex parte* decree should be accompanied either by a deposit of the decretal amount in Court or by such security as the Court may by previous order have directed. This really means not only that the application for leave to file a security bond should have been presented before but that the security itself should be filed at the same time as the application for setting aside the *ex parte* decree. Before the amendment of S. 17 in 1935 there was a difference of opinion between various Courts. The view that was accepted by this Court: (*vide* 5 Luck. 294[1]) was that it was sufficient compliance with the proviso if the security was given within limitation. This was also the view held by the Madras High Court This Court has had occasion to consider the effect of the amendment in several cases after 1935. It is not necessary to refer to them all because the law is very clearly enunciated in 1941 O. A. C. C. 151.[2] It was there held :

"Whatever doubt may have existed before the introduction of the amended proviso to S. 17 (1), Provincial Small Cause Courts Act, as regards the power of the Court to extend the time for depositing the money or the furnishing of the security it seems to me to be quite clear that the mandatory nature of the amended proviso leaves no room for doubt that the Court has no jurisdiction to grant any extension of time either for making the deposit or for the filing of the security."

The same view has been adopted in 1943 O. A. 321[3] by the same learned Judge. Counsel for the opposite party wished to rely upon 1937 O. W. N. 53[4] and 1936 O. W. N. 688.[5] In those cases however security bonds were actually filed though it was subsequently found that owing to some mistake the security furnished was not sufficient to cover the decretal amount. The Court, therefore, allowed the applicant time to make good the deficiency. This case does not in any way militate against the principle enunciated in the case to which I have referred because in those cases there had been substantial compliance with the provisions of the proviso to S. 17 cl. (1) inasmuch as the security had been given for the performance of the decree of the Court. Both these cases were considered in the case in 1941 O. A. C. C. 151[2] and it was held that the language of the amended proviso now left no room for doubt that the Court had no power to extend time. That being the position the trial Court acted without jurisdiction in setting aside the *ex parte* decree on an application which must have been deemed to have been filed beyond limitation. I therefore set aside the order of the trial Court, setting aside its own previous *ex prate* decree. From this it follows that the new decree, which has been passed dismissing the suit, must also be set aside and the previous decree decreeing the suit will be restored. The applicant will get his costs of both the Courts.

N.S.D. *Order set aside.*

A. I. R. (35) 1948 Oudh 42 *[C. N. 19.]*

MISRA J.

Mushtaq Ahmad Khan and another—*Defendants*—*Appellants* v. *Mt. Noor Zohra Begam*—*Plaintiff*—*Opposite Party.*

Civil Revn. Appln. No. 60 of 1942, Decided on 25-3-1947, from order of Temporary Civil and Sessions Judge, Lucknow, D/- 24-3-1942.

Civil P. C. (1908), S. 151—Another remedy open—Availability of relief under S. 151.

Ordinarily, if a party has another remedy open and the party does not adopt it or negligently fails to pursue it, relief under the Court's inherent powers is not granted in the absence of exceptional or peculiar circumstances : 29 A. I. R. 1942 Oudh 343 and 30 A. I. R. 1943 Oudh 136, *Rel. on.* 12 A. I. R. 1925

Oudh 495; 19 A. I. R. 1932 Oudh 220 and 29 A. I. R. 1942 Oudh 189, *Disting.* [Para 3]

(Held there were no exceptional circumstances in the case.)

But where the other remedy for the same relief has in fact been availed by the party S. 151 can no longer be invoked. [Para 8]

Annotation :—(44-Com.) C. P. C., S. 151, Note 4 Pt. 23.

Cases referred:—

1. ('25) 12 A. I. R. 1925 Oudh 495 : 86 I. C. 356, Mt. Mahadei v. Tirbeni.
2. ('32) 9 O. W. N. 430 : 19 A. I. R. 1932 Oudh 220 : 138 I. C. 149, Jagmohan Tewari v. Mahadeo Prasad.
3. ('41) 1941 O. W. N. 1239 : 29 A. I. R. 1942 Oudh 189 : 17 Luck. 297 : 197 I. C. 471, Tajammul Husain Khan v. Amiruddin.
4. ('42) 17 Luck. 673 : 29 A. I. R. 1942 Oudh 343 : 200 I. C. 101, Chandra Shekhar v. Shankar.
5. ('43) 30 A. I. R. 1943 Oudh 136 : 205 I. C. 269, Birendra Bikram Singh v. Bajrang Bahadur Singh.

Nasir Ullah Beg—for Appellants.
Siraj Husain—for Opposite Party.

Order.— This is a revision under S. 115, Civil P. C. It is directed against an order passed by the learned Temporary Civil and Sessions Judge, Lucknow, under S. 151, Civil P. C. The effect of that order was to set aside the decree passed by him in favour of the defendants-applicants under O. 17, R. 3 and to restore the suit of the plaintiff-opposite party Mt. Nur Zohra Begam.

[2] The suit was for possession of a plot of land situate on Jopling Road by the defendants on a variety of grounds. There were a number of hearings at which the plaintiff's witnesses were examined and her case was closed. The oral evidence of defendants' witnesses was commenced on 16-2-1942. The statement of the second defence witness could not be completed because the plaintiff's counsel had to attend to some professional work in this Court. The case was accordingly adjourned to 17th February but on that date also the plaintiff's counsel was absent. The Court waited till 12 noon, and eventually the witness was discharged. The third witness also could not be cross-examined on account of the absence of the plaintiff's counsel. The defence was then closed and the case was argued. The judgment was pronounced on the same date and the plaintiff's suit was dismissed, special costs being awarded against her under S. 35A, Civil P. C. Subsequently on the same date Nur Zohra Begam applied under S. 151, Civil P. C., for restoration of the case. She alleged that on 17th February a request had been made to the Court to take up the case 15 minutes later and that the refusal on its part to postpone the cross-examination of the two witnesses was unjustified. The plaintiff also preferred an appeal against the decision of the Temporary Civil and Sessions Judge. That appeal was pressed and was dismissed, but before it could be decided the trial Court set aside its judgment of 17-2-1942 and, as stated above, restored the suit to its original number and permitted the plaintiff to cross-examine the last two witnesses.

[3] Ordinarily if a party has another remedy open and it does not adopt it or negligently fails to pursue it relief under Court's inherent powers is not granted in the absence of exceptional or peculiar circumstances. The defendants, however, took up a somewhat untenable position. It was contended by their learned counsel that where another remedy is available the rule that S. 151 should not be applied is absolute. The lower Court refused to accept the proposition which was thus propounded as correct. In this Court the same contention was raised and it was sought to be supported by the decisions reported in A. I. R. 1925 Oudh 495,[1] 9 O. W. N. 430[2] and 1941 O. W. N. 1239.[3] I have examined these cases and find that they do not lay down the rule that the jurisdiction of a law Court to act under its inherent powers is lost if another remedy for the same relief can be pursued. On the other hand, in 17 Luck. 673,[4] a Division Bench of this Court held that the availability of another remedy is not an inflexible bar and does not necessarily prevent a Court from granting reliefs under its inherent powers. In A. I. R. 1943 Oudh 136[5] another Division Bench of this Court said that the view that S. 151 was intended to meet only cases for which no other provision was made in law has not been adopted in this Court.

[4] The learned lower Court gave three reasons for entertaining the application: (1) that the remedy by way of appeal would be costly, (2) that the plaintiff would not get an opportunity to cross-examine witnesses in appeal and the case would have to be argued as it stands on the record, and (3) that the cross-examination of witnesses was essential for testing the credibility of the last two defence witnesses. Obviously these reasons were considered to be exceptional enough to entitle the plaintiff to restoration. The allegation, namely, that the plaintiff made a request for 15 minutes' postponement on 17-2-1942 was not found to be correct. The lower Court was, however, over-borne by the apologetic attitude of the plaintiff's counsel. It said:

"The plaintiff's counsel has come before us in rather a sad and almost repentent mood and has apologized for his absence on 17-2-1942. In reply to our question he says that he had in fact that day sent information to us about his absence—being busy in another Court—through the pairokar of the plaintiff. But unfortunately the pairokar being deaf misunderstood him and did not deliver the message to us."

[5] It seems to me that the rights acquired by the defendants under the decree of 17-2-1942, ought not to have been lightly interfered with merely because the plaintiff's pairokar did not deliver the message to the Court. The learned Judge, however, observed:

"But then in granting this application I do not think that the defendants would be very much prejudiced because in the ordinary circumstances the D. Ws. would not have gone uncross-examined but for the natural disabilities of the pairokar. The counsel has apologised for his mistake, or rather for the mistake of the pairokar. Surely arguments help the Court quite a lot to arrive at findings. We must not forget moreover that justice must be adorned with grace just as it must be tempered with mercy. The plaintiff has not applied as a matter of right but depends only upon the grace of the Court using its inherent powers The jurisdiction under S 151, Civil P. C. is ever-flowing and can never stop as the first words in the Section are, "Nothing in this Code ....." After all, not only must justice be given but the parties must feel that justice has been given The parties must feel that they have been heard."

[6] I find it somewhat difficult to accept as true the story about the pairokar's mistake or his deafness. There is no affidavit of the advocate concerned. The deaf pairokar was not produced in Court to substantiate the case which, it may incidentally be noticed, was not even set up in the application under S. 151, Civil P. C. But assuming that the story is well founded, I am inclined to think that unless the Court had agreed to take up the case at the counsel's convenience, his absence to come to Court till noon could not be justified on any ground.

[7] There is, however, another and a more important reason why the plaintiff's application should have been rejected. It does not appear to have been brought to the notice of the learned lower Court that an appeal against the decree of 17-2-1942 had already been preferred and was pending decision. It was pressed to conclusion subsequently and was dismissed. The plaintiff's plea, therefore, that the recourse to the other remedy namely that an appeal would be unduly expensive was wholly unfounded. It would further seem that if Nur Zohra Begam had any legitimate ground for complaint she could have asked the appellate Court to remand the case for the cross-examination of the last two defence witnesses and for a fresh judgment. Such a course was apparently not considered necessary. The learned temporary Civil and Sessions Judge was in the circumstances not justified in setting aside his decree and taking up the case from the stage at which the plaintiff's learned counsel had absented himself.

[8] As to Court's jurisdiction to exercise its inherent powers in exceptional cases where another remedy is open, there can scarcely be any doubt but where the other remedy for the same relief has in fact been availed by the parties S. 151, Civil P. C. can no longer be invoked. There was, in my opinion, material irregularity in the exercise of jurisdiction by the Court below. I, therefore, allow the revision and set aside the order, dated 24-3-1942. The defendants-applicants shall get their costs of this Court from the opposite-party.

D.H. *Revision allowed.*

A. I. R (35) 1948 Oudh 44 *[C. N. 20.]*

KIDWAI J.

Shri Nath Seth—Defendant—Applicant v. *Nand Lal and others—Plaintiff and Defendant—Opposite Party.*

Civil R vn. Appln. No. 37 of 1942, Decided on 24-1-1947, from order of Munsif, Rae-Bareli, D/-14-1-1942.

(a) Civil P. C. (1908), S. 115—Case decided—Order refusing to implead person under O. 1, R. 10—Civil P. C. (1908), O. 1, R. 10.

An order refusing to implead a person as a party under O. 1, R. 10 is a case decided and may properly be challenged by an application under S. 115: 16 A. I. R. 1929 Oudh 148; 25 A.I.R. 1938 Oudh 10 and 30 A.I.R. 1943 Oudh 315, *Ref.* [Para 4]

Annotation ('44-Com.) C. P. C., S. 115, N. 5, Pt. 17.

(b) Civil P. C. (1908), S. 115—Applicability—Irregular exercise of jurisdiction—Trial of case without impleading proper parties—Interference by High Court.

It is true that S. 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it and that it is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. But the trial of a case without impleading proper parties may amount to an irregular exercise of jurisdiction. Thus, if it is shown that the trial Court has not correctly appreciated the position in the case, the High Court may interfere with the order in revision: 4 A. I. R 1917 P. C. 71, 13 A. I. R. 1926 P. C. 142 and 30 A. I. R. 1943 Oudh 315, *Foll.* [Para 4]

('44 Com) C. P. C. S. 115 N. 9 Pt. 3, and N. 12 Pt. 27

(c) Civil P. C. (1908), O. 1, R. 10—Addition of person as party necessary to avoid multiplicity of proceedings.

A party should not be added so as to change the nature of the suit. But when no new question will be raised by the addition of a person as a party and on the other hand, the addition of the person is necessary to avoid a multiplicity of proceedings and to protect the rights of the defendant, he should be impleaded: 30 A. I. R. 1943 Oudh 315, *Foll.* [Paras 5, 6 and 8]

Annotation: ('44-Com.) C. P. C., O. 1, R. 10, N. 14, Pts. 4 and 5 and N. 29, Pt. 1.

Cases referred:—

1. ('29) 6 O. W. N. 118: 16 A. I. R. 1929 Oudh. 148: 116 I. C. 58, Gopi Nath v. Murtaza Ali.
2. ('37) 1937 O. W. N. 1118: 25 A. I. R. 1938 Oudh 10: 13 Luck. 625: 171 I. C. 434, Sheo Prasad Lal v. Mt. Prakash Rani.
3. ('43) 1943 O. W. N. 138: 30 A. I. R. 1943 Oudh 315 209 I C. 308, Kadir Ahmad v. Abdul Khalik.
4. ('17) 44 I. A. 261: 4 A. I. R. 1917 P. C. 71: 40 Mad. 793: 40 I. C. 650 (P. C.), Balkrishna Udayar v. Vasudeva Aiyar.
5. ('26) 3 O. W. N. 989: 13 A. I. R. 1926 P. C. 142: 54 Cal. 338: 53 I. A. 271: 99 I. C. 749 (P. C.), Umed Mal v. Chand Mal.

S. P. Avasthi—for Applicant.
R. B. Prasad—for Opposite Party (2/1 and 2/2.)

Order.—One Thakur instituted a suit in the Court of the Munsif, Rae Bareli, against Ajodhia, opposite party No. 3, for a sum of Rs. 48. The plaintiff alleged that grove No. 595 situated in village Para Kalan district Rae Bareli, belonged to him and that he was in sole possession of it; that the defendant had purchased 24 Babul trees situated in this grove from the plaintiff for Rs 48 promising to pay the money when the trees were cut: that all the trees had been cut and removed and the price had not been paid. The defendant filed a written statement in which he denied the plaintiff's ownership of the grove. He also denied that he had purchased any trees from the plaintiff. He pleaded that on 15-3-1941, he had purchased 4 Babul trees on plot No. 595 and 16 on plot No. 594 from the Taluqdar owner of the village, Lala Srinath Seth for Rs. 48: that plots Nos. 594 and 595 were in the possession of the Taluqdar and the plaintiff has no concern with them: and that the plaintiff is estopped from asserting that Lala Srinath is the owner in possession of plots Nos. 594 and 595. With his written statement the defendant filed a receipt for Rs. 48 purporting to have been executed by the ziladar of the Taluqdar.

[2] On 17th November issues were framed by the learned Munsif, the first of those issues being as follows:

"Is the plaintiff tenant grove-holder of the plot in suit?"

[3] On 6-1-1942, Lala Srinath applied stating that he had sold the trees, through his servant, to Ajodhia and consequently it was necessary, for a final decision of the dispute, that he should be impleaded as a defendant. The learned Munsif has rejected this application and the Taluqdar has come up to this Court in revision. Thakur is dead and the opposite parties 1 and 2 are his sons and heirs.

[4] An objection is taken that no revision lies. It has, however, been repeatedly held that an order refusing to implead a person as a party under O. 1, R. 10, Civil, P.C. is a case decided and may properly be challenged by an application under S. 115, Civil P. C.: *vide* 6 O. W. N. 118,[1] 1937 O. W. N. 1118[2] and 1943 O. W N. 138.[3] It was next contended that even if a revision lies the order in the present case was passed by a Court having jurisdiction to pass it and there has been no irregularity in the exercise of jurisdiction. It is true that it is settled by several decisions that S. 115

"applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. It is not directed against conclusions of law or fact in which the question of jurisdiction is not involved: (*vide* 44 I. A. 261[4] at 267.)

It must, however, be remembered that it has also been laid down that the trial of a case without impleading proper parties may amount to an irregular exercise of jurisdiction: *vide* 3 O. W. N. 989[5] and 1943 O. W. N. 138[3] at p. 139. Thus, if it is shown that the trial Court has not correctly appreciated the position in the case this Court may interfere with the order in revision.

[5] The lower Court has quite rightly said that it is a settled rule of law that a party should not be added so as to change the nature of the suit. If the addition of the applicant as a party would change the nature of the suit, he cannot be impleaded. It is contended that the addition of the applicant would, as held by the trial Court, result in changing a suit for recovery of the purchase money into a suit to determine title. This contention ignores the fact that in the suit as it is at present framed the question of the title of the plaintiff as a grove-holder (which is the only title he claims—*vide* the proceedings of 17-11-1941), has already arisen and issue 1 has been specially framed to try this. Moreover the question whether the trees are on plot No. 594 or 595 has also been raised and the Court has appointed a commissioner to determine this. Thus no new question will be raised by the addition of the applicant as a party.

[6] On the other hand, the addition of the applicant is necessary to avoid multiplicity of proceedings and to protect the rights of the present defendant who claims that he has already paid the full price to the rightful owner. If the applicant is not added as a party and the suit succeeds, the defendant will have to pay the price to the plaintiff and it will be only by a separate suit that he will be able to recover the money he has already paid to the applicant. In that suit he will have to prove independently that the trees in fact belonged to Thakur and the decision in the present suit will be of no value for proving this fact. This may result in grave injustice to Ajodhia and it is really in his interests and in order to avoid multiplicity of proceedings that the applicant should be impleaded.

[7] It is difficult to see what advantage the applicant himself will derive by being brought on the record as a defendant. He has already, according to his case, received the price and it is immaterial to him whether the plaintiff gets a decree against Ajodhia or not. He will not be bound by that decree and should as easily defend his title, if and when Ajodhia brought a suit against him. He however, not only applied to the trial Court to be impleaded but has also come up in revision.

[8] In view of what I have stated above it is necessary in order to avoid multiplicity of proceedings on the reasoning of 1943 O. W. N. 138[3]

at 139 which is, mutatis mutandis directly applicable to the present case, that the applicant should be impleaded.

[9] I accordingly allow the application with costs and direct that Lala Srinath Seth be impleaded as defendant No. 2 in the suit and the trial Court should proceed to dispose of the case according to law after impleading him.

V.R. *Application allowed.*

A. I. R. (35) 1948 Oudh 46 *[C. N. 21.]*

MADELEY J.

Khuda Bux—Defendant—Appellant v. *Bafati and another—Respondents.*

Second Appeal No. 428 of 1941, Decided on 11-3-1947, from the order of Civil Judge, Sultanpur, D/- 20-10-1941.

U. P. Tenancy Act (17 [XVII] of 1939), Ss. 183 and 290 and Sch. 4, Group B—Suit for declaration —Jurisdiction—Civil and revenue Courts.

Defendant misrepresenting to landlord that plaintiff had relinquished his holding—Defendant admitted to and allowed to retain possession of the holding by landlord—Plaintiff's suit for declaring defendant's lease illegal and for possession is triable by Assistant Collector of first class and not by civil Court—Defect not curable under S. 290: 17 A.I.R. 1930 All. 193 (FB) and 34 A.I.R. 1947 Oudh 133 (FB), *Rel. on.* [Paras 7 and 11]

Cases referred:—

1. ('30) 17 A. I. R. 1930 All. 193: 52 All. 501: 124 I. C. 540 (F. B.), Mt. Ananti v. Chhannu.
2. ('47) 1947 O. A. C C. 1: 34 A. I. R. 1947 Oudh 133: 228 I. C. 346: 22 Luck. 71 (F. B.), Mahadeo Prasad v. Jokhan Ram.

Anwar-ul-Hasan—for Appellant.

S. N. Srivastava for P. N. Chaudhri—for Respondents.

Judgment.—This is a second civil appeal. The facts are that Bafati brought a suit for possession of Plot No. 297 in village Taj Khanpur, pargana Misranpur, district Sultanpur. Bafati alleged that he was tenant of the Dera estate. Ghulam Abbas, son of defendant 1, was his sub-tenant and he had sued Ghulam Abbas for arrears of rent in respect of the Rabi 1344 Fasli and the whole of 1345 Fasli. Khuda Bux defendant 1 was doing "pairwi" in that case on behalf of Ghulam Abbas, and during the course of this litigation defendant 1 gave out that he had got a registered lease dated 10-2-1938, of the land in suit from the Dera estate. This lease is Ex. A-6. On the basis of this lease the suit of Bafati was dismissed in respect of Rabi 1345 on 11-9-1939. In the present suit Bafati claims that the execution of this lease is illegal and as he has been dispossessed of his land, he sues to recover possession from defendant 1 and the Dera estate, defendant 2. This suit was filed towards the end of October 1939 in the civil Court. Both the defendants filed written statements and took much the same pleas. The main defence was that Bafati was not a tenant, and that even if he was, he had relinquished the land, and thereupon the landlord had given a lease to defendant 1 for planting a grove and building a house. The jurisdiction of the civil Court was also questioned, and it was said that the suit should have been brought under S. 108 (10), Oudh Rent Act, and that as no suit had been brought within time under that section, this suit was time-barred. It was also pleaded that actual possession could not be given to the plaintiff in any case. There was an issue concerning special costs under S. 35-A, Civil P. C.

[2] The trial Court decreed the suit and allowed special costs Rs. 20 to the plaintiff. Defendant 1 went in appeal and his appeal was dismissed.

[3] During the course of the trial in the first Court the U. P. Tenancy Act came into force and it is claimed that by virtue of S. 296 of that Act the case falls under S. 183, U. P. Tenancy Act.

[4] The Court of first appeal has found that the plaintiff was dispossessed by defendant 1 and not by defendant 2, and that defendant 1 is a rank trespasser on the ground that defendant 1

"is a most unscrupulous man and had deceived the Manager, Court of Wards, Deara estate in misrepresenting to him that the plaintiff had relinquished the land and had obtained the patta in his favour fraudulently. In fact the plaintiff never relinquished the land in suit."

[5] The findings of fact are binding upon this Court but the question arises whether these findings can take the case out of the provisions of S. 183, U. P. Tenancy Act, which now applies or, for the matter of that, out of the provisions of S. 108 (10), Oudh Rent Act, which was in force when the suit was filed.

[6] In my opinion these facts can have no such effect.

[7] Though he was deceived, the landlord did "treat the holding as abandoned" (S. 108 (10), Oudh Rent Act) and defendant 1 was "admitted to" and "allowed to retain possession of the holding by the landholder" (S. 183, U. P. Tenancy Act). Such suits are triable under the U. P. Tenancy Act by Assistant Collectors of the first class and appeals lie to the Commissioner.

[8] The wording of S. 290 itself shows that this defect of jurisdiction cannot be cured in cases where a suit is wrongly instituted in a civil Court and an appeal lies to the Commissioner, from the decision of the revenue Court in which it should have been instituted.

[9] In A. I. R. 1930 ALL. 193[1] at p. 194 it was held:

"It has not been contested before us that the initial right of choosing the forum is with the plaintiff. He is to see in which Court his suit would lie, having regard to the

facts of his case, which means the allegations in his plaint, and the valuation of the suit. When the plaintiff has chosen his forum, it will be for the Court in which the suit has been filed or application has been made to see whether, on the allegations made in the plaint or application, it is cognizable by it. If the plaint or application be cognizable by that Court, the defence, whatever it may be, will not oust the jurisdiction of the Court to try this suit. It may be that on the facts alleged and established by the defendant, it will be found that the plaintiff's allegations, as made in the plaint, are incorrect or false and that the real relief, which the plaintiff is entitled to get (if any), is not within the jurisdiction of the Court, which is seised of the case, to grant. In such circumstances, the suit will be dismissed, on the ground that the Court is not in a position to grant the relief. This initial position has not been contested before us. In fact the rule is so well established that it is impossible to controvert it."

[10] This was quoted with approval by a recent Full Bench decision of this Court: 1947 O. A. 1.[2] It was also held in that case:

"The provisions of S. 290, U. P. Tenancy Act which bear an objection in an appeal that the suit was taken in the Court of first instance, apply only to suits in which an appeal would lie to the District Judge or to the High Court or to the Chief Court if they had been rightly instituted in the civil or revenue Court."

[11] It follows that the suit must be dismissed since it was brought in the wrong Court and S. 290 cannot cure the defect of jurisdiction.

[12] I, therefore, allow this appeal and set aside the decree of the lower Court. The suit is dismissed. The appellant will get his costs in all Courts.

D.H. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 47 *[C. N. 22.]*

MISRA AND KAUL JJ.

Bandhu Upadhya and another—Plaintiff—Appellants v. *Jagdamma Prasad and others—Defendants—Respondents.*

Appeal No. 5 of 1946, Decided on 18-2-1947, from order of Walford J., D/- 19-2-1946.

(a) Oudh Laws Act (18 [XVIII] of 1876), S. 15—Mere submission of tender within period fixed for payment.

The provisions of S. 15 which declare the consequences of non-compliance must be regarded as mandatory and not merely directory. Hence the mere submission of the tender on a date prior to the expiry of the period fixed by the decree for pre-emption for making payment cannot be regarded as payment on that date so as to constitute compliance either with the terms of the decree or of S. 15 : 7 A. I. R. 1920 Ondh 25, *Rel. on.* 10 A. I. R. 1923 Oudh 271, 21 A. I. R. 1934 All. 817 and 24 A. I. R. 1937 All. 122, *Disting.* [Para 4]

(b) Oudh Laws Act (18 [XVIII] of 1876), S. 15—Oudh Civil Rules, R. 572—Plaintiff's duty not to delay payment — Delay caused by unjustifiable refusal of Nazir to accept money — Effect.

Section 15 must be strictly construed, and if by its force the decree becomes void and the right of pre-emption is lost at the moment when the Court rises on the last date on which the actual payment is to be made, the pre-emptor who should be aware of the procedure of he Court must take good care to see that the payment is not delayed. (O. 21 R. 85, Civil P. C. Compared.) [Para 5]

Where the plaintiff offered the money to the Court Nazir shortly after 3 P. M. on the last day on which payment could be made but the Nazir refused to accept the money.

Held that in view of R. 572 the refusal was wholly unwarranted and since that refusal was the direct and proximate cause for the delay, it could not be allowed to prejudice the plaintiff. [Paras 7 and 8]

(c) Oudh Courts Act (4 [IV] of 1925), S. 12 (2)—Point raised in memorandum of second appeal but not pressed before single Judge—Point cannot be considered in appeal—But principle should not be allowed to be stretched too far : 34 A. I. R. 1947 Oudh 71, *Ref.* [Para 8]

Cases referred:—

1. ('20) 23 O. C. 254: 7 A. I. R. 1920 Oudh 25: 57 I. C. 488, Janga Singh v. Lachhmi Narain.
2. ('23) 10 A. I. R. 1923 Oudh 271 : 77 I. C. 116, Binda Prasad v. Babu Banarsi Das.
3. ('12) 34 All. 596: 15 I. C. 337, Ali Hussain v. Amin Ullah.
4. ('10) 56 P. R. 1910: 6 I. C. 954, Bhagwana v. Goru.
5. ('34) 21 A. I. R. 1934 All. 817: 148 I. C. 348, Mt. Gomti v. Lachhman Das Champa Ram.
6. ('37) 24 A. I. R. 1937 All. 122: 167 I. C. 313, Mewa Ram v. Ablak Singh.
7. ('46) 1946 O. W. N. C. C. 331 : 34 A. I. R. 1947 Oudh 71: 22 Luck. 19: 226 I. C. 561, Beni Madho v. Harihar Prasad.

Moti Lal Tilhari—for Appellants.

Hyder Husain—for Respondents Nos. 1 and 2.

Judgment.—This is an appeal under S. 12 (2), Oudh Courts Act. The controversy between the parties to this appeal relates to deposit of pre-emption money, and the question which arises for consideration is whether the sum of Rs. 700 subject to the payment of which within three months of the decree pre-emption was granted was deposited within time. The period expired on 29-11-1940. The plaintiffs-appellants, Bandhu and Jagardeo, presented a tender for Rs. 700 in the Court of the Munsif, North Sultanpur, on 28-11-1940. It was passed the same day and handed over to the appellants, but the money could not be deposited till 29-11-1940, after the Court had risen. The appellants at first attempted to deposit the money in the treasury on 29th of November shortly after 3 P. M. The accounts had by that time closed, and the money could not be taken there. The plaintiffs subsequently approached the Court Nazir twice but there also the offer was refused. Finally they got an application prepared in order to present it in Court but by the time it could be ready the Munsif had risen and left, and the application had, therefore, to be taken to him at his residence. At 5 P. M. the learned Munsif ordered that the money should be received by the Nazir, and the actual deposit was made shortly thereafter on the same date. The vendee when called upon to take the money, however, refused. He contended that the deposit did not comply with the requirements of law.

[2] The decree was passed in accordance with S. 14 which lays down that

"If the Court find for the plaintiff, the decree shall specify a day on or before which the pur hase-money or the amount to be paid to the mortgagee shall be paid."

Section 15 then provides that

"If such purchase-money or amount is not paid into Court before it rises on that day, the decree shall become void, and the plaintiff shall, so far only as relates to such sale or mortgage, lose his right of pre-emption over the property to which the decree relates."

[3] The vendee's objection on the basis of the aforesaid sections was that the money was not paid into Court before it rose on 29-11-1940, and the decree in favour of the appellants had, therefore, become void, and the right to pre-empt was lost. This contention was accepted by the learned Munsif as well as by the Court of first appeal. The pre-emptors came up in second appeal, and the case was heard by a learned Single Judge of this Court. At the time of arguments it was urged on appellants' behalf, as it was urged in the Courts below, that the tender having been accepted on 28-11-1940, the payment, though actually made on 29th, must relate back to the date of acceptance. The argument was repelled, but leave to appeal under S. 12 (2), Oudh Courts Act, was granted at the time of delivery of judgment on the oral request of the appellants' learned counsel. The point has been debated before us again.

[4] In support of the contention that the date of tender must be deemed to be the date of actual deposit, it has been urged that the appellants having offered the money by tender on 28th November are not responsible in the absence of any laches on their part for the delay occasioned in the acceptance of the money by Court. The decree, we have already mentioned, prescribed that the payment must be made on or before 29-11-1940, and in default of such payment the suit was to stand dismissed. The mere submission of the tender on 28th November could not, it is obvious, be regarded as payment on that date so as to constitute compliance either with the terms of the decree or of S. 15, Oudh Laws Act. In 23 O. C. 254[1] a learned Judge of the late Court of the Judicial Commissioner of Oudh said that the provisions of S. 15, Oudh Laws Act which declared the consequences of non-compliance must be regarded as mandatory and not merely directory. The facts of the case were somewhat similar. An application for depositing the pre-emption money was filed at 6-30 P. M. on the last day fixed for payment. The money could not be deposited till the next day. On these facts it was held that the presentation of the tender at the house of the Judge was not a payment as required by S. 15, Oudh Laws Act. Reliance was placed on appellants' behalf on a later decision of another Judge of the late Court of the Judicial Commissioner of Oudh in A. I. R. 1923 Oudh 271,[2] but that case does not appear to us to be relevant. There a sum of Rs. 80 was deposited within the period specified in the pre-emption decree. Subsequently a sum of Rs. 22 out of it was attached and withdrawn on account of the plaintiffs' decreed costs. The vendees meanwhile had filed an appeal, and the appellate Court enhanced the amount subject to the payment of which the property could be pre-empted, and the parties were ordered to bear their own costs in the event of payment being made as directed. The plaintiff thereupon paid in the difference namely Rs. 26-6-0 and obtained possession of the property. The sum of Rs. 22 which had previously been withdrawn was attempted to be deposited after the expiry of one month allowed by the appellate Court. On these facts a learned Judge of the late Court of the Judicial Commissioner held that there was sufficient compliance with the decree. He said:

"The appellant seeks to differentiate these rulings (34 All. 596,[3] and 56 P R. 1910[4]) by the fact that in Oudh the right of pre-emption is a statutory right and payment is made in accordance with S. 15, Oudh Laws Act. This, however, does not affect the question. Section 15 says that the amount due must be paid into Court. In fact it was paid into Court, although the plaintiff treating it as money in deposit to the credit of the defendant subsequently withdrew part of it on account of costs due to him in the same case."

It will be noticed that the point which arose in 23 O. C. 254[1] did not arise for consideration in A. I. R. 1923 Oudh 271[2] and the principle which was laid down earlier was left untouched.

[5] The appellants' learned counsel has also drawn our attention to two cases of the Allahabad High Court, namely, A. I. R. 1934 ALL. 817[5] and A. I. R. 1937 ALL. 122.[6] In the first of these cases a Division Bench had to deal with the validity or otherwise of the deposit of purchase-money in Court in consequence of an auction sale, one-fourth of the money at which the auction purchaser had taken the property was deposited on the date of the sale. The remaining 3/4ths should have been deposited on 17-11-1932, before the closing of the Court. A tender was presented on that date at 3 P. M. and returned to the applicant. The deposit was not made till 18th of November. The sale was set aside by the execution Court. It was contended in revision that the tender amounted to payment, and the applicant should be deemed to have paid the full purchase money on 17-11-1932. The learned Judges constituting the Bench observed that a *bona fide* tender amounted to payment, and since there was no suggestion that the applicant was not in a

position to make the payment at the time when he filed the tender in Court the offer to pay should be deemed to be payment of the amount. The view expressed was that the cumbersome procedure laid down for depositing money in Court was for the Court's own convenience, and if that procedure resulted in non-compliance with the provisions of law without any circumstance to indicate that the depositor was at fault, he should be deemed to have fulfilled the requirements of O. 21, R. 85, Civil P. C. In the next case cited a similar view was taken. The validity of tender, it was said, depended upon the fact whether it was a real tender in the sense that the tenderer was able and willing to pay in the money at the time when the tender was made. If it was fictitious in the sense that there was neither an intention on the part of the tenderer nor a possibility to pay the money, the tender could not be a *bona fide* tender and would not amount to a deposit of the sum which had been paid. The decree in that case was a pre-emption decree and the payment was held to be valid even though the actual deposit was made beyond the specified period. It is to be noticed that S. 15, Oudh Laws Act did not fall to be considered in these cases. The section expressly lays down that the money must *be paid into Court* before it rises on the last day of the period allowed for payment, and it is difficult to assume that the Legislature only intended that only tender must be presented to the Court on such day. No doubt the language of O. 21, R. 85, Civil P. C. also requires the payment to be made by the purchaser into Court before the Court closes on the 15th day. It does not, however, go on to say that on failure to make the deposit as required by the rule the sale shall become void, and the auction purchaser shall lose all rights over the property. Section 15, Oudh Laws Act must be strictly construed, and if by its force the decree becomes void and the right of pre-emption is lost at the moment when the Court rises on the last date on which the actual payment is to be made, the pre-emptor who should be aware of the procedure of the Court must take good care to see that the payment is not delayed.

[6] It remains, however, to determine whether the actual payment on 29th November was unduly delayed. Rule 572 of the Oudh Civil Rules has to be considered in this connection. That rule occurs in Chap. 14 and is preceded by R. 568 (1) in which the various heads of accounts maintained by civil Courts are classified. The first classification relates to certain deposits and repayments. They include sums which may be deposited under O. 20, R. 14, Civil P. C. Order 20, Rule 14 deals with decrees in pre-emption suits. Rule 572 says that notwithstanding the fact that the money is tendered after the hour prescribed in R. 574, it must be received when tendered under the first head of account if the sum is payable into Court amongst others under O. 20, R. 14, Civil P. C. Rule 574 refers to the time during which the cash payable into Court may be received. This is from the opening of the Court until a time which shall be one hour in advance of the time fixed for the closing of the treasury to the public.

[7] In the case before us Bandhu and Jagardeo offered the money to the Court Nazir shortly after 3 P. M., and in view of R. 572 there was no conceivable justification for refusal to accept it.

[8] The only objection urged on respondents' behalf is that the point, though raised in the memorandum of second appeal, was not pressed before the learned Single Judge. On the principle enunciated in a series of decisions of this Court such point, it was said, cannot be considered in appeal under S. 12 (2), Oudh Courts Act. The principle invoked is now well settled and the latest case where it has been acted on is 1946 O. W. N. 331.[7] We think, however, that the principle should not be allowed to be stretched too far. The question whether the plaintiffs-appellants were responsible for the delay was definitely raised before the learned Single Judge. Two cases of the Allahabad High Court were cited in that connection. There can be no doubt that the refusal of the Nazir to accept the money on 29th November when it was first offered to him was the sole cause for the delay. The refusal was wholly unwarranted by the rules, and since that refusal was the direct and proximate cause for the delay, it cannot be allowed to prejudice the appellants.

[9] We accordingly allow the appeal, set aside the orders passed by the learned Single Judge and the Courts below and overrule the vendee's objection. The appellants are entitled to their costs of this Court and of the lower Courts.

V.R. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 49 *[C. N. 23.]*

WALFORD J.

Raunak Ali—Plaintiff-Appellant v. *Municipal Board, Unao—Defendant-Respondent.*

Second Civil Appeal No. 33 of 1942, Decided on 12-2-1947, from order of Addl. Civil Judge, Unao, D/-4-11-1941.

(a) U. P. Municipalities Act (2 [II] of 1916), S. 97 — Contract with Municipal Board—Seal of Board not necessary.

Section 97 does not require that a contract with the Municipal Board should bear the impress of the seal of the Municipal Board. It merely requires that a contract

should be in writing and signed by the officers or persons mentioned in the section : 19 A. I. R. 1932 Oudh 193 (F.B.), *Expl.* [Para 4]

(b) U. P. Municipalities Act (2 [II] of 1916), S. 326 (3)—Suit for balance due for work done under contract—Limitation—Notice period under S. 326(1) —Deduction of—Limitation Act (1908), Ss. 15 (2) and 29 (2) and Art. 56.

The plaintiff sued a Municipal Board on 21st October 1940 for the balance due for work done under a contract between the parties. It was not disputed that the cause of action accrued to the plaintiff on 21-3-1940 when a cheque was sent purporting to be in full satisfaction of his bill, though it did not represent the amount for which he had submitted his bill. It was admitted that notice required under S. 326 (1) was served on the Board:

Held that whether the rule of limitation in S. 326(3), U. P. Municipalities Act which was 6 months applied or the ordinary law of limitation which was 3 years applied, the suit was not barred. If the former applied the plaintiff was entitled under Ss. 15 (2) and 29 (2), Limitation Act, to deduct the two months required for the notice: 25 A. I. R. 1938 All. 540 and 23 A. I. R. 1936 All. 18 (F.B.), *Ref.* [Paras 7 and 8]

Cases referred:—

1. ('32) 9 O. W. N. 461: 19 A. I. R. 1932 Oudh 193: 8 Luck. 1:137 I. C. 574 (F. B.), Municipal Board, Lucknow v S. C. Deb.
2. ('38) 25 A I. R. 1938 All. 540: I.L.R. (1938) All. 823: 178 I. C. 79, Ram Narain v. Municipal Board, Muttra.
3. ('36) 58 All. 569: 23 A. I. R. 1936 All. 18: 160 I. C. 226 (F. B.), Dist. Board, Allahabad v. Behari Lal.

Kalbe Mustafa and Anand Madho—for Appellant.

P. N. Chaudhri and S. N. Srivastava—for Respondent.

Judgment.—This second civil appeal arises out of a suit in which the plaintiff claimed a sum of Rs. 525 against the defendant Municipal Board, Unao, for work done by him, to wit, constructing a tin-shed for the Board.

[2] The facts appear to be that the plaintiff appellant entered into a contract with the Municipal Board, Unao, to build a tin-shed initially for a sum of Rs. 3,720. Subsequently the amount was increased to Rs. 4,245 and embodied in an agreement, paper No. 28, which is to be found in the file of the Municipal Board, marked Ex. A2. After the work was completed, the Municipal Board sent a cheque to the plaintiff appellant for a sum of Rs. 3,720 only instead of the full amount Rs 4,245 along with a letter dated 21-3-1940 in which it was said that the cheque was being sent in full satisfaction of the bill. There was some correspondence between the Municipal Board and on behalf of the appellant. The latter wanted to know the reason for withholding the amount of Rs. 525 which had been subsequently agreed to by the Board and demanding full satisfaction of his bill. It seems that by two resolutions one dated 11-6-1940 and the other 20-6-1940, the Board declined to pay the amount demanded. The plaintiff appellant thereafter filed the present suit for recovery of the amount on 21-10-1940, alleging that the cause of action accrued to the plaintiff on 15-1-1938 when the work was completed and on 21-3-1940 when on behalf of the Municipal Board the cheque was sent accompanied by the letter in which it was said that it was being sent in full satisfaction of the bill.

[3] The defence raised by the Municipal Board, Unao was that the suit was barred by limitation for in terms of S. 326 (3), U. P. Municipalities Act the suit should have been brought within six months of the completion of the work.

[4] The learned Munsif in the first Court decreed the claim of the plaintiff. In appeal the learned Additional Civil Judge, Unao reversed the decision of the first Court and dismissed the suit. One of the reasons which influenced the learned Additional Civil Judge in reversing the decision of the Court of first instance was that in his opinion the contract was invalid because it did not bear the seal of the Municipality. It may be mentioned that this particular point was not in controversy in the first Court. The learned Judge arrived at the conclusion that a contract to be valid must bear the seal of the Municipality from a passage in the judgment of Sir Saiyid Wazir. Hasan C. J. in a Full Bench case reported in 9 O. W. N. 461[1] at p. 465. I have read this passage and I am clear that the learned Additional Civil Judge has clearly misinterpreted it. The passage in question runs as follows:

"It was agreed that the contract on which the plaintiff relies and which is stated in para 2 of the plaint and is embodied in Ex. 11 was a contract the value whereof exceeds Rs. 250, it was also agreed that it was reduced to writing as is evidenced by Ex. 11 and it was further agreed that it was not signed by any person specified in cls. (a) and (b) of sub-s (2) of the section The learned Advocate for the defendant therefore contended that the contract was wholly void and illegal by reason of the provisions of sub-s. (3) and as such was not binding on the Board. For the sake of brevity the contract was treated in the course of argument, and I propose to follow the same course in my judgment as a contract not under seal and void as the statute required it to be under seal.

The learned counsel for the plaintiff admitted at the very threshold of his opening address that the contract in question was not under seal and that the statute, that is S. 97, Municipalities Act, was mandatory in its terms that the contract must be under seal."

The term "under seal" in that judgment has been interpreted by the learned Judge in the lower Court as meaning an impress of the actual seal on the contract which from the context is untenable. Section 97, Municipalities Act, 1916, to which a reference was made in the passage quoted above runs as follows:

"(1) Every contract made by or on behalf of a board whereof the value of the amount exceeds Rs. 250 shall be in writing. (2) Every such contract shall be signed—(a) by the chairman or a vice-chairman and by the executive officer or a secretary or (b) by any person or per-

sions empowered under sub-s.(2), or (3) of the previous section to sanction the contract if further and in like manner empowered in this behalf by the board. (3) If a contract to which the foregoing provisions of this section apply is executed otherwise than in conformity therewith it shall not be binding on the board.'

Section 97, Municipalities Act clearly does not require that the contract should bear the impress of the seal of the Municipal Board. It merely requires that a contract should be in writing and signed by the officers or persons mentioned in the section. Obviously when the learned Chief Judge said that for the sake of brevity he would use the term 'contract under seal' he clearly meant 'duly signed or executed' in the terms of the section. In the present case all the requirements of S 97 are admittedly fulfilled. The learned counsel for the respondent was forced to admit this and virtually conceded that he could not maintain the position taken up by the lower Court.

[5] The next and more serious ground upon which the suit has been dismissed by the Court below is the question of limitation. In the plaint it was distinctly alleged that the cause of action accrued to the plaintiff on 21-3-1941, when the cheque was sent purporting to be in full satisfaction of his bill, though it did not represent the amount for which he had submitted his bill. The learned counsel for the defendant does not dispute this date as giving rise to the cause of action. He, however, contends that under S. 326 (3), Municipalities Act, the period of limitation provided is six months and computing this period from 21-3-1940 the suit is clearly barred by time.

[6] The learned counsel for the appellant has refuted this contention on two grounds. He firstly contends that the rule of limitation in S. 326 (3), Municipalities Act is not intended to govern suits of the present nature but it comes within the ordinary law of limitation which is three years and for this proposition he relies on A. I. R. 1938 ALL. 540 : I L. R. 1938 ALL. 823[2] wherein a Divisional Bench of the Allahabad High Court held that :

"A suit claiming the balance due for work done under a contract between the parties is not a suit falling within S. 326 (1) and the action can proceed without any notice under S. 326 (1). Limitation for such a suit is three years and not a period of six months as prescribed by S. 326 (3)."

The law was exhaustively reviewed in that case and the learned Judges forming the Divisional Bench relied upon a Full Bench decision of the same Court reported in 58 ALL. 569[3] in which an analogous section in District Boards Act couched in the same terms as S. 326 (3), Municipalities Act was interpreted.

[7] In the alternative the learned counsel for the appellant argues that assuming that the present case fell within the purview of S. 326, Municipalities Act, he is still within limitation inasmuch as sub-s. (1) of S. 326 requires that :

"No suit shall be instituted against a Board, or against a member, officer or servant of a Board, in respect of an act done or purporting to have been done in its or his official capacity until the expiration of two months next after notice in writing has been in the case of a Board left at its office and in case of a member officer or servant delivered to him or left at his office or place of abode, explicitly stating the cause of action the nature of the relief sought the amount of compensation claimed. ....."

In the present case, it is admitted that the required notice was served upon the Board. The learned counsel for the appellant has contended that under S. 15 (2) and S. 29 (2), Limitation Act, he is entitled to deduct the two months required for the notice and if this is done the suit is still well within limitation. The learned counsel for the respondent has felt himself unable to meet the argument.

[8] In my judgment, the learned Additional Civil Judge has erred in reversing the decision of the trial Court for it matters little which of the two views is accepted the suit is not barred by lapse of time. I, therefore, allow the appeal, set aside the order of the lower appellate Court and restore the judgment and decree of the Court of first instance with costs.

V.B B. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 51 *[C. N. 24.]*

GHULAM HASAN C. J.

Mohammad Saddiq and another —*Appellants* v. *Wafati* —*Respondent.*

Misc. Appeal No. 45 of 1946, Decided on 12-2-1947, from decree of Dist. Judge, Lucknow, D/- 18-5-1946.

(a) Guardians and Wards Act (1890), S. 8—Application by father.

A father being the natural guardian of a minor son is not entitled to apply for guardianship under the law: 14 A. I. R. 1927 All. 581, *Foll.* [Para 5]

(b) Guardians and Wards Act (1890), S. 48—Application upon fresh facts whether barred.

Section 48 does not bar an application for instance an application under S. 25, upon fresh facts being established. The result of entertaining such an application and deciding it on the merits will not affect the finality of the order previously passed as laid down by S. 48 :28 A. I. R. 1941 Bom. 103, *Rel.on*; 28 A. I. R. 1941 Mad. 569, *Ref.* [Para 6]

Thus, a previous order as to the custody of the minor child is no bar to the entertainment of an application for guardianship. [Para 6]

(c) Guardians and Wards Act (1890), Ss. 19 (b) and 25—Application for change of custody—Considerations which should influence Court—Guardians and Wards Act (1890), S. 17.

The welfare of the minor is the paramount consideration which should influence the Court in deciding to whom the guardianship of the minor should be assigned [Para 7]

The rule that the father has got the natural right to the custody of his children is not a rigid and inflexible rule and must give way where the minor's welfare demands otherwise. [Para 9]

If the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years: 28 A. I. R. 1941 Bom. 103, *Rel. on.* [Para 7]

Muhammadan boy of tender years in the custody of his mother—Application by father for the return of the boy to his custody —Applicant imputing immorality to boy's mother but adducing no evidence to substantiate it —Held that having regard to the course of conduct followed by the applicant throughout the proceedings and other circumstances, the applicant was not a fit person to be entrusted with the guardianship of the minor : 22 A. I. R 1935 Oudh 492 (F.B.) and 16 A.I.R. 1929 Mad. 81, *Disting.*; 33 A. I. R. 1946 Mad. 110, *Ref.* [Para 8]

Cases referred.—

1. ('27) 49 All. 773 : 14 A.I.R. 1927 All. 581 : 102 I. C. 103, Mt. Ulfat Bibi v. Bafati.
2. ('41) 28 A. I. R. 1941 Mad. 569 : 198 I. C. 305. Venkata Rangacharyulu v. Ranga Subbe Akkappa Rao.
3. ('41) 28 A.I.R. 1941 Bom. 103 : I.L.R. (1941) Bom. 455 : 194 I. C. 48, Saraswatibai v. Shripad Vasanji.
4. ('22) 24 Bom. L. R. 779: 9 A. I. R. 1922 Bom. 405: 68 I. C. 518, Bai Tara v. Mohanlal.
5. ('35) 1935 O. W. N. 1096 : 22 A. I. R. 1935 Oudh 492 : 11 Luck. 553 :158 I. C. 581 (F. B.), Mt. Ghuran v. Riaz Ahmad.
6. ('29) 16 A. I. R. 1929 Mad. 81 : 120 I. C. 747, Atchayya v. Kosaraju Narahari.
7. ('45) 1945- 2 M. L. J. 463 : 33 A. I. R. 1946 Mad. 110 : 223 I. C. 464, Abubacker v. Mariyumma.

B. N. Khanna and S. B. Bajpai —for Appellants.

Mohammad Husain—for Respondent.

Judgment.—This appeal is filed by the minor and his mother against the minor's father and arises out of guardianship proceedings. The case has had a chequered history and affords a typical instance of the manner how the process of the Court has been abused for a long number of years.

[2] There has been unpleasant litigation between Wafati respondent and his former wife Rasoolan. She was married in 1931 and divorced in 1938. There were two issues of the marriage Nur Muhammad and Muhammad Siddiq, the former being elder of the two by a couple of years. Mohammad Siddiq was born on 23rd September 1936. Wafati has remarried and has got two children from the second wife.

[3] Rasoolan obtained a decree for Rs. 4 as maintenance under S. 488, Criminal P. C. some time in 1938. On 30th November 1938, she applied for maintenance of her minor son Mohammad Siddiq. She got a decree of Rs. 5 but this was reduced to Rs. 3 by the appellate Court on appeal by Wafati. This amount was not regularly paid and when it was, it was deposited in the Magistrate's Court and not paid direct to Rasoolan. Rasoolan got a decree for Rs. 500 for dower against Wafati on 6th May 1940. Admittedly this has not been paid up today. On 11th July 1940, Wafati was declared an insolvent upon his own application. He remained an insolvent for nearly five years and was discharged in 1945 without paying his debts. The elder boy Nur Muhammad has been living with Wafati from the beginning but Muhammad Siddiq has been living with his mother who stays with her parents and her three brothers. Her father is a tailor. Wafati began his attempts to get Muhammad Siddiq under his own custody. His first application for guardianship was dismissed on 2nd April 1942, the second application on 14th September 1942, and the third application on 20th December 1943. It may be mentioned that in one of the applications Wafati in resisting the custody of Rasoolan imputed immorality to her but this was found unproved. Against the dismissal of his third application he filed an appeal in this Court which was dismissed on 7th February 1945, by the late Chief Judge awarding Rs. 25 as costs. There is no evidence whether these costs were paid. The learned Chief Judge in his judgment says that Wafati got himself declared insolvent in order to deprive Rasoolan of the dower decree. He expressed the opinion that Wafati had not been honest in his dealings. He further observed that Muhammad Siddiq is well kept by his mother and in view of the strained relations between husband and wife he did not think that the step-mother will be keen to look after Muhammad Siddiq. The learned Chief Judge, in order to put a stop to frivolous applications by Wafati, awarded special costs of Rs. 25 against him. Unfortunately this order proved no deterrent. Wafati did not stop here. He applied for a review of the order and this was dismissed on 2nd May 1945, with Rs. 10 costs. These costs were not paid. My learned predecessor observed that Muhammad Siddiq was studying in a primary school at Pul Jhahu Lal and if Wafati was keen to have him educated in a better school he was prepared to reconsider the position provided he deposited a year's fee in advance. These were deposited in Islamia School. There is yet another order of the learned Chief Judge dated 3-8-1945, which shows that Muhamad Siddiq was admitted into Class III in the Aminabad High School. Mr. Siraj Husain, counsel for Wafati, had stated before the Court that Wafati will deposit the whole year's school fees. This was not done.

[4] The application which gave rise to this appeal was filed on 6-10-1945, under S. 8, Guardians and Wards Act by Wafati in person. The application is in English. It refers to his three applications previously made and dismissed. It again imputes immorality to Rasoolan, an allegation which was previously found to be false. The application states that Wafati being the father is the natural guardian under the Mahomedan Law and yet he asked that he should be appoint-

ed guardian of the minor's person. Several grounds are stated in the application which have furnished him with a fresh cause for making the application. These grounds in substance refer to his better financial position, to the unsatisfactory bringing up and education of Mahammad Siddiq under his mother's care, neglect in education, deterioration in his health and undertaking to educate Mahammad Siddiq along with his other brother under more satisfactory conditions.

[5] Counsel for both parties agree that a father being the natural guardian of his minor son is not entitled to apply for guardianship under the law: *see* 49 ALL. 773.[1] The District Judge took evidence of the parties and allowed the application for guardianship. He observed that:

"Whatever the circumstances may have been in the past however reprehensible the conduct of Wafati may have been towards his wife whom he has divorced, it is now proved that after his discharge from the insolvency he has been doing business of his own and has been comparatively prosperous."

He held that it was for the welfare of the minor to remain with his father. He, however, added the following rider:

"But I consider it necessary to add the direction that for the present Muhammad Siddiq the minor shall stay with his mother during the night time if his mother so desires. He shall go to school with his elder brother Nur Muhammad and spend the day with him in the school and thereafter with their father till they have had their evening meals. The two boys shall remain together during the day time."

This order may well be regarded as one for dual guardianship. It may also be mentioned that the learned District Judge did not consider the previous order dated 7-2-1945, as a bar to the entertainment of the application for guardianship.

[6] I may at once dispose of the latter argument. Section 48 on which the contention is founded runs as follows:

"Save as provided by the last foregoing section and by S. 622, Civil P.C. an order made under this Act shall be final, and shall not be liable to be contested by suit or otherwise."

All that the section in my judgment means is that once an order of the kind mentioned under the Act is passed it can either be set aside by an appeal under S. 47 or by revision under S. 115, Civil P.C. but it cannot be contested in a regular suit or in any other manner, *see* A. I. R. 1941 Mad. 569,[2] but this does not, however, mean that an application upon fresh facts being established cannot be maintained, for instance an application under S. 25. The result of entertaining such an application and deciding it on the merits will not affect the finality of the order previously passed as laid down by S. 48. This position was recognised in A. I. R. 1941 Bom. 103[3] where it was held that orders as to the custody of a child being always of a temporary nature those interested in the minor are at liberty to apply to the Court at any time for the change of the minor's custody. That was a case in which the child had been in the custody of the mother and the father had applied under S. 25 asking for the return of the child to him. I am of opinion, therefore, that S. 48 is no bar.

[7] The further question whether there should be any change of custody now at the instance of the father appears to me to present no difficulty. Although the application purports to have been made under S. 8, counsel has treated it as one under S. 25 and has argued that the learned District Judge having found that it was for the welfare of the ward to return to the custody of his father, the natural guardian, the order cannot be interfered with. There is no doubt that the welfare of the minor is the paramount consideration which should influence the Court in deciding to whom the guardianship of the minor should be assigned. Having regard to the consistent course of conduct, followed by Wafati throughout these proceedings combined with a singular pertinacity in litigating in Court a matter which could easily have been composed by private arrangement, I am of opinion that he is not a fit person to be entrusted with the guardisanship of the minor. Beaumont C. J. in the above Bombay case observed as follows:

"I think the law on questions of this sort is the same in this country as in England, though of course social habits may be different. The modern view of Judges in England is that it is impossible in the case of a young child, to find any adequate substitute for the love and care of the natural mother. If the natural mother is a suitable person, the Courts in England will as a general rule hand over the custody of a child of tender years to the mother. The mother's position is regarded as of much more importance in modern times than it was in former days, when a wife was regarded as little more than the chattel of her husband. The view of society in India as to the position of women may not have advanced so far or so fast as in England, but at the same time the right of the mother to the custody of her young children is undoubtedly recognised in this country: *see* for example, 24 Bom. L. R. 779.[4] However the paramount consideration is the interest of the child rather than the rights of the parents. Human nature is much the same all the world over, and in my opinion if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years."

I am in respectful agreement with the view expressed. The fact that these observations were made in a Hindu case can make no difference in the principle. In my opinion they are of universal application.

[8] Reference was made to a Full Bench decision in 1935 O. W. N. 1096.[5] There it was held that the father remains the guardian of the person of the minor in spite of the fact that she is in the actual physical custody of her grand-

mother and where the minor was sent by the father along with her mother to her mother's house and stayed there with her grandmother after the death of the mother, it was held that she had left or had been removed from the custody of his father and the latter could apply for return under S. 25, Guardians and Wards Act. Neither of these questions arises here. Upon the merits, the order was made in favour of the father particularly on the ground that the maternal grandmother had refused the father access to the daughter and he was thus deprived of all control over the education and upbringing of the child. The facts in the present case are entirely different. The contest here is between the father who has remarried and has children by the second wife on the one hand and the mother herself who has been divorced and has not remarried. The father has kept the elder boy with him. He was admittedly a man of small means getting, according to his own admission, Rs. 11 per mensem as a servant at an ice-vendor's shop. When his wife obtained an order for maintenance of Rs. 5 from the Magistrate's Court despite his contest, he had it reduced by appealing to the District Magistrate. When asked whether he had stated his income to be Rs. 4 before the Magistrate, he said that he did not remember. He admitted that he did not pay anything for the maintenance of the boy for a whole year when the guardianship case remained pending. In his application for insolvency he stated that he had no property of any kind. He valued his assets at Rs. 125 and his liabilities varied between Rs. 2000 to Rs. 3000. From 1939 till his discharge in 1945 he continued to get the same pay of Rs. 11 per mensem. According to him, he started the business in cement and lime in 1946 and earned about Rs. 100 in December. He admits, however, that the rent of the shop is paid by his previous employer. There is no reliable evidence to show that Wafati is a prosperous business man. He owns no house of his own. Muhammad Siddiq, when examined, expressed his clear preference to live with his mother. Rasoolan lives in the house of her parents. She has three brothers and all of them appear from the evidence to be fairly well off. It is true that the boy has not made much progress in the school as compared to his elder brother, but the obvious explanation of this is to be found in the fact that his mother has been continuously harassed over the custody of the boy and it is easy to conceive that the boy could not have improved under these unfavourable conditions. Wafati imputed immorality to Rasoolan and adduced no evidence to substantiate it. Having regard to all the circumstances of the case, I am convinced that Wafati is unfit to be guardian of the person of the minor (S. 19 (b), Guardians and Wards Act).

[9] The case in A. I.R. 1929 Mad. 81[6] is distinguishable on the facts. That case itself recognises that the decision of the question whether it would be for the welfare of the child to return to the custody of the guardian depends entirely on the circumstances of each case. In (1945) 2 M. L. J. 463[7] the learned Chief Justice of the Madras High Court held that where a husband makes a false allegation of immorality against his wife and is unable to prove it, that itself is an indication that the father is not a proper person to have the custody of his child. The rule that the father has got the natural right to the custody of his children is not a rigid and inflexible rule and must give way where the minor's welfare demands otherwise.

[10] On a consideration of the entire circumstances of this case, I am of opinion that the order of the learned District Judge cannot be supported. I allow the appeal with costs, set aside the order and direct that the minor Muhammad Siddiq shall continue to remain with his mother. It will be open to Wafati to contribute such expenses towards the maintenance and education of the minor as his circumstances permit. Wafati's conduct throughout the proceedings has been nothing short of reprehensible and dishonest, to use the words of the late learned Chief Judge. I, therefore, allow Rs. 50 as special costs against the respondent.

V.B.B. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 54 *[C. N. 25.]*

MISRA AND KIDWAI JJ.

U. P. Govt. in Nazul Department, Lucknow—Defendant — Appellant v. *Church Missionary Trust Association Ltd., London and Allahabad — Plaintiff — Respondent.*

First Appeals Nos. 86 and 135 of 1941, Decided on 4-11-1946, against decree of Civil Judge, Malihabad, Lucknow, D/- 13-1-1941.

(a) Contract Act (1872), S. 188—Power of attorney —Construction—All clauses must be read together.

In order to determine what powers a power of attorney purports to grant the whole must be read together. It would be an entirely incorrect mode of construction to take a few sentences or clauses and to consider them removed from the context. [Para 21]

(b) Contract Act (1872), S. 188 — Power of attorney — Construction — Power of attorney given for various purposes, governing object being power to sell—All other purposes must be read as ancillary to governing object.

Where a person was appointed as agent under a power of attorney for the purpose of selling certain property of the principal and the power of attorney also provided for other purposes and the words conferring powers for the other purposes were quite general :

Held, that the governing object of the power was the dealing with or disposing of the property by sale and

the other purposes for which the power was executed must therefore be read as ancillary to this object and even the general words conferring these powers must be so construed as to restrict them to what may be required for the performance by the agent of his duty to sell. [Para 22]

(c) Contract Act (1872), S. 237 — Third party not caring to read written power of attorney—Principal is not bound if agent has acted in excess of authority.

Where an agent holds a power of attorney and the person dealing with the agent does not care to ask for the power of attorney to see if the transaction was warranted by it, the principal cannot be bound by the transaction if it is in excess of the agent's authority : 9 Cal. 1, *Foll.* [Para 20]

(d) Contract Act (1872), S. 187—Implied authority — Power to sell implies power to clarify title and settle disputes necessary for effecting sale.

When a power of attorney confers a power to sell and there are no words limiting the power, a power to clarify title and to settle disputes, in so far as it is necessary for effecting a sale would be implied, in view of the duties imposed on a seller under S. 55, T. P. Act. [Para 24]

(e) Compromise—Binding nature — It stands on same tooting as family settlement.

There is no reason to treat a compromise settling doubtful rights on a footing different from a compromise between members of a family. In each case the basis is a compromise and principles governing compromises must be the same no matter who the parties to the compromise may be. [Para 28]

(f) Evidence Act (1872), S. 91 — Compromise—Correspondence preceding compromise is admissible.

When a compromise is arrived at by means of correspondence the final document executed is the result of negotiations which preceded it and the whole must be considered to determine what the compromise is. In such a case, there is no question of varying the terms of a document but only of determining the circumstances under which it came into existence : *Case law reviewed.* [Para 30]

(g) Contract Act (1872), S. 20 — Compromise of doubtful claims — Subsequent inquiry revealing title in one person—Such person cannot resile from compromise on ground of mistake.

Compromises are usually entered into only where there is some doubt in the minds of the parties to it as to their respective rights This does not mean that the title itself is doubtful: the title always lies in some one or other. Thus one or other of the parties has title but it is not certain which. A compromise is thus usually arrived at in order to settle in whom the title lies and the parties agree to settle their differences privately in order to prevent or cut short litigation. If it were open to the person whom subsequent enquiry reveals to have title to resile from a compromise deliberately entered into merely on the ground that the result of a subsequent litigation has shown his title to be clear and that, therefore, the compromise was not proper but was induced by a mutual mistake as to rights or was merely the admission of the title of another it would lead to an impossible result. The person subsequently found to have title or a particular title, would never be bound if there was any derogation from it and only the person who had no title would be bound by it, which, on the face of it, is a wholly untenable proposition: *Case law reviewed* : 26 A. I. R. 1939 Lah. 511, *Dissent.* [Para 32]

(h) Transfer of Property Act (1882), S. 105—Perpetual lease—Lease held to be perpetual.

Where (1) the land was given on lease at the same time as the building upon it was sold for residential purposes to the lessee and (2) no period was fixed for the lease and (3) the land was held at a uniform rent for 69 years and (4) several transfers had taken place and the transferability of the lessee rights was clearly recognised and (5) the lessor never claimed that the lease was terminable :

Held, that although none of these facts taken by itself was sufficient to establish the fact that the lease was a permanent one, the cumulative effect of all of them taken together was to establish that the land was held under a perpetual lease. [Para 55]

Annotation: ('45-Com.) T. P. Act, S. 105 N. 48.

(i) Evidence Act (1872), S. 13 — Recital in document — Admissibility.

A document is admissible in evidence if it is a transaction by which a right is asserted or claimed. Recitals in it are not however admissible except to the limited extent laid down in 29 Cal. 187 (P. C.) and 18 A.I.R. 1931 P. C. 89. Recitals of previous transactions are not admissible : *Case law discussed.* [Para 74]

(j) Evidence Act (1872), S. 13 — Section does not tell how facts are to be proved.

Section 13 occurs in Chap. II, Evidence Act, which is headed "Of the Relevancy of Facts" and it says only:— "Where the question is as to the existence of any right or custom, the following facts are relevant". It does not say how these relevant facts are to be proved ; for that one has to look to other provisions of the Evidence Act. [Para 74]

(k) Limitation Act (1908), Art. 144 — Adverse possession—Each case of adverse possession is to be judged on its own merits and the circumstances of the case. [Para 77]

Annotation: ('42-Com.) Lim. Act, Arts. 142 and 144 N. 96.

(l) Limitation Act (1908), Art. 144—Adverse possession—Burden of proving lies on party asserting adverse possession. [Para 77]

Annotation ('42-Com.) Lim. Act, Arts. 142 and 144 N. 87.

(m) Evidence Act (1872), S. 110 — Section does not apply when initial title of another person is established.

The effect of S. 110, Evidence Act, is that if a person is in possession his title is presumed until the title of some other person is proved. Once the initial title of another person is established S. 110 no longer applies and the possessor must prove that that title has somehow or other been terminated. [Para 77]

(n) Limitation Act (1908), Art. 144 — Adverse possession—Essentials — Possession must be adequate in continuity, publicity and extent.

The classical requirements of adverse possession are that the possession must be *nec vi nec clam nec precario*, that is to say it must be adequate, in continuity, in publicity and in extent to show that it is possession adverse to the competitor. But a mere exercise of exclusive and continuous acts of possession would not be enough and it must further be shown that the possession was not permissive and that a vigilant owner would have known of it. Further, if a person in possession recognises the superior title of the true owner, e. g., by the payment of rent, no length of time and no amount of assertion will oust the title of the true owner. Moreover the exclusion of the true owner must be complete and partial possession by him keeps his title alive. [Para 78]

Annotation: ('42-Com.) Lim. Act, Arts. 142 and 144 N. 16.

(o) Limitation Act (1908), Art. 144 — Adverse possession—Tacking — Person seeking to tack on must be successor-in-interest.

If a person claims adverse title not only by reason of his own possession but also by reason of possession by another person he can only succeed if he establishes that he is the successor-in-interest of the previous possessor. There can be no tacking on of the possession of independent trespassers. [Para 79]

Annotation: ('42-Com.) Lim. Act, Arts. 142 and 144 N. 92.

(p) Contract Act (1872), S. 196—There can be no ratification of illegal act without knowledge of illegality.

There can in truth be no ratification without an intention to ratify and there can be no intention to ratify an illegal act without knowledge of the illegality: 25 A. I. R. 1938 P. C. 284, *Foll.* [Para 82]

(q) Contract Act (1872), S. 228 — Compromise by agent partly within and partly in excess of authority—Parts inseparable—Whole compromise fails.

When an agent entered into a compromise of doubtful rights with regard to a certain property of his principal and it was found that with regard to a major portion of the property there was no dispute as to principal's title and consequently the agent had no authority to enter into the compromise and the various portions of the compromise could not be separated:

Held, that the whole compromise failed and the parties must be relegated to the position they would have occupied but for the compromise. [Para 81]

Cases referred :—

1. ('35) 1935 O. W. N. 490 : 22 A. I. R. 1935 Oudh 305 : 155 I. C. 180, In re Assessment of Income-tax of Mahomed Mehdi.
2. ('16) 43 I. A. 48 : 2 A. I. R. 1915 P. C. 121 : 43 Cal. 527 : 32 I. C. 419 (P. C.), Bank of Bengal v. Ramanathan Chetty.
3. (1893) 1893 A. C. 170 : 62 L. J. P. C. 68 : 68 L. T. 546 : 41 W. R. 600, Bryant v. La Banque du Peuple.
4. ('83) 9 Cal. 1, Jumma Das v. Eckford.
5. (1886) 32 Ch. D. 625 : 55 L. J. Ch. 725 : 54 L. T. 899 : 34 W. R. 701, Loring v. Davis.
6. (1916) 85 L. J. K. B. 1187 : 115 L. T. 61, Weigall & Co. v. Runciman & Co.
7. (1920) 2 K. B. 186 : 89 L. J. K. B. 700 : 123 L. T. 256, Gould v. South Eastern and Chatham Ry. Co.
8. ('71) 15 W. R. 16 : 6 Beng. L. R. 283 : 13 M. I. A. 585 (P. C.), Mt. Oadey Kunwar v. Mt. Ladoo.
9. ('99) 26 Cal. 81 : 25 I. A. 161 (P. C.), Mohammad Imam Ali Khan v. Hussain Khan.
10. ('82) 8 I.A.215(P.C.), Seth Jaidial v. Seth Sitharam.
11. ('26) 13 A. I. R. 1926 P. C. 54 : 48 All. 313 : 53 I. A. 123 : 95 I. C. 566 (P. C.), Lakhmi Chand v. Mt. Anandi.
12. ('38) 25 A. I. R. 1938 Lah. 69 : 176 I. C. 813, Amir Chand v. Desraj.
13. ('10) 34 Bom. 139 : 4 I. C. 833, Krishna Tanhaji v. Aba Shetti.
14. ('25) 12 A. I. R. 1925 P. C. 122 : 88 I. C. 103 (P. C.), Tilakdhari Singh v. Kesho Prasad Singh.
15. ('37) 24 A. I. R. 1937 Pat. 65 : 16 Pat. 159 : 166 I. C. 966 (S. B.), Kuchwar Lime & Stone Co., Ltd. v. Secy. of State.
16. ('39) 26 A. I. R. 1939 Lah. 511 : I. L. R. (1940) Lah. 392 : 185 I. C. 713, Ram Rattan v. Municipal Committee, Amritsar.
17. ('38) 25 A. I. R. 1938 Rang. 227 : 177 I. C. 599, Alagammai Achi v. P. L. P. R. P. R. Firm.
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19. ('27) 14 A. I. R. 1927 Oudh 198 : 100 I. C. 730, Secy. of State v. Nabi Bakhsh.
20. ('21) 24 O. C. 33 : 8 A. I. R. 1921 Oudh 65 : 61 I. C. 721, Barati v. Secy. of State.
21. ('34) 21 A. I. R. 1934 Oudh 442 : 152 I. C. 186, Tikam Das v. Abbas Mirza.
22. ('36) 23 A. I. R. 1936 Oudh 97 : 159 I. C. 772, Tikam Das v. Abbas Mirza.
23. ('40) 27 A. I. R. 1940 Pat. 406 : 189 I. C. 739, Central Co-operative Bank, Ltd. v. Dasrath Pandey.
24. ('31) 18 A. I. R. 1931 Pat. 268 : 10 Pat. 203 : 131 I. C. 811, Rupan Singh v. Akhaj Singh.
25. Second Appeal No. 351 of 1937, U. P. through the Nazul Officer, Lucknow v. Mrs. Daisy Sadac.
26. ('81) 6 I. A. 63 : 3 Sar. 244 (P. C.), Nawab Malka Jahan v. Deputy Commissioner, Lucknow.
27. ('99) 26 I. A. 58 : 21 All. 496 : 7 Sar. 523 (P. C.), Lala Beni Ram v. Kundan Lall.
28. ('89) 16 Cal. 223 : 16 I. A. 6 : 5 Sar. 275 (P. C.), Secretary of State v. Luchmeshwar Singh.
29. ('45) 32 A. I. R. 1945 Cal. 283, Sailendra Nath v. Bijan Lal.
30. ('28) 15 A. I. R. 1928 Cal. 703 : 117 I. C. 599, Abdul Munser Munshi v. Yakub Talukdar.
31. ('24) 11 A. I. R. 1924 Cal. 991 : 83 I. C. 948, Jnanendra Nath Dutt v. Nasia Dasi.
32. ('30) 17 A. I. R. 1930 All. 299 : 52 All. 464 : 126 I. C. 29, Tika Ram v. Moti Lal.
33. ('38) 25 A. I. R. 1938 Lah. 795 : I. L. R. (1938) Lah. 494 : 181 I. C. 498, Municipal Committee, Batala v. Wali Mohammad.
34. ('38) 25 A. I. R. 1938 Lah. 846 : 179 I. C. 762, Lachmi Narain v. Nanak Chand.
35. ('35) 22 A. I. R. 1935 Cal. 367, Rasik Lal v. Prasanna Kumar.
36. ('02) 29 I. A. 24 : 29 Cal. 187 : 8 Sar. 224 (P. C.), Dinomoni v. Brojo Mohini.
37. ('31) 58 I. A. 125 : 18 A. I. R. 1931 P. C. 89 : 58 Cal. 1187 : 131 I. C. 753 (P. C.), Govind Narayan Singh v. Sham Lal Singh.
38. ('24) 28 C. W. N. 942 : 12 A. I. R. 1925 Cal. 194 : 82 I. C. 99, Gopi Sundari Dasi v. Kherod Gobinda.
39. ('27) 14 A. I. R. 1927 Cal. 1 : 99 I. C. 189, Brojendra Keshore v. Mohim Chandra.
40. ('35) 39 C. W. N. 311, Kanta Mohan Mallik v. Basudev Ghosa.
41. ('28) 15 A. I. R. 1928 Cal. 893 : 110 I. C. 521, Ambica Charan v. Kumud Mohun.
42. ('41) 28 A.I.R. 1941 Cal. 541: I. L. R. (1941)2 Cal. 44: 197 I. C. 376, Jogendra Krishna v. Subasini Dassi.
43. ('10) 33 Mad. 173 : 5 I. C. 121, Krishna Aiyar v. Secy. of State.
44. ('16) 43 I. A. 192 : 3 A. I. R. 1916 P. C. 21 : 39 Mad. 617 : 35 I. C. 902 (P. C.), Secy. of State v. Chelikani Rama Rao.
45. ('22) 9 A. I. R. 1922 P. C. 181 : 44 Mad. 883 : 48 I. A. 395 : 66 I. C. 451 (P. C.), Kuthali Moothavar v. Kunharan Kutty.
46. ('30) 17 A. I. R. 1930 P. C. 281 : 11 Lah. 638 : 57 I. A. 273 : 127 I. C. 537 (P. C.), Jahandad Khan v. Abdul Ghafur Khan.
47. ('34) 21 A. I. R. 1934 P. C. 77 : 56 All. 111 : 61 I. A. 50 : 147 I. C. 887 (P. C.), Mt. Allah Rakhi v. Shah Mohammad Abdul Rahim.
48. ('41) 1941 O. W. N. 537 : 28 A. I. R. 1941 Oudh 436 : 194 I. C. 50, Iqbal Ali v. Humayun Qadar.
49. (1900) 27 I. A. 136 : 27 Cal. 943 : 7 Sar. 714 (P. C.), Radhamoni Debi v. Collector of Khulna.
50. ('39) 1939 O. W. N. 249 : 25 A. I. R. 1938 P. C. 284 : I. L. R. (1939) Lah. 1 : I. L. R. (1939) Kar. P. C. 16 : 178 I. C. 659 (P. C.), Premila Debi v. Peoples Bank, Northern India, Ltd.

Nasirullah Beg, Govt. Advocate — for Appellant.

Ram Bharosey Lal and M. M. Lal — for Respondent.

Judgment.—These two appeals arise out of two suits disposed of by one judgment by the Civil Judge, Malihabad, Lucknow. They relate to four pieces of land, namely the whole of plot No. 287 and portions of plots Nos. 282, 288 and 296, measuring in all 2 bighas, 16 biswas, 6 biswansis 15 kachwansis situated in muhalla Khas Bazar on the Bisheshwar Nath (formerly Banks) Road, near the Kaiserbagh Circus in the city of Lucknow. Part 1 of this land is covered by buildings formerly occupied by the Church Mission Birkett High School and the rest of it is open land forming part of the school compound. The school was run by the Church Missionary Society while the property was under the control of the Church Missionary Trust Association Ltd., (hereinafter called the Association), a company registered under the English Companies Act which was formed solely for the purpose of holding, dealing with or disposing of the property of the Society: *vide* Ex. A-67.

[2] The Association had been in possession of this land for a long time and as early as 1922, if not earlier, (*vide*, Ex. A-6), it had decided to dispose of the whole property of the school. It accordingly appointed some persons including the Rev. Carpenter, as its agents to sell this property authorising those persons, or any of them, to substitute others in their place. In pursuance of this authority, the Rev. Carpenter, by a power dated 11-9-1923, (Ex. A-7) appointed the Rev. Mukand, then principal of the school, to act as agent. The extent of the authority conferred by this power and the object of the appointment are questions of importance arising for determination in this appeal.

[3] After some correspondence commencing in 1928, a lease was executed on 4-10-1932, on behalf of the Secretary of State for India in Council by which the four pieces of land in suit were demised to the Association to be held by it for so long as the land was required for educational purposes. This lease reserved an yearly rent of Rs. 70-6-9 and it was to come into operation with retrospective effect from 1-4-1930. It was signed, on behalf of the Association, by the Rev. Mukand as its agent and attorney.

[4] The Church Mission School was closed from the month of June 1935. Consequently, the Lucknow Improvement Trust, which was managing Nazul properties, on behalf of the Government, gave a notice to the Association, through the Rev. Mukand, on 18th May 1936, terminating the lease and asking for vacant possession of the land covered by it by 30th June 1936. The premises were not vacated, and on 27th September 1937, the United Provinces Government (hereinafter referred to as the Government) filed a suit in the Court of the Munsif, South, Lucknow, against the Association, claiming vacant possession of the land and some money as rent and damages. The suit was found to be beyond the jurisdiction of the Munsif and the plaint was orderded to be returned. It was returned on 28th March 1938, and the next day, 29th March 1938, it was filed in the Court of the Civil Judge, Malihabad at Lucknow. This suit was numbered as Suit No. 28 of 1938 and Appeal No. 135 of 1941 arises out of it.

[5] The plaint was a very short one and simply stated that the whole of the land was held by the respondent under a lease for educational purposes; that it had ceased on 30th June 1935, to be used for any educational purpose; that the lease had been terminated by notice from 30th June 1936; and that the defendant had refused to vacate the land. Hence the suit was filed and the following reliefs were claimed: (a) Vacant possession of the land be delivered to the plaintiff; (b) Rupees 17-9-9 be decreed as rent for the period from 1st April to 30th June 1936; and (c) Rupees 2464-12-3 be decreed as damages for use and occupation of the land from 1st July 1936 to 30th March 1938, at the rate of Rs. 1408-7-0 per year.

[6] The Association resisted the claim and filed a very elaborate written statement in which, among other pleas, it set up title to each of the plots in suit quite independently of the lease (*vide* paras. 10 to 20 and 29 to 32 of the written statement and paras. 23 (a) to (g) inserted by application dated 15th December 1938). The question of title was further elucidated by the parties in the oral pleadings of 23rd January 1939. The details of the defence with regard to each plot will be mentioned when the question of title is being considered. The Association further pleaded that the Reverend Joseph Mukand had no authority to take the lease (para. 23); that both the parties acted under a mutual mistake (paras. 21, 22 and 25) or, at least, that the Reverend Mukand was acting under a mistake induced by misrepresentations on behalf of the plaintiff (para. 24); that, on the determination of the lease, the old title of the defendant revived and it was entitled to continue in possession under that title (para. 26); that, in any case, it had been in possession at the date of the lease and was entitled to continue in possession as before (para. 27); that, even if the Reverend Mukand had authority to enter into the transaction of lease and to admit the title of the plaintiff, the admission made was gratuitous and the defendant was entitled to withdraw it (para. 28): and that the respondent was not liable to pay any rent under the lease. Consequently, it was prayed that the suit be dismissed.

[7] The Government filed a replication in

which it denied that the Association had title to any of the plots in suit independently of the lease. Its position was further clarified in the oral pleadings of 23rd January 1939. It was asserted that there was no misrepresentation or mutual mistake: that the Reverend Mukand had full authority to enter into the transaction of lease: that the admissions contained in the lease are binding on the defendant; that the lease was in reality a compromise of disputes relating to title and that the Association had ratified the lease and was bound by it.

[8] On the pleadings the trial Court framed the following issues:

"1. Is the lease (Ex. 1) dated 15th October 1932, invalid for having been brought about under misrepresentation and under mutual mistake of facts as alleged by the defendants in paras. 24 and 25 of the written statement? If so, its effect? 2. Whether the Reverend J. Mukand had no authority to sign the lease for the defendant as alleged by the defendant in para. 23 of the written statement? If so, its effect? 3 (a) Was the lease ratified by the defendant as alleged by the plaintiff in paras. 23, 27 and 28 of the replication? (b) If so, its effect? 4. Is the plaintiff entitled to any and what amount for use and occupation of the land in suit as alleged in para. 5 of the plaint? 5. To what arrears of rent, if any, is the plaintiff entitled? 6. Is the plaintiff entitled to get vacant possession of the land in suit as alleged by him? 7. Is the suit undervalued and is the court fee paid insufficient?"

[9] The defendant's counsel pressed for an issue to determine title to the land in suit but the plaintiff's counsel urged that the suit was based solely on the lease and there was no claim on the basis of title. This was accepted by the learned Judge and he held that the suit depended entirely on the validity of the lease and that no question of title arose. He accordingly refused to frame any issue on the question of title. As a result of this refusal, the Association felt compelled to institute a suit to determine the question of title. Accordingly, it itstituted Suit No. 24 of 1939 against the Government, in the Court of the Civil Judge, Malihabad, on 20th February 1939. Appeal No. 86 of 1941 arises out of this suit.

[10] The parties took up the same position in the suit which they had taken up in the previous suit and the reliefs claimed were: (a) A declaration that the lease dated 4/15th October 1932 is null and void; (b) In the alternative, the lease be set aside; (c) A decree for refund of Rs. 385-0-6 paid under the lease be passed. In this suit the following additional issues were framed:

"1. Is the plaintiff proprietor of the disputed land as alleged? or Is the plaintiff a perpetual lessee of the same land? or Does the plaintiff hold heritable and transferable rights in respect of that land?

2. Has the plaintiff perfected any of the rights covered by Issue No. 1 by adverse possession in the land in suit?

3. What are the rights of the plaintiff in 282 in suit?

4. Is the plaintiff estopped from denying the title of the defendant in respect of the land in suit as alleged?

5. To what relief, if any, is the plaintiff entitled?"

The two suits were consolidated by an order of the Court dated 26th April 1939, and they were tried together. The learned Civil Judge dismissed the suit of the appellant in its entirety and decreed the suit of the respondent, on the following findings:

"(1) That the Reverend Carpenter was not given any authority under the power of attorney in his favour (Ex A-6) to execute the lease in question on behalf of the Association. (2) That the Reverend Carpenter could and did invest the Reverend Mukand only with the powers which he himself possessed under Ex A-6. (3) That the Association is the owner of plot No. 282 by virtue of a permanent transfer from the Government. (4) That plot No 296 is owned by the Government and the Association has no title to it. (5) That the Association had, before the lease in dispute, the rights of a permanent lessee in the plot No. 287. (6) That the Association is the proprietor of plot No. 288 and if there was any defect in the title it has been made good by 60 years' adverse possession. (7) That it was by reason of a mutual mistake of fact that it was agreed between the Nazul department and the Reverend Mukand that the proprietary rights in the four pieces of land vested in the Nazul. (8) That if the true facts were known to the Nazul department, they were at least not known to the Reverend Mukand and so there was misrepresentation by the Nazul (9) That the lease was void under S. 20, Contract Act and voidable under S. 19 of that Act. (10) That there is no evidence to prove that the lease was ratified either by the President or Secretary of the Association or by the Association itself. (11) That for the applicability of S. 116, Evidence Act, it is not necessary that the person should have obtained possession under the lease but there is no estoppel in the present case. (12) That there can be a compromise only of doubtful rights and, in the present case, the title of the Association being clear, there could be no valid compromise."

[11] The Government has filed these two appeals from the decrees in both cases and the grounds taken in appeal are identical. The learned Government Advocate, who appears for the Government has not argued that any estoppel under S. 116, Evidence Act arises. He has divided his arguments into four heads. He argues, firstly, that the Reverend Mukand had full authority to enter into the transaction of lease on behalf of the Association; secondly, that, even if he had no such authority, the circumstances are such as to justify the application of S. 237, Contract Act or, in any case, the lease was ratified by the Association; thirdly, that the Government has title to all the land in dispute; and, fourthly, that there was no mutual mistake or misrepresentation.

[12] The learned counsel for the respondent controverts all these pleas and urges that the title of the Association to all the land in suit is made out quite apart from the lease of 1932.

[13] On the first point the argument is that the lease in suit, Ex. 1/1, is in reality a settle-

ment or adjustment of claims by which the Reverend Mukand, on behalf of the Association, recognized the Government as the owner of the property and the Government, in consideration of this, allowed the Association to continue in occupation of the property on a specially favoured rental so long as the land continued to be used for educational purposes. It is urged that, in the trial Court, even the counsel for the Association admitted that "technically" the lease "may be called an adjustment of a claim." He, therefore, argued that this lease came within the authority conferred by the Association on the Reverend Carpenter by EX. A-6 and by the latter on the Reverend Mukand by EX. A-7, whether the said powers are construed in the wide sense of enabling the agent to exercise powers generally in all matters or in the narrower sense of being exercisable in connection with the sale of those properties. He also relied upon Ss. 186 to 188, Contract Act to make good any deficiency that may exist in the working of the powers.

[14] On the other hand the learned advocate for the Association contended that the power conferred by EX. A-6 upon the Reverend Carpenter must be strictly construed and that it did not confer upon him power to be a party to a lease or to enter into any adjustment, settlement or compromise on a question of title. The Reverend Carpenter was only given power to sell the property as it stood because para. 1 of EX. A-6 clearly indicates that there was, in the mind of the Association, no doubt as to its title to all the properties sought to be sold. He urged that the dominating object of the power was the sale of the properties and all other powers conferred must be referred back to it. He proceeded further and contended that the proceedings mentioned in para. 5 and the adjustment etc. mentioned in para. 6 related back to paras. 2 and 3 and to anything that might be done after the sale in order to give effect to it and not to anything done before the sale.

[15] It is obvious that the Reverend Carpenter could not confer upon the Reverend Mukand any power which he did not possess, though he may not have conferred even all these powers. We have, therefore, first of all to consider what powers EX. A-6 conferred upon the Reverend Carpenter. Before doing this, however, it is advisable to remind ourselves of the principles in the light of which powers of attorney should be construed.

[16] Advocates for both the parties agreed that powers of attorney must be strictly construed but with regard to other matters they placed a large number of authorities before us. It is unnecessary for us to consider all of them because the principles are well settled. In Pollock and Mulla's Commentary on the Contract Act, 7th (1944) Edn. p. 539, the following passage occurs :

"Another rule is that where special powers are followed by general words, the general words are to be construed as limited to what is necessary for the proper exercise of special powers and as enlarging those powers only when necessary for the carrying out of the purposes for which the authority is given."

The principles applicable have been very clearly and succinctly summarised in Bowstead's "Agency", 8th Edn., Art. 34 p. 73 (corresponding to Art. 36 of the 9th Edn.) :

"Powers of attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction : (1) The operative part of the deed is controlled by the recitals. (2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts. (3) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers when necessary, and only when necessary for that purpose. (4) The deed must be construed so as to include all medium powers necessary for its effective execution."

[17] It was laid down in 1935 O. W. N. 490[1] (at pp. 493-494) that a power of attorney must be strictly construed as giving only such authority as it confers expressly or by necessary implication and, in order to see what was intended by certain words in a power of attorney, they must be considered in the context in which they are placed and the general object of the power must also be borne in mind. In the same case it was further laid down at p. 494, that when the agent is appointed by a written deed "there seems to be no question of any implied agency. The powers conferred upon him as agent have been definitely set forth in the written mukhtarnama" and there is no justification for going outside its terms.

[18] In 43 I. A. 48,[2] their Lordships of the Judicial Committee say at pp. 54 and 55 :

"Applying to the power in the present case the canon of construction laid down in (1893) A. C. 170[3] at p. 177, namely, 'that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication,' their Lordships consider that the authority to enter into transactions of the nature in dispute is to be found in the document itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted. Without such authority it would hardly have been possible to carry on the business of a money-lender and financier."

Further their Lordships say :

"It was urged on behalf of the defendant that it was not shown he had received any benefit from the transaction in question. Their Lordships think that if authority is established the mere fact that the principal

did not receive any benefit does not rid him of his liability."

In 9 Cal. 1[4] it was laid down by a Bench of the Calcutta High Court at page 8:

"One very fair test, as it seems to me, whether the plaintiff ought to be bound by the transaction, is this. If the defendant had looked at the transfers, as he ought to have done, and had seen that they were transfers made of the Muir shares and on the plaintiff's behalf, and if he had then asked to see the power-of-attorney, ought he not, and should he not, at once as a reasonable man have seen, on looking at the power, that the transaction into which he was entering was one which the power-of-attorney did not warrant."

The learned Government Advocate also argued that if the terms of the power of attorney are ambiguous and it is not certain whether they did or did not authorise the lease or a settlement of claims etc. the Association must be held bound by acts which the agent did in the *bona fide* belief that the power had been conferred upon him. In support of this proposition, he relied upon the following authorities: (1886) 32 Ch. D. 625,[5] (1916) 85 L. J. K. B. 1187[6] and (1920) 2 K. B. 186.[7]

[19] Though apparently these authorities support his contention, they are not directly applicable to this case because in none of these cases was there any power of attorney to interpret and the only question was whether an agent could bind his principal if he carries out a particular direction given to him by his principal in a particular manner which was not justified by the direction in question but which he *bona fide* believed to be justified. Further, the authorities which have been referred to earlier in this judgment clearly show that, in the words of Lord Macnaghten in (1893) A. C. 170[3] at p. 177:

"Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument."

Moreover, in the present case, we shall presently show that there is no such ambiguity as would call for the application of the principle invoked by the learned Government Advocate.

[20] We may note that in the present case the Nazul Department did not try to ascertain the extent of the Rev. Mukand's authority though it could easily have done so by asking to see his power. It is no doubt true that, in his capacity of Principal of the School, he was in charge of the property of the Association at Lucknow but this, the Nazul Officer himself realised, was not sufficient because he wrote and asked the principal, "the name and the designation of the officer who will sign the lease on behalf of the school" (*vide* Ex. 13). The Rev. Mukand wrote back that he would sign as "agent and attorney, Church Missionary Association, Ltd., London and Allahabad": *vide* Ex. 14. The Nazul thereafter, instead of asking for the power of attorney, accepted this and proceeded to get the lease signed by the Rev. Mukand. Applying the test laid down in 9 Cal. 1[4] to this case, the Association cannot be bound by the action of the Rev. Mukand if it is in excess of his authority.

[21] We come, therefore, to a consideration of the power of attorney, Ex. A-6, itself. In order to determine what powers it purports to grant the whole must be read together. It would be an entirely incorrect mode of construction to take a few sentences or clauses and to consider them removed from the context. The relevant portion of Ex. A-6 reads as follows:

"Whereas among the objects for which the company is established is to act as and allow its name to be used as trustee whether alone or jointly with any person or persons for the Church Missionary Society for Africa and the East (hereinafter called the Society) whose office is situate in Salisbury Square aforesaid and accordingly to hold and deal with the disposal of lands, buildings investments and property of any kind real or personal moveable or immoveable in any part of the world belonging to the said Society. And whereas by a resolution passed at a meeting of the General Committee being the governing body of the Society on the thirteenth day of September 1922 the said committee authorized and directed the company to issue a power of attorney to the effect and for the purposes hereinafter more particularly expressed. Now these presents witness that in compliance with the said resolution and direction and for effectuating the same company doth hereby make, constitute and appoint the Reverend James Nelson Carpenter of Allahabad in the province of Agra in the United Provinces in India and Arthur Gordon Dallimore of Allahabad aforesaid Office Manager to the Society (who and the survivor of them are hereinafter included in the expression the attorneys) jointly and each of them severally to be the true and lawful Attorneys and Attorney of the company for the purposes following namely:

1. To sell, convey, transfer and assign absolutely unto the purchaser or purchasers thereof at such price and prices and upon such terms and upon such conditions as the attorneys shall think fit all or any part or parts of the premises next hereinafter described namely:

(a) The land, buildings and other property of the Society commonly known as the Oxford and Cambridge Hostel at Allahabad in the province of Agra with the Warden's Bungalow Lodge Offices other buildings, playing fields and other appurtenances.

(b) The land, buildings and other property of the Society commonly known as the Birkett High School at Nos. (Ahlea Manzil) and 2 (Khas Manzil) Banks Road Mohalla Khas Bazar Thana Hazratganj (formerly Ganeshganj) Lucknow or elsewhere with Bungalow Offices, out buildings and other appurtenances.

(c) The land, buildings and other property of the Society commonly known as the High School Hostel Nazar Bagh. Husainganj also at Lucknow comprising Hostel and Warden's bungalow in one Courtyard three large playing fields two shops and numerous houses some of which are let to tenants near the High School Hostel or erected on land held therewith.

2. To ask, demand, sue for, recover and receive the purchase monies and all other sums of money and property whatsoever and give effectual receipts, releases and discharges for the same respectively.

3. To redeem any lien, charge or burden affecting any part or parts of the property sold which the attorneys may think fit to redeem upon such terms as the attorneys shall think fit or to make any sale or sales subject to any such lien, charge or burden.

4. To pay any sums which the attorneys may deem to be due from the company or expedient to pay.

5. To institute any proceedings in any Court of Justice and to appear, defend or intervene in any proceedings brought by other persons and to take such steps in any such proceedings as the attorneys shall think fit.

6. To settle, adjust, compound, submit to arbitration and compromise all actions, accounts, claims, and demands whatsoever which now or hereafter shall be depending between the company and any person or persons in such manner as the attorneys shall think fit."

[22] In considering EX. A-6, the first thing to be noticed is the recital which mentions that one of the objects of the Association is "*to hold and deal with and dispose of lands*, buildings investments and property of any kind . . . ." Then follows another recital and the various powers which are conferred upon the agent, the first of which is to sell the property described in the paragraph numbered 1. This is a clear indication of the fact that the governing object of the power was the dealing with or disposing—in this case by sale—of lands and buildings. All the other "purposes" for which the power is executed must, therefore, be read as ancillary to this object and even the general words of paras. 5, 6 and 8 must be so construed as to restrict them to what may be required for the performance by the agents of their duty to sell.

[23] This brings us to the second line of argument, namely, that, no matter where the title to the properties lies, the right of the Association was of a doubtful nature and the land on which the school buildings stood could not be sold without a clarification of the title and the production of proper title deeds for the satisfaction of intending purchasers. Thus, it is argued, that since the agreement of lease was executed in pursuance of the idea of clearing title in view of the claims made by the Lucknow Improvement Trust, it was such a settlement, adjustment, compounding or compromise of claims as came within the purview of para. 6 of EX. A-6. It is further argued that, even if this were not so, the Rev. Mukand, as the agent charged with the sale of the property, had implied authority to enter into such agreements as might be found necessary for proceeding with the sale. The contract of lease is sought to be sustained on this ground also.

[24] As we have already stated, the learned advocate for the Association strongly contends that EX. A-6 conferred no authority on the Rev. Mukand to clarify title; he had power only to sell whatever title the Association had. We cannot agree with this contention and our construction is that paras. 5 and 6 of EX. A-6 cannot be co-related only to paras. 2 and 3 but must be referred to the governing object of the power of attorney, namely, the sale of the property. There are no words limiting the power and, in accordance with the principles which the authorities discussed by us have laid down, the power to clarify title and settle disputes, in so far as it was necessary for effecting a sale, would be implied even if it were not expressed, in view of the duties imposed upon a seller by S. 55, T. P. Act. When, therefore, the authors of the power of attorney confer upon the agent authority to adjust and settle claims, there is every reason to think that they were empowering him to place himself in the position of being able to satisfy intending purchasers of title to the property to be sold. We have, therefore, come to the conclusion that the power of attorney, EX. A-6, did not confer upon the Rev. Carpenter any power of adjustment, settlement or compromise of claims beyond such as might be necessary for carrying out the sale to effect which it was principally executed.

[25] Coming now to EX. A-7, we find that the Rev. Carpenter says:

"I do hereby appoint Joseph Newman Mukand Clerk in Holy Orders, resident in the city of Lucknow, my substitute to sell all or any of the properties, to execute deeds of sale and to do all or any of the things I am entitled to do by the within aforementioned powers of attorney . . . . . ."

These words are very wide and clearly indicate that the Rev. Mukand had conferred upon him all the powers which the Rev. Carpenter had.

[26] We thus come to the next question argued before us, namely, whether the lease can be considered to be a "settlement, adjustment . . . . compromise" within the meaning of para. 6 of EX. A-6. The learned Advocate for the Association contended that, in the present case, there had been no claim or contest at all but that the Rev. Mukand had surrendered himself entirely into the hands of the Improvement Trust, seeking guidance from them and allowing them to dictate his action. Thus there was no settlement of rival claims. He further argued that any settlement in the present case could only be effectuated by a conveyance,—from the Rev. Mukand, since the title was that of the Association. It is nothing more than a gratuitous admission which can always be withdrawn. He also urges that the lease does not mention the existence of any dispute and its settlement and that for this reason also it cannot operate as a compromise. He relies upon 15 W. R. 16[8] and 26 Cal. 81[9] in which it was laid down that title can pass from one person to another only by a conveyance and, unless a conveyance was executed, there was nothing more than a mere admission which could be withdrawn. In the first mentioned case,

on an objection being made to her not being impleaded, Mt. Ladoo had made an application in Court that she was neither the guardian of the minor plaintiff nor had she any interest in the property. This was held not to affect any right which she might have had in the property or which she might subsequently acquire. In the second case, the repeated assertions by a taluqdar of Oudh that his uncle was malik were held in the absence of a conveyance of his undisputed rights not to confer any title upon the uncle. Neither of these cases related to any settlement relating to disputed rights and they can be of no assistance to the Association.

[27] There are a large number of cases relating to family settlements in which it has been held that a compromise of disputed claims may operate only as recognition of pre-existing title and will be binding on the parties even if no duly registered deed of conveyance is executed but the learned Advocate for the Association distinguishes those cases on the ground that the settlement of family disputes is such a laudable cause that things are permitted to be done to achieve that object which are not otherwise permitted. Further he differentiates the authorities on compromise relied upon by the learned counsel for the appellant on the ground that in all these cases the compromise was followed by a decree or order of Court.

[28] We see no reason to treat compromises settling doubtful rights on a footing different from compromises between members of a family. In each case, the basis is a compromise and the principles governing compromises must be the same no matter who the parties to the compromise may be. As to the second point we find that, in the present case also, the settlement of disputes was followed by a lease which was executed by both the parties, being an acknowledgment by the Rev. Mukand of the proprietary rights of the Government and an agreement by the Government to allow the Association to continue in possession at a favourable rent for such time as the land may be required for educational purposes.

[29] In 8 I. A. 215[10] two wills and a deed called an acquittance roll were treated as a compromise without the necessity either of a deed of conveyance or a decree of Court. In A. I. R. 1926 P. C. 54,[11] a will although invalid as a will, was held to be good evidence of a family arrangement which their Lordships deduced not only from a consideration of the documents themselves but also from the surrounding circumstances. In A.I.R. 1938 Lah. 69[12] a petition of compromise presented in execution proceedings was held to be sufficient evidence of a compromise. In 34 Bom. 139[13] a document embodying a compromise was neither registered nor followed by a decree. Each party acknowledged the existence of certain rights in the others, and neither party conveyed any rights to the other nor did the document mention that there were any disputes between the parties to be settled. It was held that the document was good evidence of a compromise which bound the parties.

[30] The learned counsel for the Association drew our attention to A. I. R. 1925 P. C. 122[14] and tried to pursuade us to hold that the correspondence which preceded the execution of the lease could not be considered for determining whether there had been a compromise. We do not agree with this view. When a compromise is arrived at by means of correspondence the final document executed is the result of negotiations which preceded it and the whole must be considered to determine what the compromise is. In such a case there is no question of varying the terms of a document but only of determining the circumstances under which it came into existence. In the case to which the learned Advocate referred, their Lordships quote with approval the following passage from the judgment of the High Court as laying down "a correct appreciation of the functions of a Court in construing a document of title submitted to it for consideration:"

"I took the view that in order to understand what was actually settled it was necessary to deal with certain documents on which the settlement was based, not to contradict any of the terms of the settlement, but to identify the thing demised."

In the present case also the correspondence which preceded the granting of the lease in 1932 —EXS. A-9, A-73, A-10, A-11 and 9 — may be considered not for contradicting or varying the terms of the lease, but in order to understand what it was that the contract of lease actually determined. (It may be noted that the Association itself produced most of the documents to a consideration of which it now objects.)

[31] We, therefore, hold that the lease, EXS. 1/1 well may, and in the present case does, evidence a settlement or adjustment of claims between the Government and the Association. The correspondence which precedes the lease and the evidence of the Rev. Mukand as D. W. 7 leaves no room for doubt that the Rev. Mukand was trying to get clear evidence of the title of Association to the property to be sold. The Rev. Mukand says :

"I wanted to purchase also the land which might be proved to belong to the Nazul about 1928. I wanted to do it in order to consolidate my rights so that it may be made freehold, as the question of sale, although postponed, was still there. I wrote or spoke about the Nazul noting down on the receipt for what they had charged Rs. 6-4-0 from the school. I was under the impression that I could take a lease as well as that I

could buy. Exhibits A-9 and A-11 were written in continuation of the correspondence I began with a view to buying the land from Nazul. That correspondence resulted in the execution of the lease I entered into this lease in the interest of my principals to the best of my ability."

At this stage, it is necessary for us to consider another argument which has been strongly pressed before us by the learned advocate for the Association and which was accepted by the learned trial Court and that is that the lease in question evidences not an adjustment or a settlement or compromise ot disputed claims but only a gratuitous admission by the Rev. Mukand of the claim of the opposite party. The trial Court has proceeded to consider all the evidence adduced in the case and, after an elaborate examination of that evidence, which led it to conclude that the Association had title to all the plots in suit (except NO. 296), it held that the rights were not doubtful and that, therefore, there could be no compromise in the true sense of the word.

[32] The approach made by the learned Civil Judge to the question of title is entirely incorrect and, if it were sanctioned, no compromise at all could be sustained. Compromises are usually entered into only where there is some doubt in the minds of parties to it as to the respective rights. This does not mean that the title itself is doubtful : the title always lies in some one or other. Thus one or other of the parties has title but it is not certain which. A compromise is thus usually arrived at in order to settle in whom the title lies and the parties agree to settle their differences privately in order to prevent or cut short litigation. If it were open to the person whom subsequent enquiry reveals to have title to resile from a compromise deliberately entered into merely on the ground that the result of a subsequent litigation has shown his title to be clear and that, therefore, the compromise was not proper but was induced by a mutual mistake as to rights or was merely the admission of the title of another it would lead to an impossible result. The person subsequently found to have title or a particular title, would never be bound if there was any derogation from it and only the person who had no title would be bound by it, which, on the face of it, is a wolly untenable proposition.

[33] In order to arrive at this conclusion the learned Civil Judge has relied upon the following authorities, which are the only ones which the learned advocate for the Association has placed before us, on the point: A I.R. 1937 Pat. 65;[15] A.I.R. 1939 Lah. 511;[16] A. I R. 1938 Rang. 227;[17] A. I. R. 1940 Oudh 409;[18] 26 Cal. 81.[9] None of these cases except the Lahore case, related to compromises. The decision in the Lahore case was based on the fact that the party relying upon the compromise had not carried out its terms. There is no doubt, however, that the learned Judge also considered Ss. 19 and 20, Contract Act, and held that, in that case, in circumstances similar to the present, the parties were under a mistake of fact essential to the agreement and that, for that reason also, the compromise should be set aside. If this principle is accepted, then no compromise can ever be upheld because it is only when the parties are not fully aware of their respective rights in the subject-matter of the dispute, owing to mistakes either of fact or law, that compromises are arrived at, except in the limited number of cases in which one of parties, although fully aware of his rights, is prepared to concede something to the other in order to purchase peace. In our opinion, in considering a compromise, it is not the title or the facts upon which that title is based that are essential but the fact of the existence of a *bona fide* dispute is the only thing essential to the settlement of the dispute.

[34] In A.I.R. 1927 Oudh 198[19] the Secretary of State had sued to recover possession of certain plots of land in the possession of Nabi Bakhsh. Nabi Bakhsh denied the title of the Secretary of State. Subsequently the parties came to terms and it was agreed that Nabi Bakhsh should recognise the title of the Secretary of State but continue to hold on a lease on payment of Rs. 20 a year as rent. A decree was passed in terms of the compromise and subsequently a lease and kabuliyat were executed. Then came the decision in 21 O. C. 33[20] in which the whole question of title to lands in the City of Lucknow was decided. Nabi Bakhsh failed to pay rents and the Secretary of State brought a suit for arrears. It was pleaded by Nabi Bakhsh that the compromise, lease and kabuliyat were void by reason of a mutual mistake of the parties as to title in view of S. 20, Contract Act. This plea was rejected by a Bench of this Court and the compromise was upheld. The learned Judges say :

"The agreement contained in the compromise and in the subsequent deeds following it was not conditional on the existence of title, as a matter of fact, in the Secretary of State. The essence of the compromise was the recognition of antecedent title independently of the fact as to whether it actually existed or not. Thus the matter that the title actually lay in the Secretary of State was not a fact essential to the agreement."

[35] The case was followed in A. I. R. 1934 Oudh 442,[21] in which Ziaul Hasan J., held that S. 20, Contract Act, was not applicable and he quoted with approval the following passage from p. 335 of Kerr on Fraud :

"Mistake in law is not a ground for setting aside a compromise, if the parties to the transaction were in difficulty and doubt, and wished to put an end to disputes and to terminate or avoid litigation. If one or

more parties having, or supposing they have, claims upon given subject-matter or claims against each other, agree to compromise these claims, and the knowledge, or means of knowledge, of each of them with respect to the mode in which, and the circumstances under which, his claim arises, stand upon an equal footing and there is an absence of fraud or misrepresentation, the transaction is binding although the conclusion at which the parties may have arrived is not that which a Court of justice would have arrived at had its decision been sought. The real consideration which each party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only and that the others had no right whatever. If, for instance, two parties claim adversely to each other the inheritance of a deceased person, and, in order to avoid litigation, agree to divide the inheritance it is no ground for setting aside the agreement that only one was heir and that the other gave up the right which he really possessed. The fact that the one may have had no claim is immaterial, if he was honestly mistaken as to his claim. It is enough if, at the time of the compromise, he may have believed he had a claim, and that the parties have, by the transaction, avoided the necessity of going to law. To render valid the compromise of a litigation, it is not even necessary that the question in dispute should really be doubtful, if the parties *bona fide* consider it to be so. It is enough to render a compromise valid, that there is a question to be decided between them. A compromise of doubtful rights will not be set aside on any other ground than fraud."

There was an appeal from the decision of Ziaul Hasan J. in A. I. R. 1936 Oudh 97[22] and a Bench of this Court affirmed the view he had taken and again followed A.I.R. 1927 Oudh 198,[19] holding that "such a compromise of disputed title is not affected by a later decision upon that title."

[36] The same view was taken by the Patna High Court in A.I.R. 1940 Pat. 406.[23]

[37] A consideration of all these authorities leads us to the conclusion that the crucial moment of time to be considered in judging of the validity of a compromise is the time at which the compromise was arrived at. In the present case, since one of the parties was only an agent with limited powers, we must also consider whether the compromise or adjustment fell within the scope of his authority, that is to say, whether the compromise was necessary for the purpose of proceeding with the sale. This requires a consideration of the state of title as it must have appeared to the Rev. Mukand and to the Nazul Officer in 1928 to 1932 quite apart from what we may now find it to be. Since, however, it is necessary for us to determine, for the purposes of the Association's suit, where title actually lies we will consider both aspects of the question of title at one and the same time.

[38] Plot No. 282 may first be disposed of. With regard to this plot, the learned Government Advocate wished to argue that there was no valid deed of transfer of this plot by which title passed to any one from the Government and consequently the Association ought not to be granted the declaration for which it prayed. He based his arguments on the provisions of 21 and 22 Vict. Chap. 106, S. 40 as modified by 22 and 23 Vict. Chap. 41, S. 1, and upon the interpretation placed on them in A. I. R. 1931 Pat. 268.[24] He contended that those sections authorised only an officer entrusted with the government of a district to convey property belonging to the Crown and he urged that, in the present case, the proper officer to convey plot No. 282 would have been the Deputy Commissioner of Lucknow. We find, however, that it is not only the officer charged with the administration of a district who can make a transfer but "any officer for the time being entrusted with the Government, charge, or care of any presidency, province, or district of India." Thus the officer charged with the government of the Province of Oudh was also competent to make the transfer and, in the present case, the sanction of the Government of North-Western Provinces was given (*vide* Ex. A-69 and Ex. A-2/D. W. 1). We are, however, not called upon to determine the true meaning of the Statutes mentioned or whether they have been complied with in the present case because in para. 9 of its written statement in suit No. 24 of 1939 the Government clearly admitted that a transfer had been made to the principal of the school for the benefit of the school, though it denied that the Association had acquired any rights thereby or that even the principal had acquired proprietary rights. It is not open to the learned Government Advocate to resile, on a question of fact, from the position which his client adopted in the written statement. The effect of the transfer remains to be considered. The transfer is of a permanent nature and no conditions are imposed, no rent is reserved and no right of re-entry is provided for. We can find nothing in the correspondence relating to this piece of land which would in any way limit full proprietary rights and make the land liable to resumption on the school ceasing to exist. Indeed it appears to us that, at that time, it never entered into any one's head that the school might cease to exist. Even when the Government made grants of money to the school for building purposes it only stipulated for some return if the school ceased to exist within 20 years (*vide* Exs. A-26, A-27, A-28 and A-29). In the present case there is no such stipulation and it is clear that the grant is a permanent one. We find, therefore, that the Church Mission High School became the owner of the portion of plot No. 282 now in suit. There is, however, no evidence of any transfer to the Association and it is agreed by the parties that

the Church Missionary Society, which runs the school, is not the same thing as the Association. Thus a grant to the school is not a grant to the Association and the latter has not proved its title to the portion of plot No. 282 granted to the school but, at the same time, the Government also had no title to this plot.

[39] With regard to plot No. 296, the Association was not at all clear as to its position. In para. 17 of its written statement it said :

"That to the south of No. 287 is khasra No. 296 which was the property of the Nazul. It seems that at some time in adjusting the boundary, some portion of No. 296 was included within the area of the kothi and it seems probable that a perpetual lease in respect of the land so included was given by the Nazul to either Raja Sarabjit Singh or Mohiuddin at an annual rent of Rs. 6-4-0."

Again, in para. 36 it is said :

"That as to a portion of plot No. 296, now in suit, the Church Missionary Trust Association Limited set up the title of a perpetual lease on a payment of Rupees 6-4-0 per annum as it appears highly probable that such a lease was granted by the Nazul."

These pleas are repeated in paras. 4 and 23 respectively of the Association's plaint in identical terms. The Government denied any perpetual lease and alleged that the plot was Nazul property. This uncertainty in the minds of the responsible officers of the Association existed even when the present suit was filed, and it must also have existed in 1928 to 1932 when negotiations were going on between the Rev. Mukand and the Nazul Department. The trial Court has found that this plot was owned by the Government and the Association had no rights in it. In appeal, the only argument advanced is that, though the title of the Association is not proved, the narrow strip of land has for long past been treated as a part of plot No. 287 and should be deemed to be an accretion. Exhibit A-28, a deed executed by the Association in favour of the Government, shows that the present compound wall was built in 1914. It appears probable that the strip of land was included in the school compound at that time. There is no proof of an earlier possession by the school. Thus the school has not been in possession for a sufficient length of time to acquire title, and in this piece of land, the association has no title at all and the property remains that of the Government.

[40] We will now take up Plot No. 287 which comprises by far the largest portion of the land in suit, measuring 2 bighas 2 biswas, 17 biswansis and 12 kachwansis. It is as well to bear in mind that the building situated on this plot was called Khas Manzil (and later No. 2 Banks Road), since reference is made in most of the documents not to Plot No. 287 but to 'Khas Manzil.' With regard to this plot and the buildings situate upon it, the Association pleaded that it had acquired title from Mohiuddin, who had obtained it by gift from Raja Sarabjit Singh, that Raja Sarabjit Singh was entered in the khasra of the city of Lucknow as full proprietor ; that the Association and its predecessors had been in full proprietary possession of it for over 60 years and that, consequently, it had become the absolute owner of this plot. The position which the Government took up was that the building had been sold in 1861 by the Government to Mrs. Johannes, mother of Mrs. Quieres, and that Mrs. Johannes had agreed to be a lessee of the site at a rental of Rs. 6-4-0 per annum. It was then pleaded :

"Mrs. Johannes paid rent to the Nazul from 1861 to to 1868 and from 1868 to 1876, Raja Sarabjit Singh paid the same to the Nazul. When Raja Sarabjit Singh gifted the building to Mohiuddin, the latter paid rupees 6-4-0 by way of rent to the Nazul from 1877 to 1893. In the sale deed executed by Mohiuddin in favour of the defendant, it is clearly mentioned that the latter shall pay Rs. 6-4-0 by way of rent to the Nazul and the defendant regularly paid this rent to the plaintiff till 1932 in which year it executed the lease in question in the Government's favour. Hence the possession of the defendant had all along been that of a leseee and all its predecessors in title were only lessees of the plot in question."

[41] In this reply, although a lease was pleaded as negativing the proprietary right of the Association, the nature of the lease i. e., whether it was one from month to month, or for an undetermined period or a permanent one, was not stated. On the filing of this replication, the Association sought leave to amend its written statement and added paras. 23 (a) and 23 (b) in which it was denied that the sale of the buildings had been made to Mrs. Johannes, that she had agreed to take a lease and that she had made payments in respect of plots Nos. 286 and 287. It was then pleaded

"that even if it is found that Mrs. Johannes became a lessee of plots Nos. 286 and 287, the alleged lease must have been a perpetual one and in case Raja Sarabjit Singh and his successors and the defendant are found not to be proprietors of plot No. 287, they were and the defendant is or its predecessors were at least perpetual lessees of the said plot."

[42] After these pleas had been taken we find that, in the oral pleadings of 23rd January 1939, the Advocate for the Government reiterated the position which had been taken up in the replication in the following words :

"Plot No. 287 is also Nazul land. It was also let to Mrs. Johannes along with No. 286 orally. His interests in the plot were transferred to the aforesaid Raja in the manner his interest in No. 286 were transferred. The Raja made a gift of his interests in the plot to Mohiuddin, who sold his rights to the defendant. Both the plots Nos. 286 and 287 were let originally on an annual rent of Rs. 6-4-0. The original oral lease which was effected on 21st December 1861 was an ordinary monthly lease although the rent was to be paid yearly. The oral lease was not a perpetual lease either in fact or in law."

[43] The position thus adopted by the Association was that it was owner of absolute rights by transfer from the donee of Raja Sarabjit Singh, whose name is entered in the khasra of Lucknow as the owner of the plots and, in the alternative, that it had acquired full proprietary title by adverse possession. The trial Court has found and this finding has not been challenged in appeal, that the Association has been paying a sum of Rs. 6-4-0 per annum as rent in respect of this plot. There can thus be no case of the acquisition of proprietary right by adverse possession.

[44] It has, however, been contended that, though Rs. 6-4-0 per annum is paid for this plot, this is not rent but a mere tax which does not affect the proprietary nature of the rights of the Association. It is urged that the entry in the khasra of the city of Lucknow, of which an extract has been filed as EX. A-1, shows that Raja Sarabjit Singh entered as owner and there is no entry of the proprietorship of the Government or Nazul. It is, therefore, argued that, the khasra being a document of title, the ownership of the Raja is proved and the payment of Rs. 6-4-0 annually is only by way of tax resembling land revenue. The learned advocate for the appellant strongly relies upon EXS. A-81 and A-80. By EX. A-81, which is dated 28th July 1868, the Commissioner of Lucknow proposed that 'land occupied by houses be given to the proprietors of the houses without calling upon them to prove that in each instance the land had been purchased.' In his reply, EX. A-80, dated 7th August 1868, the Financial Commissioner of Oudh wrote 'I am of opinion that land occupied by houses in the city of Lucknow should not be recorded as Nazul, but be considered the property of owners of the house, in possession, liable hereafter for purposes of taxation, to a ground rent.'

[45] The trial Court has held that these letters do not in any way affect lands which, at the time of the correspondence vested in the Government and which were held by other persons on rent from the Government. In doing so, it has relied on the decision of Hamilton J., in Second Appeal NO. 351 of 1937,[25] which, though properly speaking, is not evidence but only an authority, has been produced in this case and is numbered as EX. 73. We agree with the trial Court's view of the matter.

[46] The house in question and the land under it was the property, not of any private individual, but of the King of Oudh. On annexation it vested in the British Government. Even if it did not, the British Government acquired title to it by virtue of the confiscation effected by Lord Canning's Proclamation of March 1858: *vide* 6 I. A. 63.[26] It is further settled law that all who claim title in any land in Oudh must either claim through the Government or must prove 60 years' adverse possession counting from Lord Canning's Proclamation. We must also remember that in those days there was no law of Registration in force in Oudh and transfers were often made without the execution of any formal conveyance. In the case of Government grants, except the sanads issued to taluqdars which too do not give any lists of property granted, the evidence usually consisted of entries in the Government records, e. g., a decree of a settlement Court or entries in khewats or khasra or some letter or other similar evidence. This is a well-established position in Oudh and should have been known to any one concerned with an enquiry into titles in Oudh. This position was well known to the Rev. Mukand as is clear from EX. A-73, in which he says:

"I had requested you to have plans prepared at Mission expense showing what actually is Nazul land, not according to the office but according to the settlement of 1867, the only authority which can be acceptable."

In considering the actual question of title to Plot NO. 287 as well as the state of title as it appeared in 1928 to 1932 we must bear these facts in mind.

[47] The question of the effect of the letters of the Commissioner of Lucknow and the Financial Commissioner, EX. A-81 and EX. A-80, and of the entry in the settlement records was elaborately considered in 24 O. C. 33[20] in which it was laid down that entries in the khasra should be presumed to be correct but that they could be shown to be wrong. At p. 45 the Judicial Commissioners say:

"But the presumption must yield to positive and convincing evidence that the records do not represent the actual state of things."

In this view of the matter, the Judicial Commissioners held that, although the Government was entered in the khasra as proprietor, that title was negatived. Thus, if, in this case, the evidence establishes the proprietary title of the Government, the entry of Raja Sarabjit Singh's name in the khasra cannot negative that title. In the same case the Judicial Commissioners further held that the Financial Commissioner had authority to issue the letter in question; that the letter really intended to confer full proprietery rights upon all occupants of houses in the city of Lucknow and that the words "ground rent" were used in the Financial Commissioner's letter *per incuriam*. In view of some further official correspondence they held that the true test was whether the person in possession had paid rent. If he had he was not the proprietor if he had not he was the proprietor.

[48] In the unreported case to which reference has been made, EX. 73, Hamilton J., held that:

"The khasra was prepared on the basis of possession. Either the Government, or Nazul or a private person in possession was entered as owner on the basis of possession. We thus find that there was no real enquiry and consequently all that this khasra of settlement shows is that Mr. Craven was then in possession of the land and he was presumed to be owner of it. This is only a presumption and is not conclusive proof that Mr. Craven was owner and it is, therefore, open to the appellant to show that Mr. Craven was not a person on whom the letter of the Financial Commissioner conferred proprietary title."

The learned Judge then referred to 24 O. C. 33[20] (at p. 54) and he proceeded :

"..... the letter of the Financial Commissioner never intended to confer proprietary title on every one in possession of land in Lucknow nor did it do so. It was intended to restore the land to persons from whom it had been confiscated and not to confer proprietary title on persons who had acquired land after the confiscation."

[49] On a consideration of the evidence produced in the present case, we have come to the same conclusion. Khas Manzil was sold to Mr. Johannes not to be pulled down but to be lived in. Exhibit 28/1, the register in which the entry of the sale is made is divided into a large number of parts. The second part is headed "register of houses to be destroyed for roads etc. belonging to the Sarkar, i.e. Royal" (register makanat munhadmi sarak weghaire Sarkari yani Shahi) and the fourth part is headed "Register of Sarkari or Royal houses to be sold" (register makanat neelam Sarkari yani Shahi). Khas Manzil is entered in the fourth part. Thus it was not to be pulled down. But for other evidence on the record we would have presumed that, when the house was sold, the land on which it stood was also sold. but that this is not so is proved by EXS. 29/1 and 29/2. These papers came into existence in the following circumstances :

[50] On 25-7-1863, a clerk in the Nazul Office reported :

"According to the rule laid down by the Government a rent (mahsool) of Rs. 2-8-0 per Bigha has been fixed for all Government houses and lands recently sold but so far there is no register from which the full extent of the land and the annual rent (kiraya) might be ascertained in detail."

Consequently it was prayed that the Darogha Nazul be ordered to prepare such a register. Thereupon, the Darogha Nazul prepared EX.29/2 and reported that the facts, so far as they were known to him, were entered in the register but that as some land and houses had been let out by the higher authorities and he had not been informed he could not enter them in his register. Exhibit 29/2 is headed "register of land of kothis which have been sold and which Sahebs and others have taken on rent" (Register araazi kothiat jo farokht hui hain aur jo Saheban waghaira ney bakirya lia hai). At serial NO. 20 of this register we have an entry showing the land of Khas Manzil measuring 2 bighas 10 biswas was let for RS. 6-4-0 per annum (at the rate of RS. 2-8-0 per bigha) to Jacob Johannes from 21-12-1861, which, EX. 28/1 shows, was the date of the sale of Khas Manzil. All this took place in the year 1861, long before EXS. A-81 and A-80 were written. At that time, at least, there was no question of any one but the Government being the owner of the land and the rent which Mrs. Johannes agreed to pay cannot be deemed to be tax or even "quit rent." The whole of the proceedings of the time as evidenced by EXS. 29/1 and 29/2 clearly show that it was rent that was fixed. At the time, therefore, that the letter of the Financial Commissioner, of which EX. A-80 is a copy, was written the land was the undisputed property of the Government and was held by a lessee. The person in possession was thus the Government itself through its tenant and the entry in the khasra of the name of Raja Sarabjit Singh, who had by that time obtained the lessee rights by transfer along with Kothi Khas Manzil, cannot make him proprietor of it. We have, therefore, come to the conclusion that the rights of the Association in plot NO. 287 are those of a lessee. This leads us to the question whether the lease was a permanent one or operated from month to month. These were the only two alternative cases set up and we cannot entertain a third alternative, of which there is no proof, suggested by the learned Government Advocate, that the lease might have been for such period as the kothi existed.

[51] The learned Government Advocate has placed before us a large number of authorities for the proposition that the burden of proving that he is a permanent lessee lies upon the person who asserts it i.e., in the present case, the Association. It is, however, not necessary for us to examine those authorities because the proposition has not been disputed in the present case. In fact issue NO. 1 of SUIT NO. 24 of 1939 clearly imposes the burden on the Association. The only question for consideration is whether, on the evidence adduced and in the circumstances of this case, this burden has been discharged.

[52] The learned Government Advocate also relied upon the principles contained in certain sections of the T. P. Act, although he conceded that the Act itself was not applicable. He contended that the principles underlying the Act were correct legal principles and should be held applicable and that this lease should be considered as being one from month to month. He also placed before us 26 I. A. 58[27] for the proposition that the construction of expensive buildings by the lessee on the plot, even if proved to be with-

in the knowledge of the lessor, did not make the lease a permanent one. In that case, however, the period of the lease was fixed in the lease itself and, consequently, the one-sided action of one of the parties, even though within the knowledge of the other, could not extend the period. Similarly the case in 16 Cal. 223[28] upon which he relied for the proposition that, the mere failure to enhance rents does not lead to the conclusion that the lease was a permanent one, is not of much assistance, because it is not only on the continuation of the same rent for a long period of time that the respondent relies.

[53] In this case, the following facts have been fully established : (1) That the land was given on lease at the same time as the building upon it was sold for residential purposes to the lessee. In this connection, it is significant to note that the land is not described by its number but as land of kothi Khas Manzil. (2) That EX. 29/2 shows that while lands upon which no buildings were situated were let out for fixed periods no period was fixed for leases of lands upon which buildings stood. No term was fixed for the land of Khas Manzil also. (3) That the land has been held at one uniform rent from 1861 to 1930—a period of 69 years—not only by the lessee and his heirs but by various transferees of the original lessee. It was suggested that this was because the Government did not increase the rent since the land was utilised for a charitable purpose but this is not so. The school only purchased it in 1912, and it had been held for 50 years before that. On this point the case in A. I. R. 1945 Cal. 283[29] will be found of much assistance. (4) That various transfers made of kothi Khas Manzil were considered to carry with them the right to be in possession of the land at the rent of Rs. 6-4-0 and mutation was made in the records of the Nazul department at every transfer: *vide* EXS. 21,22,30,31,32 and 33. Thus transferability of the lessee rights was clearly recognised. It is contended that the deeds of transfer do not mention land. As a matter of fact, some of them do but that is immaterial because the documents mentioned above clearly establish that, inspite of this, the Nazul authorities effected mutation of names in respect of the land. (5) Even in 1928 to 1932 when both parties were ascertaining title to all the land in possession of the Association, the Government never claimed that the lease was terminable. Indeed, the letters make it quite clear that the validity of the lease was recognised and that there was no assertion even that the lease could be terminated.

[54] In EX. A-9 dated 17th October 1928, the Chairman of the Lucknow Improvement Trust (who was in charge of Nazul or Government lands) informed the Rev. Mukand

"that on checking the plan, filed by you it has been found that besides Nazul land No. 287, B. 2-2-17-12 for which the school pays Rs. 6-4-0 per annum the Nazul land noted on the margin is also included in the school compound. If you admit the Nazul title the price will be calculated and communicated to you as soon as possible."

In the margin plots NOS. 282, 288 and 296 with their areas in possession of the school are noted. This was at the commencement of the negotiations. EX. A-11 dated 29th March 1930, which came at the end of negotiations is still more explicit:

"From the plan you will see that the portion hatched in red is already under lease to the school for which it pays Rs. 6-4-0 per annum. The portion of the Nazul land, hatched in yellow is in wrongful possession of the school..."

[55] Although none of these facts taken by itself might be sufficient to establish the fact that the lease was a permanent one, we consider that the cumulative effect of all of them taken together is to establish that plot NO. 287 was held by the school under a perpetual lease.

[56] On this part of the case, the learned Government Advocate further argued that all this evidence was inadmissible under S. 64, Evidence Act, because it was shown that a document of lease existed in this case and its non-production would lead to the inference that it was not such as the Association represented it to be. Reference was made in this connection to EX. A-62, a telegram sent by the Association's officers *in London* to the Rev. Mukand. The relevant portion of this document is "Morse states perpetual lease attached purchase deed....protest to Nazul that perpetual lease still operative." We cannot attach much importance to what "Morse states". The property was purchased by the Rev. Morse, who had been principal of the school till 1923 and had been in charge of the transaction of sale by which the Association acquired the property. He was examined on commission as a witness in this case and he stated that he was handed "the title deeds of Khas Manzil house and compound by a money-lender who I understood held a mortgage of the property." In reply to cross interrogatories put to him on behalf of the Government he stated :

"I do not remember if I asked for any documents specifically; I am referring to the spring of 1912. I did not see Mohiuddin again. I asked for 'title deeds'. This was at the time when the property was being bought by the defendants. I never asked him for any lease and it was the money-lender who gave me the title deeds."

This evidence clearly establishes that the only title deeds that he got were those handed over to him by the money-lender who held a mortgage. Exhibit A-70, A-71 and A-72 are the three mortgages over the property and the first of them, EX. A-70, mentions only two documents—a mort-

gage deed dated 20th May 1867, by Mrs. Johannes and a deed of gift dated 3rd September 1872, executed by Raja Sarabjit Singh in favour of Mohiuddin—as having been handed over to the mortgagee. None of the other mortgage deeds refers to any other document. Thus it can only have been these two deeds that came into the possession of the Association. When the Rev. Morse speaks in June 1936 about the existence of a perpetual lease he could only have been speaking from memory about events which happened 24 years previously. We notice no question was put to him in cross-examination relating to this telegram although this telegram was on the record.

[57] This is not all. It was the case of the Government itself that there was only an oral lease: *vide* proceedings of 23rd January 1939. We have, therefore, come to the conclusion that there was no written lease, and that the evidence which we have considered in arriving at our decision as to the nature of the lease is admissible.

[58] The learned Government Advocate wished to argue that, even if the Association held the rights of a perpetual lessee, those rights had come to an end by reason of the fact that the Association by filing Suit No. 24 of 1939, claiming, in the alternative, a declaration of proprietary title, has denied the tenancy. This plea was not taken in the trial Court nor do we find it mentioned in the grounds of appeal to this Court. The learned Government Advocate admits that the plea is a new one but urges that he should be allowed to take it in appeal because it is purely a question of law. It may turn out to be, as he says, purely a question of law but we are not prepared to hold, at this stage, that no question of fact is involved. In any case, the Association should have been given an opportunity of meeting such an entirely new case in the trial Court and it would not be fair to it to allow such a plea to be raised in appeal. In the circumstances, we do not allow this plea to be taken in this appeal. This, of course, does not in any way affect the merits of any right which the Government may have.

[59] The evidence and circumstances which we have considered above, apart from establishing the title of the Association as a permanent lessee of plot No. 287 also establishes that in 1928 to 1932 the Government had made no claim or demand with regard to this plot and that, therefore, it was not within the powers of the Reverend Mukand to enter the agreement of lease with regard to it. According to the view which we have taken of the power of attorney, the Reverend Mukand's powers were confined to entering into such adjustments or compromises as were necessary for the purpose of selling the property which he was directed to sell and he had no powers beyond those. The title of the Association with regard to plot No. 287 and its rights to transfer it was clearly established by various deeds, Exs. A-2, A-3, A-4, A-70, A-71 and A-72 dating back from 1868, 62 years earlier. The fact that the Nazul had recognised the right was established by Exs. 21, 22, 23, 30, 31 and 32. The entry in the khasra of Lucknow was there. No intending purchaser could expect any better title deeds. Further the Nazul authorities made no claim with regard to this plot during the whole course of negotiations: *vide* Exs. A-9 and A-11. The Reverend Mukand was, therefore, not justified in any way reducing the rights of the Association in this plot of land. As a matter of fact, negotiations with regard to this plot started not with a view to clear title but with a view to purchase the free-hold rights in this plot: *see* Ex. A-9, last paragraph and the statement of the Reverend Mukand. This the Reverend Mukand was not justified in doing. The lease Ex. 1/1 with regard to this plot must fail.

[60] There only remains plot No. 288. The pleadings with regard to this plot are very prolix. The arguments advanced by the learned Advocates for the parties have been very elaborate and have not left any aspect of the matter unconsidered. We do not, however, propose to deal with all the alternative pleas and arguments but will only advert to those which are necessary for our decision of the matter.

[61] The pleadings with regard to this plot are contained in paras. 16, 17, 23 (d), 23 (e) and 31 of the Association's written statement and in paras. 7, 8 and 22 of its plaint. The Government's reply is contained in the corresponding paragraphs of its replication and written statement. The sum and substance of these pleadings is that the property is alleged to have belonged to Darogha Mohammad Abbas in full and absolute proprietary right; that it was purchased in 1868 in execution of a decree against him by Mrs. Jackson: that Mrs. Jackson sold it to the Reverend Birkett who transferred it to the Association. It was further pleaded that in any case the Association had acquired title by over 60 years' adverse possession by itself and through its predecessors. Finally it was pleaded that the Association had at least the rights of a perpetual lessee.

[62] The Government denied that the property belonged to Darogha Mohammad Abbas and alleged that "Mrs. Johannes was a lessee of the disputed plot No. 288 and Mrs. Jackson bought the property in court auction on the basis of a mortgage executed by Mrs. Johannes." The Government subsequently clarified the position in this respect in the oral pleadings of 23-1-1939

when its counsel stated that the auction sale effected in 1868 (the sale to Mrs. Jackson) did not relate to No. 288 or any portion of it. The Government further denied the acquisition of title by adverse possession. It will be noticed that the pleadings of the parties with regard to all the portions of No. 288 in suit were the same. Subsequently, however, it was realised that there was a considerable difference in the matter of proof concerning various portions of this land. For the purposes of our decision, we will divide the portion of the plot in dispute into three pieces: (1) The southernmost portion corresponding to goshas 3 and 7 of plot No. 288 which covers a very small area and to which we will hereafter refer as "the triangle." (2) The portion having at its corners the letters A 4, T 4, R 1 and A in the Commissioner's map, which we will hereafter refer as "the larger quadrilateral" and (3) The portion lying north of the line A 4, and T 4; to which we will refer as "the smaller quadrilateral". Plot No. 288 is a big plot on which were situated a large number of houses, as the Commissioner's report shows. We are not concerned in this case with any of the houses except one, "Alia Manzil" which extended not only over the larger quadrilateral and the triangle but also over numbers 289, 290 etc. with which we are not concerned. The learned Advocate for the Association contends that the smaller quadrilateral appertained to the same building but Ex. 41, which both the parties have accepted as correctly representing the state of affairs existing in 1861, read with the Commissioner's plan, clearly establishes that the northern boundary of Alia Manzil extended only as far as line A 4, T 4 in the commissioner's map.

[63] We would also make it clear at the outset that there is no question of any lease, whether perpetual or from month to month, because, although it was at one time pleaded, and some evidence was produced to prove that a sum of Re. 1-1-0 per year was fixed as the rent of a portion of the land of Alia Manzil measuring about 8 biswas, it has not been proved that the Nazul authorities ever realised this sum nor is it established to what portion of Alia Manzil it related. We do know from Ex. A-28/1 that, in 1861, Mr. Johannes purchased a portion of Alia Manzil known as "Gol Darwaza". If any land of Alia Manzil was let to him, it must have been the land under this building. It cannot be ascertained where the "Gol Darwaza" was but, if Ex. 41 is any indication, it must have been somewhere on plot No. 289 where the name "Johannes" occurs in that document. Thus there is no question of any portion of plot No. 288 having been leased.

[64] Alia Manzil also was a Royal building which, on the annexation of Oudh, vested in the British Government with all its land and appurtenances. Exhibit 28/1 shows that a portion of it, known as the Gol Darwaza was sold to Mr. Johannes for Rs. 100 and possession of it was given to the purchaser on 28-2-1862. A portion, known as the mahal-serai (the zenana courtyard), remained to be sold—it is entered in the eighth part of Ex. 28/1, under the heading "Register of Sarkari Shahi houses which are undisposed of" (Register makanat Sarkari Shahi joki Baqin hain). Opposite the column of remarks in respect of the entry relating to the undisposed of portion it is first stated that it had been let out on rent and then that it was sold along with the Mahalserai of Inayat Manzil to Hakim Fakhiruddin in 1866. Exhibit 56, which is a report of the Nazul Darogha, also shows that Alia Manzil had been sold to the Hakim but, since he had not fulfilled the condition of repairing it, it could be resumed by returning to him the part of the purchase money which he had paid up. This report is dated 11-7-1866, and we find that there is another entry without date, but subsequent to the entry relating to the sale to the Hakim, in column of remarks opposite the Mahalserai of Alia Manzil that it would be sold again ("*bawact moyana kafiyat baza kai malum hua ki phir farokht hoga*"). Thus it is established that the sale to Fakhiruddin had taken place some time in 1866 and that it had been cancelled. It is further proved that this building was being sold not for the purpose of being destroyed but to be used as a residence (hence the condition for repairs.) Thus the case of the Government that the portion of building on plot No. 288 was destroyed in 1870 and the land lay vacant till 1922 when the Association encroached upon it is without substance and, indeed, no attempt has been made to substantiate it.

[65] There is no direct evidence as to whether Alia Manzil was sold again or not and if it was sold who became its purchaser, but we find that as early as April, 1866, even before the cancellation of the sale in favour of Hakim Fakhiruddin Mrs. Johannes was giving No. 1 Banks Road, (which was the number given to Alia Manzil) as collateral security for a loan taken by her: *vide* Ex. 65. No boundaries are given in the deed but, in the suit that followed, a plan of the building mortgaged is given: *vide* Ex. 63 annexure B. This includes within its boundaries by far the larger part of the Alia Manzil. Subsequently, in execution proceedings against Darogha Mohammad Abbas, who was a transferee of the building from Mrs. Johannes, it is this very building that was sold: *vide* Exs. 68 and 69. Further, a reference to Ex. A-1, copy of an extract from the khasra of muhalla Khas Bazar in the city of Lucknow, shows that in respect of all the plots comprised

within Alia Manzil, Darogha Mohammad Abbas is entered as owner of all the houses. He is also entered as owner of one of the houses on No. 288 though we do not know where this house is. It is obvious that all this building (which clearly includes the whole of the Mahalserai as the various plans show) could not have been the property of Mrs. Johannes by virtue of the purchase of the "Gol Darwaza". We have, therefore, come to the conclusion that, as a matter of fact, the sale in favour of Hakim Fakhiruddin was cancelled and the remaining portion of the building known as "Alia Manzil" was also sold to Mr. Johannes from whom Darogha Mohammad Abbas got it by transfer. We do not find that any portion of Alia Manzil was excepted from the eventual sale. No entry from any register of property—such registers do exist and copies of extracts of them have been produced—has been produced by the Government to show that it retained any interest in any portion of Alia Manzil. It may also be noted that, in its replication in reply to paras. 16, 17 and 31 of the written statement of the Association, the Government stated that Mr. Johannes was the lessee of the disputed portion of No. 288 and that Mrs. Jackson had purchased her right. The transfer by the Government to Mrs. Johannes was admitted though it was asserted that only lessee rights were conveyed. This latter part we have held to be incorrect. We have, therefore, come to the conclusion that the Government had parted with all its rights in every portion of Alia Manzil. We should like to make it clear once again that Alia Manzil did not include the smaller quadrilateral right up in the north nor is there any evidence that it appertained to Alia Manzil. We have next to consider whether the Association has shown its title to the portion of Plot No. 288 in suit. For this purpose we will consider each of the three pieces separately.

[66] As to the triangle there can be no doubt that it was sold in execution proceedings in December 1868. The two plans, Ex. 69 and that attached as annexure B to Ex. 63, the plaint of the suit brought against Darogha Mohammad Abbas, clearly show that the piece was sold along with the rest of the Mahalserai to Mrs. Jackson. Exhibit A-5, the sale deed by Mrs. Jackson dated 11-4-1893, shows that Mrs. Jackson conveyed whatever she had purchased to the Rev. Birkett. Exhibit A-25 dated 11-6-1895, is the deed of transfer by the Rev. Birkett to the Association. Thus the title of the Association to this portion of Plot No. 288 is clear and has been fully established.

[67] With regard to the smaller quadrilateral, the Association has failed to make out its case. This portion was not included in nor did it appertain to Alia Manzil. There is no evidence to prove that the Government parted with its rights in it to any one at any time. There is no evidence of possession by the Association over this portion before 1901: *vide* plan attached to Ex. A-69, which not only establishes the possession of the school over this plot but also the knowledge of the same department of the Government, the Nazul, that the school was in possession. This possession is not sufficient to establish the claim of the Association since by reason of S. 28, read with Art. 149 of Sch. 1, Limitation Act, a period of sixty years is required to bar the title of the Government and, in this case, counting even up to the date of the suit, it has shown only 38 years' possession.

[68] The learned Advocate for the Association contended that Mrs. Jackson purchased this property under a sale dated 21-11-1868, executed by Mr. John Sandys on behalf of the Delhi and London Bank and that she obtained possession then and that, she transferred it to the Rev. Birkett along with No. 1 Banks Road by Ex. A-5. In order to establish this he relies upon a recital contained in Ex. A-5. We cannot accept this contention for two reasons, namely, firstly, even if the recital is considered as evidence, it does not show what was the land covered by the sale, and secondly, the recital cannot be relied on as evidence of the first sale or possession under it. We will first consider the matter as if the recitals in Ex. A-5 were admissible in evidence.

[69] Exhibit A-5 is not at all clear as to where the land, other than the land purchased at the court auction, is situated. The northern and the eastern boundaries are untraceable at present. We cannot, therefore, ascertain how far north the land sold extended. It cannot by any means be said that it extended so far north as to include the two quadrilaterals. The recital tells us that a "certificate of sale" was mentioned in the conveyance by Mr. Sandys to Mrs. Jackson and that this "certificate of sale" gave the boundaries and a plan. It is further said that all the documents mentioned in the deed have been handed over to the vendee. No doubt this was the reason for the loose description of the boundaries. Neither the certificate of sale nor the sale deed of 21-11-1868, nor any plan attached to either has been produced in evidence in this case. The boundaries of the plot over which adverse possession is claimed are thus left indeterminate. It cannot, therefore, be said that the Association has been in possession of the smaller quadrilateral under the transfers of 1868 and 1893.

[70] Another aspect of this matter is that, according to the Association's own case, the sale deed by Mr. Sandys had nothing to do with the land at present in dispute. The sale deed by Mrs. Jackson, Ex. A-5, was in the possession of

the Association when their elaborate written statement was prepared. All possible pleas have been taken in it and such an important deed as the sale deed on which title was based must certainly have been seen for the purpose of drawing it up; yet we find that the title under the sale deed by Mr. Sandys is not pleaded and the position deliberately adopted by the Association was that all this land had been acquired by Mrs. Jackson at the auction sale in execution of the decree against Darogha Mohammad Abbas. The Advocate for the Association maintained this position in his oral pleadings of 23-1-1939, even after the documents, including Exs. 63 and 69 which give a plan of all the property sold, had been filed. Still later, on 20-2-1939, the Association filed its plaint (in Suit No. 21 of 1939) and took exactly the same pleas with regard to this plot as it had taken in its written statement. There are no further pleadings to indicate when the Association changed its attitude and so it can only be supposed that, at the time of the evidence the Advocate for the Association, realising that he could not claim this property under the purchase by Mrs. Jackson at auction by reason of Exs. 63 and 69, sought to establish a new title based on the recital and produced evidence to show that the deed itself was not traceable. We do not think that the change of position is justified. We have already indicated that with full knowledge of the recital in Ex. A-5 the association did not rely upon it for its title. We further find that Mr. Hardman, the property Secretary of the Society, in trust for which the association holds the property, definitely stated in his evidence:

"The deed dated 21st November 1868, executed by the Delhi London Bank Limited is not in London but may be in the defendant's office at Allahabad. It does not, however, in any way relate to the property the subject of this action."

[71] The learned advocate for the Association sought to discount the categorical statement on the ground that Mr. Hardman's knowledge was not correct but we find that this statement is exactly in line with the case of the association as evidenced by its pleadings up to that stage and there is no reason to suppose that Mr. Hardman went out of his way to make a wrong statement when he could easily have said: "I do not know to what that deed related as I have never seen it." Further, we find from his reply to cross-interrogatory No. 3, that he had inspected the property and documents of the Association and, from the statement of Mr. Fuggle, Secretary of the Association, in reply to the same cross-interrogatory, we find that Mr. Hardman compiled a register of property "after personal inspection of properties by him." The statement of Mr. Hardman must, therefore, be accepted and we find that the alleged sale deed by Mr. Sandys dated 21st November 1868, did not relate to the smaller quadrilateral and that, therefore, even if the recital in Ex. A-5 is considered it does not prove that the Delhi and London Bank or Mrs. Jackson ever had possession over this land.

[72] This being our conclusion it is not really necessary for us to consider whether the recital in Ex. A-5 is or is not admissible in evidence. The counsel for the parties have, however, argued the point fully before us and have taken great pains in placing a large number of decisions on the point before us. We feel, therefore, that it is but right that we should express our views on the question.

[73] The advocate for the Association relied upon S. 13 (a), Evidence Act and he urged that Ex. A-5 was a transaction by which the right of Mrs. Jackson to the property in question was asserted. Exhibit A-5 was, therefore, admissible in evidence to prove the assertion that Mrs. Jackson had acquired the property by sale in 1868. He also contended that, in any case, Ex. A-5 was properly admissible to prove the transfer by Mrs. Jackson and, once it was admitted in evidence it was admissible for all purposes. In support of the first part of his case he relied upon the following authorities:

A. I. R. 1945 Cal. 283.[29] In this case it was not upon the recital of any previous transaction that reliance was placed but recitals in the very transaction of the nature of the rights transferred were relied upon.

A. I. R. 1928 Cal. 703.[30] In this case also it was not the recital of any previous transfer that was relied upon but the recital of the amount of rent in the deed of transfer. The learned Judges say:

"It is a transaction by which the right of the defendant to the land was asserted, and for the definition of that right, the amount of rent had to be stated."

A. I. R. 1924 Cal. 991.[31] In this case also it was not upon the recital of any previous transaction that reliance was placed but the recital of the nature of the right in the deed of transfer itself was relied upon.

A. I. R. 1930 ALL. 299.[32] It was a case in which admissibility under S. 13 (b) was being considered and different considerations applied.

A. I. R. 1938 Lah. 795.[33] In this case also, it was laid down that the transfer by a person of a particular right is a transaction by which his right is asserted and is consequently admissible in evidence. The discussion really was whether such a transaction was admissible against third parties and it was held to be admissible.

A. I. R. 1938 Lah. 846[34] and A. I. R. 1935 Cal. 367[35] were cases of the same kind as that of Municipal Committee, Batala.

29 I. A. 24.[36] All that their Lordships of the Judicial Committee laid down in this case was

that documents of the nature mentioned in S. 13, Evidence Act were admissible even against persons who were no parties. The following remarks of their Lordships at p. 33 are of great assistance in determining this question :

"These police orders are in their Lordships' opinion admissible in evidence on general principles as well as under S. 13, Evidence Act, to show the fact that such orders were made. This necessarily makes them evidence of the following facts, all of which appear from the orders themselves, namely, who the parties to the dispute were; what the land in dispute was; and who was declared entitled to retain possession. For this purpose, and to this extent, such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained."

58 I. A. 125[37] is also a very important case but instead of supporting the contention of the Association's learned counsel, it supports the contention of the learned Government Advocate. At p. 136 their Lordships of the Judicial Committee say :

"Their Lordships are unable to accept this contention. They think that the judgment in question is only admissible under the provisions of Ss. 13 and 43, Evidence Act, as establishing a particular transaction in which the partibility of the plaintiff's estate was asserted and recognised—namely, the partition resulting from the 1793 suit. The reasons upon which the judgment is founded are no part of the transaction and cannot be regarded, nor can any finding of fact there come to, other than the transaction itself, be relevant in the present case."

It was, therefore, held that a recital in the judgment in question that a partition had previously taken place and one Thakur Shib Singh had got a village at that partition was inadmissible in evidence. 28 Cal. W. N. 942[38] followed 29 I. A. 24.[36]

[73A] On the side of the Government, reliance was placed principally upon A. I. R. 1927 Cal. 1,[39] a Full Bench case. This decision fully supports him. In this case, the whole matter was carefully considered in the judgment of Mukerji J. at pp. 5 and 6. The learned Judge points out that there is great significance in the use of the word "by" in cl. (a) of S. 13 and "in" in cl. (b). He summed up the whole position at p. 6 in the following words :

"Recitals in a deed are not transactions but instances of assertions or denials of the existence of the right. They come neither under cl. (a) nor under cl. (b). They are statements which unless they are relevant under some other provisions of the law, e.g., as admissions or statements of deceased persons, etc., are not admissible in evidence."

Later, on the same page, the learned Judge says :

" As has been observed by a very learned Judge, where a document is admitted in evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence, and the distinction between the deed as a transaction and the recitals contained in the deed is frequently overlooked."

The view taken in this case was also taken in 39 Cal. W. N. 311[40] and A. I. R. 1928 Cal. 893[41] and it was also approved, though the case was distinguished in A. I. R. 1941 Cal. 541.[42]

[74] On a consideration of all these authorities we have come to the following conclusion : A document is admissible in evidence if it is a transaction by which a right is asserted or claimed. Recitals in it are, however, not admissible except to the extent laid down in 29 I. A. 24[36] and 58 I. A. 125.[37] Recitals of a previous transaction are not admissible in evidence. To us it seems that any confusion that arises is due to the distinction between the relevancy of a fact and the admissibility of evidence to prove that fact being lost sight of. Section 13 occurs in Chap. 2, Evidence Act which is headed "Of the Relevancy of Facts" and it says only : "Where the question is as to the existence of any right or custom, the following facts are relevant :" It does not tell us how these relevant facts are to be proved : for that we have to look to other provisions of the Evidence Act, e. g., S. 64 which says : "Documents must be proved by primary evidence except in the cases hereinafter mentioned." Then comes S. 65 which lays down the exceptions.

[75] In the present case undoubtedly the fact of the alleged sale by Mr. Sandys on 21-11-1868 is relevant but it must be proved by the production of the document itself unless the case comes within one of the exceptions contained in S. 65, and not by a mere recital in a subsequent sale-deed. No doubt the legal advisers of the Association realised this position and for this reason they attempted to prove that the sale-deed was not traceable. We do not consider that they have succeeded in doing this because the evidence of the Rev. Dallimore (D. W. 6) is not satisfactory. He admits that there is a register containing a list of documents in the office. This register would have been the best evidence to show whether the sale-deed existed or not. It did exist and was handed over by Mrs. Jackson to the Rev. Birkett (*vide* EX. A-5). The non-production of the register leads to the inference that it exists even now and was withheld because, as Mr. Hardman says, it did not relate to the land in suit. We have, therefore, come to the conclusion that the recital in EX. A-5 of an alleged sale of 21-11-1868 is not admissible in this case. To the second argument namely that once a document is admitted, it is admissible for all purposes, a sufficient reply is furnished by the case reported in 29 I. A. 24[36] and 58 I. A. 125[37] from which we have already quoted.

[76] We come now to consider the case of the larger quadrilateral. On the question of title by transfer, the position with regard to this piece of land is the same as that with regard to the smaller quadrilateral but with regard to title by adverse possession the Association has made out

its case. We have already shown that on this piece of land a part of Alia Manzil was situated and that the Government parted with all its rights in Alia Manzil. The Government had, therefore, no title left, and could bring no suit at all. Article 149 of Sch. 1, Limitation Act is inapplicable and the period of time required to prescribe title is therefore not 60 years but only 12 years. This must obviously be so because the Government having no title cannot claim and third person who had title could only bring the suit within 12 years of dispossession. On his failure to do so, his title also was extinguished and the adverse possessor became the owner. If any authority is needed for this proposition, it will be found in 33 Mad. 173[43] in which too the Secretary of State failed to prove his title and the 12 years' period of limitation was held to be sufficient to bar the suit, though on the other point which placed the burden of proving possession within 60 years on the Secretary of State this decision has been overruled.

[77] A large number of authorities was cited before us on the question of adverse possession, what constitutes adverse possession, how it is to be proved, what is the length of time required and so on. In our opinion, each case of adverse possession is to be judged on its own merits and the circumstances of the case. The principles are so well settled that it is not necessary for us to consider each case cited in detail. The first of these principles is that the burden of proving adverse possession lies upon the person asserting it: *vide*, among others, 43 I. A. 192[44] at p. 204, A. I. R. 1922 P. C. 181,[45] A. I. R. 1930 P. C. 281;[46] A. I. R. 1931 P. C. 77[47] and 1941 O. W. N. 537.[48] Reference was made in this connexion by the respondent's learned counsel to S. 110, Evidence Act but, in our opinion, that section does not affect the matter. Its effect only is that if a person is in possession his title is presumed until the title of some other person is proved. Once the initial title of another person is established, S. 110 no longer applies and the possessor must prove that that title has somehow or other been terminated, either by transfer or succession or adverse possession. Thus the burden of ousting title by adverse possession lies upon the person asserting it.

[78] The classical requirements of adverse possession are that the possession must be "*nec vi nec clam nec precario* that is to say it must be adequate, in continuity, in publicity and in extent to show that it is possession adverse to the competitor." But a mere exercise of exclusive and continuous acts of possession would not be enough and it must further be shown that the possession was not permissive and that a vigilant owner would have known of it. Further, if a person in possession recognises the superior title of the true owner, e. g., by the payment of rent, no length of time and no amount of assertion will oust the title of the true owner. Moreover, the exclusion of the true owner must be complete and partial possession by him keeps his title alive: *vide* among others 27 I. A. 136,[49] A. I. R. 1922 P. C. 181,[45] A. I. R. 1930 P. C. 281[46] and 1941 O. W. N. 537.[48]

[79] If a person claims adverse title not only by reason of his own possession but also by reason of possession by another person he can only succeed if he establishes that he is the successor-in-interest of the previous possessor. There can be no tacking on of the possession of independent trespassers.

[80] Judged in the light of these principles there can be no doubt that, while the Association has failed to prove its title to the smaller quadrilateral, it has succeeded in proving it in the larger quadrilateral for which only a period of 12 years was required. The possession of the Association at least from 1901 (*vide* EX. A-69), if not from 1893, (sale deed by Mrs. Jackson, (EX. A-5)) is established. In 1928 the period of possession was well over 12 years and consequently when EX. 1/1, the lease in question was executed the Association had prescribed title. This does not, however, end the matter. The whole discussion in our judgment as well as in the judgment of the trial Court and the state of pleadings reveals the uncertainty which prevailed with regard to the plot of land even at the date of the suit. It is obvious that the uncertainty at the date of the lease EX. 1/1, i. e., 1932, was still greater. The Rev. Mukand would, therefore, have been fully justified in clearing up title to this plot of land and in entering into the lease EX. 1/1 for this purpose.

[81] We have now considered all the various plots and the conclusions at which we have arrived are: (1) The title of the Association to plot NO. 287 as a perpetual lessee is clear and was clear even in 1928 to 1932. There was no claim or demand made or dispute raised in respect of this plot in 1928 and the agent had no authority to enter into any settlement or adjustment or take any lease about it. (2) That the title of the Association in the portion of plot NO. 282 in suit is not proved although the title of this Society is established. (3) The Association has no title to the portion of plot NO. 296 in suit. (4) The Association is the owner of the triangle of plot NO. 288 by transfer; of the larger quadrilateral by adverse possession. It has not proved its title to the smaller quadrilateral. The title to all these portions was very doubtful in 1928 to 1932 and the Rev. Mukand would have been justified in effecting an adjustment or settlement

with regard to this plot, if he had dealt with this plot alone. Plot No. 287 is the largest of these plots having an area of about three-quarters of the whole disputed area and the Rev. Mukand was not justified in reducing the title of the Association in this plot, particularly when the right of the Association in it was not disputed, even if it meant a little gain in some plots lying at the back of the institution. Since the various portions of the compromise or adjustment cannot be separated, we must hold that the whole compromise—*i. e.* the lease Ex. 1/1 fails and the parties are relegated to the position which they would have occupied but for this compromise.

[82] There now remains the question of ratification by the Association. This need not detain us long because, although the point was fully argurd by the learned counsel for the parties, it was later discovered that, in view of Ex. A-62, a document which does not form part of the printed record, the point was not tenable. It is agreed between the parties that it is only the principal or agent authorised in that behalf that can ratify. In the present case, the act of ratification was said to have been the payment of rent under the lease of 1932, Ex. 1/1. Exhibit 23, which is a copy of an extract from the demand register of the Nazul department, shows that the last payment was made on 4-4-1935. The evidence of D. W. 6, the Rev. Dallimore, D. W. 7, the Rev. Mukand and of Mr. Hardman establishes that the agent of the Association in India Rev. Dallimore did not know of the lease before this dispute arose and that Mr. Hardman, who had come on tour to inspect the property of the Society in India heard of it for the first time in February 1935. Obviously, those two persons, neither of whom possessed the authority to take a lease, could not repudiate the lease without reference to the principal in England. The payment of 4-4-1935 could not, therefore, be stopped without reference to England and it was made. But we find that no payment was made after that and that by Ex. A-62 the Association definitely repudiated the lease. In 1939 O. W. N. 249,[50] their Lordships of the Judicial Committee say, at p. 260.

"There can in truth be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act withoutt knowledge of the illegality."

In the present case, the learned counsel for the Government agreed that there is no question of the principal having any knowledge but he urged that the knowledge of its agents must be deemed to be its knowledge. We agreed that the knowledge of the Rev. Mukand was not the knowledge of the Association because, in view of the fact that he was not the agent of the Association for all purposes but only for the purposes of the sale, the knowledge of the illegality of the lease was not acquired by him in the course of the business of his principal and cannot be attributed to the principal. In any case, so far as he was concerned, he did not consider the lease illegal at all and no question of ratification arose. There is nothing to prove that any other agents of the Association had any knowledge of the lease either actual or constructive. There was thus no act of ratification of the lease but rather there was the repudiation evidenced by Ex. A-62, as soon as the Association learnt of the true facts. This plea of the learned counsel for the Government must also fail.

[83] Reliance was placed by the learned Government Advocate upon S. 237, Contract Act. It was urged that the Association, apart from the power of attorney (Ex. A-7) in his favour, had placed the Rev. Mukand in charge of its property at Lucknow from 1925, that in that capacity he was making payments of rent and taxes and generally managing the property. Further his authority was of sufficient amplitude to order the destruction of the building known as "Khas Manzil". Moreover he was selling property of the Association worth lakhs of rupees. It was argued that this was sufficient evidence of the conduct of the Association to make S. 237 applicable. We cannot accept this argument because, whatever may be argued now, the Nazul authorities did not, at the time of the execution of the lease, accept all these acts of the Rev. Mukand as conferring upon him sufficient authority on behalf of the Association to execute the lease. They, therefore, made a special enquiry from him as to who would execute the lease on behalf of the Association (*vide* Ex. 13). The reply of the Rev. Mukand (Ex. 14) that he would execute the lease as the "agent and attorney, Church Missionary Trust Association Ltd." satisfied them and they did not even ask to look at the power of attorney. Thus it was not any representation or acts of the Association which the Government accepted but those of the Rev. Mukand and consequently S. 237 cannot apply.

[84] There is one other short matter which calls for our attention. The learned Civil Judge has under S. 65, Contract Act, ordered the refund of all the money paid under the lease of 1932. This order is incorrect. He should not have ordered refund to the Association of the amount due in respect of plot No. 296. In view of our finding with regard to the small quadrilateral of No. 288 a further deduction will have to be made with regard to about five biswas of land covered by that piece at the same rate. Thus out of Rs. 385-0-6 claimed a sum of Rs. 7-12-0 per year for six years at the rate of Rs. 25 per bigha per annum or a total of Rs. 43-8-0 will be deducted.

[85] In view of our findings, had the Government claimed it, we should have decreed its suit with regard to the area of plot No. 296 and the smaller quadrilateral of plot No. 288. We find, however, that the Government confined its claim to its rights under the lease of Ex. 1/1 which we have found to be beyond the authority of the agent and, as such, invalid. At the time of the framing of issues, the Association prayed that issues be framed regarding the title of the plaintiff and the defendant but the Government's Advocate said that his suit was based on the lease and not on title. Thereupon the Court passed the following order :

"A perusal of the plaint clearly discloses that the action brought by the plaintiff against the defendant is based on the lease dated 15-10-1932, executed on behalf of the defendant in the plaintiff's favour (*sic*). The nature of the claim is, therefore, an action for ejectment and for recovery of arrears of rent and for recovery of compensation for use and occupation after the termination of tenancy. The plaintiff's claim, therefore, hinges on the validity of the lease and on nothing else. . . ."

Thus, the Government deliberately confined its case to the lease and refused to allow the question of title to be raised no doubt with a view to force the Association to file a separate suit. We cannot, therefore, allow the nature of the suit to be altered at this stage.

[86] The result of the findings at which we have arrived is that Appeal No. 135 of 1941 will stand dismissed with costs.

[87] Appeal No. 86 of 1941 is partly allowed and the suit of the Association for declaration of its title to plot No. 296, plot No. 282 and the portion of plot No. 288 shown in the Commissioner's plan as lying north of the line A 4 T 4 is dismissed. A declaration is granted to the Association : (a) that it is the perpetual lessee of the plot No. 287 shown in the Commissioner's map as enclosed by the lines indicated by the letters B 2 B, C, D, E, V, and (b) that it is the owner of the portion of plot No. 288 in suit except the portion lying north of the line A 4 T 4. The suit is also decreed for the recovery of Rs. 341-8-6. Since the Association has failed with regard to nearly 1/11th of its claim it will get only 4/5th of the costs of Suit No. 24 of 1939 in the Court of the Civil Judge and of Appeal No. 86 of 1941.

G.B. *Order accordingly.*

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* A. I. R. (35) 1948 Oudh 76 *[C. N. 26.]*

FULL BENCH

MISRA, KAUL AND KIDWAI JJ.

Abdur Samad Ansari and another—Applicants v. *Mt. Aisha Bibi and others—Opposite Party.*

P. C. Appeal No. 4 of 1944, Decided on 11-4-1947, Application for leave to appeal to His Majesty in Council, Lucknow, D/- 11-3-1947.

***Civil P. C. (1908), S. 110—Affirmance—Meaning of — Decree affirmed in appeal but modified in cross-objection—Decree is varied and not affirmed.**

Section 110 does not conceive of the decree as partly affirming and partly varying the original decision. It contemplates an appellate decree either as upholding the decision or as varying or modifying it and if an appeal is permissible, it is against the decree as a whole and not against the finding or adjudications on the controversies involved in the suit: 33 A.I.R. 1946 Nag. 307, *Dissent.* [Paras 4 & 14]

Where, therefore, the main appeal against the decision of the trial Court fails, but the decision is partly modified on cross-objection and there is no substantial question of law, the appellate decree must be taken to have varied the decision of the trial Court so as to entitle the appellant to appeal to His Majesty in Council under para. 3 of S. 110: 41 C. W. N. 494; 19 A. I. R. 1932 All. 65 (F.B.) and 33 A. I. R. 1946 Mad. 539 (F.B.), *Rel. on*; 20 Luck. 256 : 31 A. I. R. 1944 Oudh 295, *OVERRULED*; *Case law discussed.* [Paras 1 & 15]

Annotation: ('44-Com.) Civil P. C., S 110 N 13.

Cases referred:—

1. ('44) 1944 O. W. N. 372 : 31 A.I.R. 1944 Oudh 295: 20 Luck. 256, Ram Naresh Singh v. Jai Raj Singh.
2. ('26) 13 A. I. R. 1926 Mad. 1024 : 97 I. C. 592, Ramanathan Chetty v. Subramanian Chetti.
3. ('01) 8 C. W. N. 294, Sree Nath Roy v. Secretary of State.
4. ('16) 3 A. I. R. 1916 Mad. 1222 : 30 I. C. 372, Lakshmi Venkayamma v. Venkatadri Appa Rao.
5. ('24) 51 I. A. 319 : 12 A.I.R. 1925 P. C. 60 : 51 Cal. 969 : 86 I. C. 504 (P.C.), Annapurnabai v. Ruprao.
6. ('07) 10 O. C. 65, Baldeo Bux Singh v. Lalji Singh.
7. ('21) 8 A. I. R. 1921 All. 270 : 43 All. 220 : 64 I. C. 3, Bhagwan Singh v. Allahabad Bank Ltd.
8. ('30) 11 Lah. 465 : 17 A. I. R. 1930 Lah. 554 : 123 I. C. 523, Asa Ram v. Kishen Chand.
9. ('19) 6 A.I.R. 1919 Cal. 118 : 50 I. C. 760, Lagandeo Prosad Singh v. D. G. Reid.
10. ('35) 22 A.I.R. 1935 Cal. 250 : 155 I. C. 727, B. N. Ry. Co., Ltd. v. Ruttanji Ramji.
11. ('29) 16 A. I. R. 1929 Pat. 561 : 9 Pat. 558 : 117 I. C. 193, Jamuna Prasad Singh v. Jagarnath Prasad.
12. ('26) 53 I. A. 197 : 13 A.I.R. 1926 P. C. 93 : 6 Pat. 24 : 98 I. C. 499 (P.C.), Jowad Hussain v. Gendan Singh.
13. ('18) 5 A.I.R. 1918 All. 245 : 48 I.C. 124, Chiranji Lal v. Behari Lal.
14. ('35) 57 All. 873 : 22 A. I. R. 1935 All. 374 : 155 I. C. 487 (F.B.), Benares Bank Ltd. v. Rajnath Kunzru.
15. ('41) 28 A. I. R. 1941 Pat. 269 : 20 Pat. 459 : 195 I. C. 344 (F.B.), Broja Sunder Deb v. Rajendra Narayan.
16. ('37) 41 C. W. N 494, Bank of Khulna Ltd. v. Jyoti Prokash Mitra.
17. ('32) 54 All. 146 : 19 A. I. R. 1932 All. 65 : 135 I. C. 234 (F.B.), Nathu Lal v. Raghubir Singh.
18. ('47) I. L. R. (1947) Mad. 6 : 33 A.I R. 1946 Mad. 539 : 228 I. C. 420 (F.B.), Gangadara Ayyar v. Subramania Sastrigal.
19. ('29) 52 Mad. 521 : 16 A.I.R. 1929 Mad. 429 : 121 I. C. 16, Shunmuga Sundara Mudaliar v. Ratanavelu Mudaliar.
20. ('35) 1935 O. W. N. 947 : 22 A. I. R. 1935 Oudh 489 : 11 Luck. 320 : 156 I. C. 10, Bisheshwar Bakhsh Singh v. Bishwanath Singh.
21. ('46) 33 A. I. R. 1946 Nag. 307 : I. L. R. (1946) Nag. 609, Abdul Majid Khan v. Dattoo Raoji.

Nasirullah Beg — for Applicants.

Mohd. Hafeez for Siraj Husain — for Opposite Party.

Judgment.—The following question has been referred to the Full Bench:

"Where the main appeal against the decision of the trial Court fails but the decision is partly modified on cross objection and there is no substantial question of law, does the appellate decree vary the decision of the trial Court as contemplated by S. 110, Civil P. C., so as to entitle the appellant to go up to His Majesty in Council."

[2] The suit was instituted by Mt. Aisha Bibi in the Court of the Civil Judge, Rae Bareli. She claimed possession of a 1/6th share in the properties of her parents by partition on the basis of inheritance. The value of the subject-matter of the suit namely her share was stated in the plaint to be Rs. 6311-11-0. The Court of the first instance passed a decree in her favour except in so far as her claim related to certain properties mentioned as item (1) in list C of the plaint. Two of the defendants, Abdus Samad and Abdul Ahmad, came up in appeal to this Court, and the plaintiff preferred cross objections. The appeal failed but the cross objections were allowed. The result was that the whole of the plaintiff's claim stood decreed. On 13th March 1944, Abdus Samad and Abdul Ahad presented petition for leave to appeal to His Majesty in Council alleging that the decree of this Court involved or affected rights in other properties, the value of which exceeded Rs. 10,000 and in any event the case was one which should be certified to be fit for appeal under cl. (c) of S. 109, Civil P. C. The applicants maintained further that they were entitled to a certificate as of right inasmuch as the decree from which the appeal was sought to be preferred varied the decree of the trial Court, and that if it was a decree of affirmance, the proposed appeal involved substantial questions of law.

[3] By an order of a Bench of this Court, dated 5th March 1945, the contention that the case should be certified as fit for appeal under S. 109, cl. (c) was overruled. It was also held that there was no substantial question of law. The lower Court was asked to submit its finding on the question of valuation and it reported that the value of the properties in suit in lists C to I together with buildings and houses standing thereon which were not directly in suit is Rs. 11,000. The finding was based upon admission of the parties and no objections were preferred against it. The sole question which was, therefore, agitated before the Division Bench was whether the decree of this Court was one of affirmance within the meaning of S. 110. It was urged on applicants' behalf that even though their own appeal had failed since the plaintiff's cross objections were allowed the decree of this Court did not affirm the decision of the trial Court. On behalf of the opposite party, reliance was placed on 1944 O. W. N. 372,[1] which held in agreement with the view expressed in A.I.R. 1926 Mad. 1024,[2] that where the High Court's decree in the main appeal confirmed that of the lower Court the mere fact that a decision was partly modified on cross-appeal or cross-objection did not afford a right of appeal to the persons whose appeal failed. A contrary opinion was expressed in a number of other decisions and to set the controversy at rest the Division Bench made the reference as stated above.

[4] The determination of the point involved depends primarily on interpretation of the relevant provision of the Code. The right of appeal to His Majesty in Council is mainly regulated by Ss. 109 and 110. Under S. 109, an appeal is to lie to His Majesty in Council (a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction; (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and (c) from any decree or order when the case is certified to be a fit one for appeal to His Majesty in Council. To the general right of appeal thus conferred S. 110 provides certain restrictions. It says that where the appellant proposes to come under cls. (a) and (b) of S. 109

"the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards or the decree or final order must involve directly or indirectly, some claim or question to or respecting property of like amount or value and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law."

We are concerned with the final clause of this section which renders the presence of a substantial question of law essential only if the appellate decree affirms the decision of the Court of first instance. On the plain reading of the provision it would be impossible to attach any qualifications to the affirmance except that it must be by the decree against which the appeal is preferred. Apparently regard is not to be had to the manner in which the affirmance is made or the person at whose instance it is brought about. The extent of affirmance is also not a matter to be considered. The sole question which arises under the clause is whether the appellate decree affirms or varies the decision of the Court immediately below on merits. This question scarcely presents much difficulty where there is only one decree passed by the High Court. But where there is a multiplicity of appeals, and consequently a number of appellate decrees are passed considerations other than those which

prevail in the case of a single appellate decree may perhaps arise. We need not, however, concern ourselves with the latter class of cases. Where an appeal is sought to be preferred against a decree which varies the decision of the Court immediately below whether the variance is brought about at the instance of the appellant or at the instance of the respondent it cannot be said that the appellate decree affirms the decision of the first Court. The section does not conceive of the decree as partly affirming and partly varying the original decision. The Legislature appears to have envisaged an appellate decree either as upholding that decision or as varying or modifying it and if an appeal is permissible, it is against the decree as a whole and not against the finding or adjudications on the controversies involved in the suit.

[5] Were it, therefore, not for the conflicting case law on the point the position would appear to be clear. Some learned Judges have, however, inclined to the view that where the trial Court's decree comprises different matters and the High Court affirms that decree in respect of some matters only and reverses it in respect of others the appeal to the Privy Council must involve a substantial question of law if it is in respect of matters in regard to which the decree of the trial Court has been affirmed. Some typical cases which have resulted in this view may be briefly referred to.

[6] The first case is that in 8 C.W.N. 294.[3] There in a land acquisition case the applicant claimed a sum of Rs. 77,000 odd. The Collector assessed the value at Rs. 28,287. The Judge on reference upheld the Collector's award. The High Court awarded to the appellant a further sum of Rs. 7000. He was still dissatisfied with the decree and applied for leave to appeal to the Privy Council. The learned Judges constituting the Special Bench considered that the decree against which the appellant desired to go up to His Majesty in Council was against the decision of the High Court "so far as it affirmed the decision of the Court below." The view was that though the High Court modified the original decree since the part of the decree against which the further appeal was sought to be preferred affirmed the decision of the Court of first instance so far as it related to that part, the bar imposed by the last clause of S. 110 operated to restrict the appeal to substantial questions of law.

[7] This decision was followed in A. I. R. 1916 Mad. 1222.[4] There the petitioner's suit for recovery of some jewels and cash was dismissed by the Subordinate Judge, but on appeal it was partly decreed by the High Court. The plaintiff proposed to proceed to Privy Council in respect of the part of his case which failed in both Courts. The learned Judges found that no substantial question of law was involved and since the proposed appeal related to the part of the claim regarding which the trial Court's decision was affirmed by the High Court, they held that no further appeal was permissible.

[8] In A. I. R. 1926 Mad. 1024,[2] a Division Bench of Madras High Court dealing with an application for leave to appeal to the Privy Council in a case where its decree in the main appeal confirmed that of the Court of first instance but modified it on cross-objection held that the modification so made could not avail the applicant who otherwise would not have had the right of appeal under S. 110, Civil P. C.

[9] It may be mentioned that shortly before the decision in the last mentioned case their Lordships' Board had made an important pronouncement on the point in 51 I. A. 319.[5] That case arose out of a suit instituted by one Ruprao for possession of certain properties on the basis of inheritance from his adoptive father Shankar Rao. The defendants, namely Annapurnabai, who was Shankar Rao's second widow and Kashi Nath who was alleged to have been adopted by her, set up the rival claim of Kashi Nath and alternatively pleaded that Annapurnabai was entitled to maintenance. The trial Court decreed the suit in favour of Ruprao but awarded Rs. 800 per annum as maintenance to Annapurnabai. On appeal by the defendants the Judicial Commissioners of Nagpur upheld the decision so far as it related to possession but increased the maintenance allowance of Annapurnabai to Rs. 1200. The defendants thereupon applied for leave to appeal and claimed it as a matter of right on the ground that the decision of the first Court was not affirmed but varied by the Judicial Commissioners. They failed to get the leave because the learned Judges considered that the change was immaterial. Their Lordships of the Privy Council did not agree on this point. They held that S. 110 gave to the petitioners a right of appeal. The appeal before the Privy Council was, it would appear in view of the concurrent findings on questions of fact, desired to be confined to the amount of maintenance. The Judicial Committee, therefore, limited the appeal to that question only. The importance of this case lies in the fact that it tacitly overrules the view taken in the Calcutta and Madras cases to which reference has been made above inasmuch as in spite of the fact that both the Courts in India had concurred in disallowing the claim of maintenance to the extent of the balance such affirmance was not regarded as an obstacle and the appeal was admitted as of right. Even before this authoritative pro-

nouncement of the Privy Council the decision in 8 C. W. N. 294[3] was not accepted as correct and since 1924 it has lost all its importance : *see* in this connection 10 O. C. 65;[6] A. I. R. 1921 ALL. 270;[7] 11 Lah. 465;[8] A. I. R. 1919 Cal. 118;[9] A. I. R. 1935 Cal. 250[10] and A. I. R. 1929 Pat. 561.[11]

[10] In A. I. R. 1926 Mad. 1024[2] it was recognised that 8 C. W. N. 294[3] and A. I. R. 1916 Mad. 1222[4] might possibly require reconsideration in consequence of Annapurnabai's case but the learned Judges thought that in cases where there was an appeal and a cross-objection though only one decree is prepared the same principle as is applied in cases of cross appeals should prevail. They said that in either case there were two orders of the Court, one dismissing the appeal and affirming the lower Court's decree and the other allowing the memorandum of cross-objections or cross appeal and modifying the trial Court's decree. They remarked :

"So far then as the decree affirming the decree of the lower Court was concerned no appeal would lie to the Privy Council. Similarly no appeal would lie to the Privy Council in respect of the order on the memorandum of objections because the subject-matter of that appeal was only Rs. 300."

[11] The same line of argument is adopted before us by the learned counsel for the opposite party. In so far as the decree from which the appeal sought to be preferred is concerned, it is clear that it cannot be considered for the purposes of S. 110 as comprising as many decrees as there were items in the suit since cl. 3 does not warrant its being so split up : *see* 53 I. A. 197.[12] To say further that the portion against which the matter is to be taken up in appeal was not varied because the variation was made on a mere cross-objection is also we think a wrong approach to the question at issue. The decree from which the appeal was proposed to be preferred was a single decree and it is difficult to draw a distinction for the purposes of S. 110, Civil P. C., between one part of the suit and another according to the petitioners' failure or success in the High Court. Such an interpretation of S. 110 as is pressed before us does violence to the letter (of the section. The decision of the) Judges of Madras High Court in 1926 was mainly based on A. I. R. 1918 ALL. 245[13] but that was a case of cross appeals in the High Court and the proposed appeal was against the decree of affirmance. On behalf of Mt. Aisha Bibi the same line of argument was taken but this again in our opinion is a wrong method of approach. Cases of that class stand on a somewhat different footing and the points which prevailed in A.I.R. 1918 ALL. 245[13] or in the subsequent case of the Allahabad High Court in 57 ALL. 873[14] do not fall to be considered where the decree of the High Court from which the appeal is proposed to be taken to His Majesty in Council partly affirms and partly modifies the original decision. In saying this we do not desire to be understood as laying down the proposition that if the cross-objections in the present case were a cross appeal and two decrees were passed by this Court an appeal to the Privy Council against the decree affirming a part of the decision would be incompetent in the absence of a substantial question of law. Other aspects of the matter may have to be taken into account in such a case and it may or may not be possible to interpret the word 'decree' occurring in the last clause of the section in a larger sense as embodying the net result of the whole suit. We observe that there are already two conflicting views on that matter. A Full Bench of the Allahabad High Court holds that there is no variation (*vide* 57 ALL. 873[14]) while the Patna High Court Full Bench expresses a contrary opinion : *see* A. I. R. 1941 Pat. 269.[15] This controversy does not concern us since here we have a single appellate decree disposing of the entire suit.

[12] The construction that we have placed on cl. 3 of S. 110, Civil P. C., finds direct support from 41 C. W. N. 494,[16] the Full Bench decision in 54 ALL. 146[17] and I. L. R. (1947) Mad. 6.[18] The last case was similar to the case in A. I. R. 1926 Mad. 1024.[2] The plaintiffs sued for a declaration that a settlement deed executed by a widow in respect of a number of items of property was void. The trial Court passed a decree in respect of six items in plaintiffs' favour and dismissed it in respect of the remaining five. The defendants appealed and the plaintiffs preferred cross-objections therein. The appeal was dismissed, but the cross-objections were allowed. The valuation of the objections was less than Rs. 10,000 and it was contended on the strength of A. I. R. 1926 Mad. 1024[2] that there could be no right of appeal to the Judicial Committee by reason of the fact that variation was made on cross-objections. This contention was negatived. The learned Judges constituting the Full Bench considered in the first place that the decision in the case cited was in conflict with the judgment of the same learned Judges in 52 Mad. 521[19] and in the second place that it erred in separating the appeal and the memorandum of objections and treating the orders of the High Court as embodying two separate decrees. The view to which they gave expression was that as the defendants desired to challenge in appeal to the Privy Council the validity of the plaintiffs' claim with regard to ten of the eleven items of property the value of which was admittedly above rupees 10,000 and as the appellate decree varied the trial Court's decree in respect of four of the

items of property it was one of variation and not of affirmance and therefore the defendants were entitled as of right to the leave. We respectfully agree with this view.

[13] The case in 1944 O. W. N. 372,[1] we have already mentioned, bases itself primarily upon the previous Madras view which has since been overruled. It appears that the attention of the learned Judges in the Oudh case was not invited to 51 I.A. 319[5] or to 1935 O.W.N. 947[20] and 54 ALL. 146.[17] We venture to think that the learned Judges of the Madras Court whose opinion was accepted in the Oudh case rejected without sufficient reason the contention urged before them that the cross-objections are regarded in law as an integral part of the appeal since there was one decree prepared by the Court both in appeal and cross-objections and such decree did not affirm the decision of the Court immediately below. One essential difference between such a case and the case where there is a cross appeal consists in the fact that in one case the decree from which appeal is proposed embraces the result of cross objection also while in the other it does not contain any expression of adjudication on the cross appeal.

[14] The only other case of any importance which lays down a contrary rule is A. I. R. 1946 Nag. 307.[21] According to it if there are several controversies in the suit and the decision of the Court is embodied in one document, described as a decree the adjudication with regard to each matter in controversy is in itself a decree. In that sense, it says one document described as a decree may contain several adjudications on several distinct matters and may amount to several decrees. According to the learned Judges who constituted the Division Bench the word "decision" in S. 110 means the decision of a suit so far as it is the subject-matter of the proposed appeal and not the decision of the suit as a whole. In their opinion, it was an unduly narrow interpretation of S. 110 to hold that a decree which varies the total decision of the Court below in however small a manner should automatically be a non-affirming decree. The distinction they observe should not be made to depend on the question whether the variation is by means of a cross-objection or by means of a separate decree in a cross appeal because such a distinction would entirely be technical and particularly so in view of the fact that by the provisions of O. 41, R. 22, Civil P. C., the hearing of the memorandum of cross-objections does not depend on the hearing of the appeal and may itself be heard as a substantive cross appeal. The view propounded in relation to the controversies in suit is based upon the observations of Niamat-Ullah J., in 57 ALL. 873.[14] We may with respect point out that it will be stretching the meaning of the word "decree" in cl. (3) of S. 110 to say that the Legislature gives the right of appeal against each component part of it and that the decision of the Court of first instance must be considered to be varied or affirmed with respect to each controversy in the suit. The fact that under O. 41, R. 22 a memorandum of cross-objections may be heard even if the appeal fails or is withdrawn is, if we may say so, hardly material for there would be only one decree whether the appeal did or did not reach the stage of hearing, and if that decree modified the decision of the Court immediately below an appeal to the Privy Council as of right would lie if the other conditions of S. 110 warranted it. We are of opinion that the construction placed upon the words "decree" and "decision" in the Nagpur case is unduly strained and we, therefore, respectfully dissent from the law there enunciated by the learned Judges. Our opinion may result in widening the scope of the section. It can scarcely be regarded as "unduly narrow."

[15] Our answer to the reference, therefore, is in the affirmative. Let the case be returned to the Division Bench with the above answer.

K.S. *Answer in the affirmative.*

A. I. R. (35) 1948 Oudh 80 *[C. N. 27.]*

MADELEY J.

Baley Din Gupta — Plaintiff—Applicant v. *The Bengal Immunity Co. Ltd. — Defendant—Opposite Party.*

Civil Revn. Appln. No. 55 of 1943, Decided on 28-1-1947, from order of Sm. C. C. Judge, Lucknow, D/- 7-8-1943.

Provincial Small Cause Courts Act (1887), S. 15 and Sch. 2, Art. 31—Suit for accounts, meaning of — Suit by agent against principal claiming definite sum of money.

A suit by an agent against his principal for a definite sum (made up of rebates and canvassing charges) is not a suit for accounts. The reason is that in the first place the plaintiff has claimed a definite sum of money and the mere fact that accounts have to be gone into in order to ascertain the sum due to the plaintiff does not make the suit one for accounts. In the second place the agent cannot sue his principal for accounts because the principal is not under any obligation to render accounts to the agent. It is a suit for an ascertained amount which will have to be verified by the Court upon examination of the accounts. Such a suit lies in a Small Cause Court: 15 A. I. R. 1928 All. 332; 27 A. I. R. 1940 Mad. 504 and 24 A. I. R. 1937 Cal. 359, *Applied*. [Para 4]

Cases referred :—

1. ('28) 15 A. I. R. 1928 All. 332 : 116 I. C. 85, Sheopal Singh v. Durga Prasad.
2. ('40) 27 A. I. R. 1940 Mad. 504 : I.L.R. (1940) Mad. 296 : 191 I. C. 598, Mahadevi v. Shankara Menon.
3. ('37) 24 A. I. R. 1937 Cal. 359 : I. L. R. (1937) 2 Cal. 259 : 169 I. C. 930, Narmada Chandra v. Maharaj Bahadur Singh Dugar.

Govind Behari Lal — for Applicant.

Order. — This is an application in revision under S. 25, Provincial Small Cause Courts Act. The facts are that Baley Din Gupta is the agent of the Bengal Immunity Company Ltd., and was working for them during the years 1938 to 1940. On 17-3-1943, Baley Din Gupta filed a suit against the company for Rs. 153-4-9 made up of "rebates and canvassing charges." The plaint was ordered to be returned to plaintiff by the Judge, Small Cause Court, on the ground that the suit did not lie in a Small Cause Court because it was admitted that for

"arriving at those 'rebates' the items of goods of all the years in suit will have to be checked and the parties' credit and debit sides will have to be examined. Nothing more or less has got to be done in a suit for an account."

[2] The applicant's learned counsel contends that this view is not correct. A suit for an account is a special form of suit, and does not mean every suit in which accounts have to be looked to in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff. A. I. R. 1928 ALL. 332[1] is cited :

"A suit does not become one for accounts simply because accounts have to be taken before a balance due from the defendant to the plaintiff can be discovered. A suit for accounts will be one where a preliminary decree for accounts will be necessary, and it will be necessary for the Court to call upon the defendant to render accounts.

A suit was brought by a plaintiff to recover a fixed amount in excess of the value of the goods supplied by the defendant to him, and for which he had made payments in advance. Every transaction between the parties was separately dealt with, and the defendant became liable to repay the sum which he had received in excess of the price ultimately fetched by any one consignment delivered by the defendant to the plaintiff :

Held, that the suit was cognizable by a Small Cause Court."

[3] In A. I. R. 1940 Mad. 504[2] it was held that a suit for an account is a special form of suit and does not embrace every case in which accounts have to be looked into to ascertain the amount due to the plaintiff, and that a suit for an account implies that the plaintiff is entitled under the substantive law to demand an account from the defendant. It was also held that an employer can call upon his agent for an account, but an agent cannot call upon his employer for an account. In A. I. R. 1937 Cal. 359[3] it was held that there cannot be in law a suit for accounts unless the defendant in the suit is under an obligation to render accounts to the plaintiff. The obligation is upon the agent to render accounts to the principal. The principal owes no obligation to render accounts to the agent. The mere fact that in ascertaining the sum due to the plaintiff it would be necessary to investigate accounts does not alter the nature of the suit.

[4] Though these cases may not be exactly on all fours with the present case, the principle involved seems to apply. In the first place the plaintiff has claimed a definite sum of money and the mere fact that accounts have to be gone into in order to ascertain the sum due to the plaintiff does not make the suit one for accounts. In the second place the plaintiff cannot sue his principal for accounts because the principal is not under any obligation to render accounts to the agent. It follows that this is not and cannot be a suit for accounts. It is a suit for an ascertained amount which will have to be verified by the Court upon examination of the accounts. Such a suit lies in a Small Cause Court.

[5] I, therefore, allow this application under S. 25, Provincial Small Cause Courts Act. The suit is returned to the Small Cause Court for trial according to law. The applicant will get his costs in this Court.

D.S. *Application allowed.*

A. I. R. (35) 1948 Oudh 81 *[C. N. 28.]*

KIDWAI J.

Abu — Accused—Applicant v. *Emperor.*

Criminal Revn. No. 22 of 1947, Decided on 16 5-1947, from order of Sessions Judge, Lucknow, D/- 10-3-1947.

(a) Criminal P. C. (1898), S. 342 — Prosecution under S. 4 (1), U. P. Food Grain Rationing Order — Confession by accused to Food Grain Inspector not put to accused under S. 342 — Confession cannot be relied upon for determining guilt of accused: 20 A.I.R. 1933 P. C. 124, *Ref.*; 21 A. I. R. 1934 Oudh 457, *Rel. on.* [Para 4]

Annotation: ('46-Com.) Cr. P. C., S. 342 N. 35 Pts. 1, 2.

(b) Evidence Act (1872), S. 25 — Food Grain Inspector under U. P. Food Grain Rationing Order is not police officer within S. 25—Statement made to Inspector is not inadmissible by reason of S. 25: Cr. Revn. No 5 of 1947, *Approved* ; 33 A. I. R. 1946 Mad. 430; 21 A. I. R. 1934 Cal. 580 (F.B.); 14 A. I. R. 1927 Bom. 4 (F. B.) and 25 A. I. R. 1938 Sind 1, *Disting.* [Para 5]

(c) Evidence Act (1872), S. 24—Person in authority — Confession to Food Grain Inspector under U. P. Food Grain Rationing Order (1945) — Prosecution if bound to prove confession to be voluntary.

A Food Grain Inspector under the U. P. Food Grain Rationing Order (1945) is a person in authority within S. 24, Evidence Act and consequently before a statement made in his presence is admitted in evidence as a confession the Court must be satisfied that the making of it was not caused by any inducement, threat or promise. No doubt the prosecution is not called upon in every case to give evidence that the extra-judicial confession was a voluntary one. But, if there is anything to arouse suspicion, there must be evidence to show that the confession is a free and voluntary act. [Para 6]

(d) U. P. Food Grain Rationing Order (1945), S. 4 (1) and (5) — Accused charged under S. 4 (1) and (5) pleading guilty to charge under S. 4 (5) — Conviction in respect of charge under S. 4 (1) is illegal. [Para 8]

(e) U. P. Food Grain Rationing Order (1945), S. 4 (1) and (5) — Prosecution sanctioned for offence under S. 4 (1)—Proceeding in respect of charge under S. 4 (5) is bad in law and must be set aside. [Para 8]

Cases referred:—

1. ('33) 20 A. I. R. 1933 P. C. 124 : 32 S. L. R. 716 : 142 I. C. 335 : 34 Cr. L. J. 322, Dwarkanath Varma v. Emperor.
2. ('34) 1934-11 O. W. N. 1206 : 21 A.I.R. 1934 Oudh 457 : 10 Luck. 235 : 151 I. C. 840 : 35 Cr. L. J. 1417, Onkar Singh v. Emperor.
3. ('46) 33 A. I. R. 1946 Mad. 430 : 226 I. C. 269, In re Someshwar H. Shelat.
4. ('34) 21 A. I. R. 1934 Cal. 580 : 61 Cal. 607 : 150 I. C. 561 : 35 Cr. L. J. 1071 (F.B.), Amin Shariff v. Emperor.
5. ('27) 14 A.I.R. 1927 Bom. 4 : 51 Bom. 78 : 99 I. C. 330 : 28 Cr. L. J. 122 (F.B.), Nanoo v. Emperor.
6. ('38) 25 A. I. R. 1938 Sind 1 : 32 S. L. R. 185 : 172 I. C. 968 : 39 Cr. L. J. 239 (F.B.), Bachoo Kandero v. Emperor.

I. A. Abbassi and Shanker Sahai — for Applicant.

P. N. Chaudhri Assistant Government Advocate — for the Crown.

Order. — The applicants Abu and Mohabbat in these two revisions were charged under the Defence of India Rules for having infringed the provisions of the U. P. Food Grain Rationing Order of 1945, in that Abu sold to Mohabbat 3 maunds, 37 seers and 8 chitanks of maida at the rate of Rs. 60 per bag and thereby committed an offence under S. 4 (1) of the Order. Mohabbat was charged under S. 4 (5) of the Order for having purchased the said quantity of maida. The trial Court convicted both the accused under S. 4 (1) and sentenced them each to 6 months' rigorous imprisonment.

[2] On appeal the learned Sessions Judge of Lucknow has upheld their convictions and sentences. He has mainly relied upon two documents, Exs. 3 and 2, which are said to be the confessions made by Abu and Mohabbat before Mr. A. M. Khan, Rationing Inspector, who has been produced as P. W. 2. These two documents were not considered by the trying Magistrate and the first objection taken in these revisions is that neither of the two documents can be relied upon for the purpose of convicting the applicants because (a) they were not put to the accused under the provisions of S. 342, Criminal P. C.; (b) they are confessions made before a person who comes within the purview of the words "a police officer" used in S. 25, Evidence Act; (c) in any case they are confessions made to a person in authority and are inadmissible in evidence unless the Court is satisfied that they were voluntarily made: *vide* S. 24, Evidence Act.

[3] With regard to the first point, it has been laid down in A.I.R. 1933 P. C. 124[1] at p. 130 that it is the duty of the Magistrate to call the accused's attention to any circumstances appearing against him and to ask for his explanation. In 1934 O. W. N. 1206[2] at p. 1209, two learned Judges of this Court laid down the following principle:

"The principles underlying the provisions of S. 342 of the Code are based on the legal maxim '*audi alteram partem*' (hear the other side) and this section contemplates that the accused should be heard and his explanation taken on every circumstance appearing in the evidence against him. The object of this section is to ensure that the trying Court after having heard prosecution should proceed to hear the defence also and for this purpose the Court must interrogate the accused and call upon him to explain if he can the circumstances appearing against him. The provisions of this section are meant as much to safeguard the interests of the accused as to enable the Court to come to a right conclusion as to the truth of the charge made against the accused and the provisions of the statute, therefore, must be strictly enforced, and disobedience of the express mandatory provisions of this section cannot be condoned under S. 537, Criminal P. C., as being a mere irregularity. The object of this section is that the accused should be brought face to face with the witnesses, who give evidence against him and should be solemnly given an opportunity to make a statement from his place in the dock, so that the Court may have the advantage of hearing his defence, if he is willing to make one with his own lips."

[4] In the present case, Exs. 2 and 3 were on the record of the trial Court and they had been put to Mr. A. M. Khan who stated that they were the statements of the accused. If they were to be relied upon by the trial Court they were the strongest piece of evidence appearing on the record against the accused. Abu accused when questioned whether he had sold the maida to Mohabbat, denied it and stated that he had put it at Mohabbat's place. This statement of his was obviously opposed to his own statement contained in Ex. 3; and if the Court desired to rely upon this document it was bound to put it to Abu in order to elicit his explanation with regard to it, if he had any to give. The failure of the trying Magistrate to do so has, therefore, been an infringement of the provisions of S. 342, Criminal P. C., and would exclude this document from consideration in determining the guilt of the accused. In this connection it is not out of place to point out that the learned Magistrate based his conviction of the accused entirely on the oral evidence and did not place any reliance upon Exs. 2 and 3. It is natural to suppose that he was not satisfied that these confessions had been properly obtained; otherwise there is no reason why he should not rely upon them since they are the only proof of the actual sale of the grain by Abu to Mohabbat. This circumstance would, however, only mean that the trial is vitiated, but it would not remove the possibility of a fresh trial. It is, therefore, necessary to consider whether there is any substance in the other two pleas of the applicants with regard to these documents.

[5] With regard to the plea that these two documents are statements made before a person

occupying the status of a police officer, my attention has been drawn to cases reported in A.I.R. 1946 Mad. 430;[3] A.I.R. 1934 Cal. 580;[4] A.I.R. 1927 Bom. 4[5] and A.I.R. 1938 Sind 1,[6] in which inspectors of various departments have been held to occupy the status and position of police officers and statements made before them have been excluded from evidence. All these cases were based upon a consideration of the powers conferred upon the officer in question by the enactments under which they were appointed. In every one of those enactments, those officers were given all the powers of a police officer in charge of a police station under the Criminal Procedure Code. They possessed very wide powers, including the powers of arresting and detaining an accused person. The Inspector in the present case possesses very limited powers. The only one of the powers of the police which he possesses is the power to "enter and search houses." Section 37 of the Order also authorises him to collect such information from any person as may be necessary. He is not, however, given any power of resorting to any means of compulsion for obtaining information. There is thus a great deal of difference between his powers and those of a police officer. In a case of this Court (Criminal Revision No. 5 of 1947) a learned Judge has taken a view that Piece Goods Inspectors, whose office corresponds to that of Food Grain Inspectors, are not police officers. In that case also, the cases to which reference has been made before me, were placed before the learned Judge, and I respectfully agree with the conclusion at which he arrived. Exhibits 2 and 3 are, therefore, not inadmissible by reason of S. 25, Evidence Act.

[6] With regard to the third point, it cannot be doubted that a person in the position of a Food Grain Inspector is a person in authority and that consequently before a statement made in his presence is admitted in evidence as a confession the Court must be satisfied that the making of it was not caused by any inducement, threat or promise having reference to the charge against the accused proceeding from a person in authority. It is no doubt true that the prosecution is not called upon in every case to give evidence that the extra-judicial confession was a voluntary one. But, if there is anything to arouse suspicion, there must be evidence to show that the confession is a free and voluntary act. In the present case, there is no direct evidence either way. But, as I have already remarked, the trial Court did not rely upon the confession at all; nor did it think it necessary to put the two confessions to the accused persons, one of whom at least was denying the alleged sale which is admitted in Ex. 3. Further, it appears from the record that these statements Exs. 2 and 3 were attested and that a witness of one of them was summoned, but that he was given up on his stating that he knew nothing about the matter. In these circumstances the defence was not called upon either to cross-examine the prosecution witnesses who deposed about Exs. 2 and 3 or to produce defence evidence to show that those two documents were not the voluntary statements of the accused. The learned Sessions Judge has ignored this aspect of the matter and he has gone so far as to remark that "it is nobody's case that it was a mistaken admission." This remark seems surprising in view of the statement of Abu that he did not sell the maida in question to Mohabbat. Obviously this statement is nothing less than a denial of the admission contained in Ex. 3. The evidence on the record is thus not sufficient to establish that Exs. 2 and 3 were the voluntary statements of the accused persons and, therefore, they cannot be admitted in evidence against them in view of the provisions of S. 24, Evidence Act.

[7] If these two documents are excluded, there only remains the oral evidence, and this taken with the circumstantial evidence does not prove that there was sale of maida by Abu to Mohabbat. The evidence on the record, apart from the technicality involved in Exs. 2 and 3 not having been put to the accussd, is not sufficient to justify the conviction of the accused and there is no occasion to order a retrial.

[8] It may also be remarked that both the Courts below have placed considerable emphasis upon the plea of guilty put in by Mohabbat. They have, however, failed to notice that he pleaded guilty not to the charge under which he has been convicted, but to an entirely different charge namely one under S. 4 (5), U. P. Food Grain Rationing Order. His conviction, therefore, is bad on this ground also. The District Magistrate sanctioned his prosecution for an offence under S. 4 (1) of the Order. He was, however, charged under S. 4 (5) of the Order and he was asked to plead to that charge. The Court has convicted him under S. 4 (1) of the Order without even amending the charge or giving the accused an opportunity of meeting it. Since there was no sanction for the prosecution of Mohabbat under S. 4 (5) of the Order the proceedings against him under a charge for infringement of that clause was bad in law and must be set aside.

[9] The result is that I allow both the revision applications, set aside the convictions and sentences passed upon the accused applicants and direct that they be released forthwith unless they are required in connection with some other offence.

G.N. *Conviction set aside.*

A. I. R. (35) 1948 Oudh 84 *[C. N. 29.]*

MISRA AND KAUL JJ.

Khuda Bux Khan — Applicant v. *Maha Nand Tewari and another — Opposite Party.*

Civil Misc Applns. Nos. 633 and 634 of 1946 filed in No. 99 of 1941, Decided on 28-11-1946.

Civil P. C. (1908), S. 115 and O. 22—Applicability of O. 22 to revision application — Limitation — Effect of admission of application — Party dying after admission—Legal representatives not brought on record within reasonable time —Effect.

Order 22 does not apply to revision applications ; nor is any period of limitation prescribed for an application for substitution of names of the legal representatives in place of a deceased party in a revision application : 26 A. I. R. 1939 Oudh 277, *Approved.* [Para 4]

But the effect of admission of a revision application is no more than that the High Court has decided that the record shall be sent for and the applicant heard in support of his application unless by his conduct in connexion with the proceedings he disentitles himself to such hearing. By admitting the application the High Court does not necessarily undertake to examine the record of the case : 26 A. I. R. 1939 Oudh 277 and 7 A. I. R. 1920 Sind 120, *Not approved.* [Para 4]

Hence, if after the admission of a revision application one of the parties dies and an application to bring his legal representatives on record is not presented within a reasonable time, the revision application will abate, in the sense that the proceedings shall cease unless good cause is shown for the delay. The legal representatives of the deceased party are not entitled to have their names brought on the record as a matter of right if the application asking for it is unduly delayed : 27 A. I. R. 1940 Oudh 394, *Disting.*; *Case law referred.* [Paras 6, 7]

Annotation ('44-Com.) Civil P. C., O. 22 (Gen.) N. 2 Pt. 9.

Cases referred :—

1. ('40) 15 Luck. 26 : 26 A. I. R. 1939 Oudh 277 : 184 I. C. 81, Kazim Husain v. Peary Lal.
2. ('41) 16 Luck. 72 : 27 A. I. R. 1940 Oudh 394 : 189 I. C. 388, Daya Ram Singh v. Surendra Singh.
3. ('24) 80 I. C. 456 : 7 A.I.R. 1920 Sind 120, Baksho v. Piaro.
4. Applns. No. 112 of 1942, D/- 18th Feb. 1946, Mohammad Ishaque v. United Provinces.
5. ('23) 10 O. L. J. 205 : 10 A. I. R. 1923 Oudh 272 : 77 I. C. 115, Binda Prasad v. Banarsi Das.
6. ('25) 12 A.I.R. 1925 Oudh 608 : 86 I. C. 329, Mahadeo Prasad v. Mt. Ganeshi.
7. ('30) 17 A. I. R. 1930 Oudh 496 : 128 I. C. 739, Hamidulnissa v. Mohd. Anwar.
8. ('36) 1936 O. W. N. 262: 23 A.I.R. 1936 Oudh 185 : 12 Luck. 52 : 160 I. C. 814, Birendra Bikram Singh v. Basdeo.

Faiyaz Ali —for Applicant.
R. N. Shukla—for Opposite Party.

Order. — Civil Miscellaneous Application No. 633 of 1946 relating to S. 115 Application No. 99 of 1941 and Civil Miscellaneous Application No. 634 of 1946 in S. 115 Application No. 100 of 1941 have been referred by the Hon'ble the Chief Judge to a Bench under S. 14 (2), Oudh Courts Act. Both of them raise the same point, and are made on the same facts, and may conveniently be disposed of by one common order. They arise on the following facts.

[2] One Khuda Bakhsh Khan filed two revision applications (Nos. 99 and 100 of 1941) in this Court on 31-7-1941, through his counsel, Mr. Faiyaz Ali. They were admitted the same day and notices were ordered to be issued. Khuda Bakhsh died in December 1943, leaving his widow Mt. Saiful Bibi, and three minors, Akhtar Husain Khan, Ali Hasan Khan and Abdur Razzak Khan as his heirs and legal representatives. On 13-3-1945, when these cases were taken up for hearing (the two applications were connected by an order of the Hon'ble the Chief Judge) Mr. Naimullah holding brief for Mr. Faiyaz Ali appeared and informed the Court that his client was dead. It was ordered accordingly that the case should stand adjourned till an application for substitution was made or the applications abated. On 29-8-1945, the applications were taken up again in the presence of Faiyaz Ali. The office report that no application for substitution of names in place of the deceased applicant had been filed was considered and the following order was recorded : "As the sole applicant is dead and no action has been taken the application has abated." On 8-5-1946, Mr. Faiyaz Ali presented two applications Nos. 633 and 634 of 1946, for substitution of names of the legal representatives of Khuda Bakhsh Khan. He averred that as O. 22, Civil P. C. did not apply to revision applications but only to suits and appeals, the present applications for substitution were maintainable under S. 151, Civil P. C. "and were well within time under Art. 181, Limitation Act." These applications were strongly opposed by the opposite party. The Hon'ble the Chief Judge before whom the application came up for hearing has referred them to a Bench as already stated.

[3] Mr. Faiyaz Ali relied on the decisions of this Court in 15 Luck. 26[1] at pp. 28 and 29 and 16 Luck. 72[2] in support of his contention that O. 22, Civil P. C., has no application to an application for substitution of the names of the legal representatives in place of a deceased party in a revision application and that there was no rule of limitation governing an application for substitution of parties in civil revisions. Reference was also made by the learned counsel to 80 I. C. 456.[3] We have also before us another decision by a single Judge of this Court in Appln. No. 112 of 1942.[4] In this case the two decisions of this Court referred to above were followed and it was held that O. 22, Civil P. C., does not apply to substitution of names of legal representatives in an application for revision.

[4] The case reported in 15 Luck. 26[1] arose on the following facts : One Seth Pearey Lal held a decree against Nawab Syed Kazim Husain. The judgment-debtor applied under S. 30, U. P.

Agriculturists' Relief Act for reduction of interest in respect of this decree. The application was rejected on 14-12-1936, and Nawab Syed Kazim Husain filed a revision petition in this Court against that order. The application was admitted on 30-4-1937, by a Bench of this Court. Seth Pearey Lal, the decree-holder, died on 23-8-1938. On 22-11-1938, the applicant, Kazim Husain applied for the names of the three minor sons of the deceased, who according to him were his heirs and legal representatives, to be brought on the record in place of that of the deceased. On 8-4-1939 the application was rejected on the ground that in view of the Hindu Women's Right to Property Act of 1937, it was not the sons of Pearey Lal but the widow who was the legal representative of the deceased. The next day, after the dismissal of the application for substitution, Kazim Husain made another application for substitution of the name of the widow of Seth Pearey Lal as his legal representative. It was contended on behalf of the widow that the application having been mademore than ninety days after the death of Seth Pearey Lal was beyond time. Radha Krishna Srivastava J., before whom the application came up for hearing, took the view that if abatement had taken place there was no sufficient cause for setting it aside. He was, however, of opinion that inasmuch as by R. 12 of O. 22, Rr. 3, 4 and 8 were made inapplicable to proceedings in execution of decrees, these provisions could not apply to the case before him. He further observed as follows :

"There is no provision of law laying down procedure for substitution in place of a deceased party in a revision application and the reason is obvious. The remedy provided by S. 115, Civil P. C., is absolutely discretionary with the High Court. This section empowers the High Court to call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies, and if certain conditions are fulfiled then the High Court is entitled to pass such orders as it thinks fit. This section does not lay down the procedure by which the High Court is to be moved to call for the record of any case. There is no specific provision for an applicant to move the High Court to take action under S. 115, Civil P. C. The applications that are made are just a method of bringing the matter to the notice of the High Court and no more. When an application has been admitted, the effect of the admission is that the High Court has decided to call for the record of the case and in my opinion when that stage is reached it is the duty of the High Court to examine the record and pass such orders as it thinks fit and in order to be able to do this more effectively it is necessary that the record be examined in the presence of the parties. If a party to the case has died in the meantime it is only just and proper that his legal representatives be brought before the Court and such an order to bring such legal representatives on the record of a revision application can be passed under S. 151, Civil P. C."

He accordingly ordered under S. 151, Civil P. C. that the name of the widow of Seth Pearey Lal be brought on the record in place of that of her deceased husband, Seth Pearey Lal. We agree with the view taken by the learned Judge in so far as the applicability of the provisions of O. 22, Civil P. C. to revision applications is concerned. We further agree with him that no period of limitation is prescribed for such an application. We are, however, with respect unable to subscribe to the view taken in the last portion of the above paragraph which would appear to cast a duty upon the High Court, once it admits a revision application, to call for the record of the case and to consider it, irrespective of whether the applicant does or does not carry out his duties as an ordinary litigant with respect to the application. If the principle laid down by the learned Judge were pressed to its logical conclusion it would follow that no revision application made under S. 115, Civil P. C., once it is admitted, could not be dismissed for default. But we are aware that if the applicant in such a case does not appear on the date of hearing, or does not otherwise prosecute the case, his application is liable to be dismissed for default. The effect of the admission of a revision application is to our mind no more than that the High Court has decided that the record shall be sent for and the applicant heard in support of his application unless by his conduct in connexion with the proceedings he disentitles himself to such hearing. We are unable to hold that by admitting a revision application the High Court necessarily undertakes to examine the record of the case. This may be so where the High Court sends for a case in exercise of its revisional jurisdiction *sue motu*. The reason given by Radha Krishna Srivastava J. for the view he took was the same as formed the basis of the decision in the Sind case, 80 I. C. 456,[3] and the same remarks apply to that case.

[5] The case reported in 16 Luck. 72[2] has in our opinion no bearing on the point that arises before us for consideration. It was held in that case that in view of the provisions of S. 50, Encumbered Estates Act in the case of the death of a landlord applicant there is no abatement. The basis of that decision was not the reasoning on which Radha Krishna Srivastava J relied, but the provisions of S. 50, Encumbered Estates Act which lays down that :

"If a landlord with regard to whom a notice has been published under S. 9 dies before a declaration has been made in respect of him under S. 44, (a) the proceedings under this Act shall be continued as nearly as may be possible in all respects as if the landlord were still living; and (b) any person succeeding to the whole or any portion of the landlord's property shall become subject in respect of that property to the disabilities imposed by sub-s. (2) of S. 7 and shall continue to be subject until a declaration has been made in respect of him under S. 44."

In view of this statutory provision, no question of abatement could possibly arise if the landlord applicant who had made an application under S. 4, Encumbered Estates Act died after a notice under S. 9 of that Act had been published with regard to such landlord.

[6] It is well established in this Court, as it was in the Oudh Judicial Commissioner's Court that applications for revision are not admitted beyond the time allowed for appeals except for special reasons : *see* 10 O. L. J. 205;[5] A.I.R. 1925 Oudh 608;[6] A.I.R. 1930 Oudh 496[7] and 1936 O.W.N. 262.[8] We see no good reason why the same principle as is observed in regard to revision applications presented beyond the period of limitation allowed for appeals should not, by parity of reasoning, be applied to applications for substitution of names of legal representatives of a deceased applicant if such an application is not presented within a reasonable time (which in the case of such an application is the time mentioned in O. 22, Civil P. C.) unless good cause for the delay is shown. It is true that the proceedings in such a case do not abate by virtue of the provisions of O. 22, Civil P. C. ; but when the word "abatement" is used in connexion with such an application, all that is meant is that in view of the fact that no steps were taken to bring the legal representatives of the deceased applicant on record within a reasonable time, the proceedings shall cease. In such a context "abatement" has the same meaning as it has in the expression "plea in abatement," which as mentioned in Wharton's Law Lexicon, means "a defence by which a defendant showed cause to the Court why he should not be sued, or, if sued, not in the form adopted by the plaintiff, and praying that the action might abate, i. e., cease." It cannot be disputed that the exercise of revisional jurisdiction by a High Court is a matter of discretion. If this is so, it is clear to our mind that the High Court has, in circumstances like those of the present case, a discretion to order for adequate reasons that the proceedings shall cease and be no longer continued. There is in our opinion nothing illegal, improper or unjust in this view. On the other hand, it would be somewhat illogical to apply one principle in regard to revision applications and another to substitution applications presented in the course of those proceedings and for which no period of limitation is prescribed by law.

[7] Turning to the facts of the two applications before us, we find that Khuda Bakhsh Khan died in December 1943. No steps were taken by his legal representatives for substitution of their names on the record. On 13-3-1945, Mr. Naimullah, who held brief for Mr. Faiyaz Ali, the counsel who presented these applications for revision stated that Khuda Bakhsh Khan was dead. The case was ordered to stand over till an application for substitution was made, or the applications abated. The cases were again taken up on 29-8-1945, i. e., about one year and eight months after the death of Khuda Bakhsh Khan in the presence of Mr. Faiyaz Ali, and it was ordered that the applications abated. The present applications were made on 8-5-1946. The affidavits accompanying the applications do not give any grounds for the unconscionable delay of over two years in making them. It would appear from these applications that substitution was asked for as a matter of right, something which the Court was bound to allow, howsoever late it was applied for. We are of opinion that the applicants are not entitled to have their names brought on the record as a matter of right if the application asking for it is unduly delayed and in the circumstances of the present case we are clear that there are no grounds for condoning the delay. The result, therefore, is that the applications are dismissed with costs. The order of abatement shall stand.

N.S.D. *Applications dismissed.*

A. I. R. (35) 1948 Oudh 86 *[C. N. 30.]*

MISRA AND KAUL JJ.

In Re The Chief Inspector of Stamps.

Bhaiya Bhagwati Prasad Singh and another —Plaintiff — Applicant v. *Deputy Commissioner in charge Court of Wards, Shahpur Estate, Gonda — Defendant.*

Civil Revn. Appln. No. 19 of 1946, Decided 10-2-1947, from order of Civil Judge, Gonda, D/- 10-10-1945.

Court-fees Act (1870), S. 7 (iv-A) (U. P. Amendment)—Applicability — Deed of relinquishment by widow in favour of step-daughter—Suit for possession by reversioner on death of widow.

One *N* died in 1928. His widow *S* executed a deed of relinquishment in favour of her step-daughter. On the death of *S* the plaintiff brought a suit for possession based on his reversionary title. The plaint mentioned the existence of the deed of relinquishment and that it was ineffective and void but no relief was claimed in respect of it :

Held that the cancellation of the deed of relinquishment was not necessary for granting the relief which the plaintiff desired and hence S. 7 (iv-A) was not applicable : 31 A. I. R. 1944 Oudh 29 and 31 A. I. R. 1944 All. 271, *Disting.* [Paras 4 and 6]

Annotation. — ('44-Com.) Court-fees Act, S. 7, N 5, Pt. 14.

Cases referred :—

1. ('43) 1943 O. W. N. 250 : 31 A. I. R. 1944 Oudh 29 : 211 I, C. 432, Ram Narain Singh v. Pancham Singh.
2. ('44) 1944 O. W. N. H. C. 94 : 31 A. I. R. 1944 All. 271 : I. L. R. (1944) All. 336 : 220 I. C. 65, Kamta Nath v. Chiranji Lal.

Nasir Ullah Beg, Government Advocate — for Applicant.

Bindeshwari Prasad — for Opposite Party.

Order. — This is an application in revision by the Chief Inspector of Stamps. It is

directed against an order of the learned Civil Judge, Gonda, rejecting the Chief Inspector's report regarding the deficiency of court-fee amounting to Rs. 2612-8-0.

[2] The suit which gave rise to the report was instituted by one Bhaiya Bhagwati Prasad Singh and another person claiming under him as a reversioner of one Thakur Nageshwar Bux Singh, Taluqdar of Shahpur Estate in district Gonda. The facts mentioned in the plaint are that Nageshwar Bux Singh died on 6-4-1928, that he left a will, dated 30-9-1927 whereby he bequeathed most of his property to his wife, Mt. Saraswati Kuar. Mt. Saraswati Kuar died on 31-5-1942. The plaintiff's case rests upon his reversionary title on the death of this lady.

[3] The property is in possession of the Court of Wards who is in charge of the estate of Nageshwar Bux Singh's daughter Kishori Lalli by another wife. It appears that in 1930 while the estate of Thakurain Saraswati Kuar was in possession of the Court of Wards, the aforesaid Thakurain executed a deed of relinquishment in favour of her step-daughter Kishori Lalli, and it was in consequence of that that the superintendence of the property in suit was assumed by the Court of Wards. The plaint mentioned the existence of the deed of relinquishment, and it also mentioned that the deed was ineffective and void for various reasons. The relief claimed was one for possession based on plaintiff's reversionary title. No relief was claimed in respect of the deed of relinquishment. The Chief Inspector of Stamps considered that the suit "involved" cancellation of the deed of relinquishment within the meaning of S. 7 (iv-A), Court-fees Act. This view was not accepted by the lower Court and the report was rejected. Dissatisfied with the aforesaid decision, the Chief Inspector of Stamps has come up in revision under S. 6B, Court-fees Act.

[4] The sole question with which we are concerned is whether the cancellation of the deed of 1930 is or is not involved in the suit. We have carefully considered the plaint and have come to the conclusion that the revision application must fail. The sole cause of action, according to the plaint, is the death of the widow Thakurain Saraswati Kuar, and the sole prayer is one for possession. The statement as to the deed of relinquishment contained in the plaint was, in our opinion, intended to explain the present possession of the Court of Wards over the property and to lay before the Court all the facts of which the reversioner was in possession. It is conceded that the allegations in para. 15 were not essential for the relief claimed. It is urged, however, that the court-fee must be paid upon what the plaint says, and if it mentions that a deed is unenforceable or void, it must be taken to involve cancellation of the instrument. In our opinion this contention is fallacious. A mere anticipation of a defence in the plaint and an averment that such a defence is unavailing does not mean that that statement is a substantive part of the plaintiff's case. The test which we think might well be applied for determination of the question whether the suit does or does not involve cancellation of a document within the meaning of S. 7, cl. (iv-A) is whether the granting of the relief which the plaintiff seeks necessarily requires a cancellation of a deed. "Involve" according to Oxford Dictionary means "to include, to contain, to imply, specially to contain implicitly." In our opinion, the relief claimed does not include any relief either expressly or by necessary implication as to adjudging void the deed of 1930. It is well-known that a reversioner may treat a widow's alienation as a nullity and may ignore it. In such a case there is nothing to set aside. The mere mention of the defendant's case in the plaint with an allegation that that claim is invalid or unfounded cannot be regarded as essential for the relief sought.

[5] Reference was made on behalf of the applicant to 1913 O. W. N. 230.[1] That case, in our opinion, has no material bearing on the facts with which we are concerned. There the plaintiff brought a suit for a declaration of his right to certain property on the basis of a deed executed in his favour by a lady whose title was founded upon a will and the defendant challenged validity of the will. The suit was decreed and the defendant again challenged the validity of the will in appeal. It was held that the appellant stood in the position of a plaintiff and S. 7, cl. (iv-A) would be applicable to him so far as the court-fee payable on appeal was concerned. Of the other cases cited by the applicant's learned counsel reference may be made only to a decision of the Allahabad High Court in 1944 O. W. N. 94.[2] There a plaintiff sued for a declaration and prayed for such other relief as may be considered necessary under the circumstances of the case. There was apparently a previous decree standing against him, and it was necessary to have it adjudged void or voidable before the substantive relief could be available to him. In these circumstances the learned Judge held that the suit involved cancellation of the decree and the court-fee was payable *ad valorem*.

[6] There is no doubt that in cases where the relief sought cannot be granted without necessarily setting aside a decree or an instrument securing money or property, S. 7, cl. (iv-A) would apply. In the present case, as we have said above, the cancellation of the deed of relinquishment was not necessary for granting the relief

which the plaintiff desired. There is no substance in this revision. It fails and is accordingly dismissed with costs.

D.H. *Revision dismissed.*

A. I. R. (35) 1948 Oudh 88 *[C. N. 31.]*

MADELEY AND KIDWAI JJ.

Girja Dat Singh — Defendant—Appellant v. *Gangotri Dat Singh—Plaintiff—Respondent.*

First Appeals Nos. 65 and 66 of 1942, Decided on 28-2-1947, against decree of Civil Judge (Special Judge 1st Grade), Lucknow, D/- 4-6-1942.

(a) Registration Act (1908), S. 17 (1) (b) — Family settlements.

In the case of family settlements of the ordinary type as the deed only states the rights of the parties as they understand them to be it does not come within the purview of S. 17 (1) (b) and, therefore, is exempt from registration. But family settlements which do operate to create, declare, assign, limit or extinguish any right, title or interest, require to be registered: 15 A. I. R. 1928 All. 641 (F. B.); 24 A. I. R. 1937 All. 578 (F. B); 33 A. I. R. 1946 Pat 55 and 26 A. I. R 1939 All. 529, *Rel. on* ; 35 A. I. R. 1948 Oudh 54 , *Ref.* [Para 33]

Annotation: ('45-Com.) Reg. Act, S. 17, N. 83, Pt. 3.

(b) Registration Act (1908), S. 17 (1) (b) — "Declare" — Meaning of.

The word "declare" implies a declaration of will and not a mere statement of fact : 5 Bom. 232 ; 19 A. I. R. 1932 P. C. 55 and 31 A. I. R. 1944 Oudh 49 *Rel. on.* [Para 34]

Where an award of arbitrators negatives the right of one party claiming under a will to the property in dispute and allots the property between both the parties in a certain proportion, it is not merely a statement of fact but a declaration of will since it not only operates to change the relations of the parties to the property but also purports to do so and as such it requires registration. [Para 37]

Annotation: ('45-Com.) Reg. Act, S. 17, N. 15, pt. 1.

(c) Registration Act (1908), S. 17 (2) (vi) — Compromise and award — Distinction between.

There is a great distinction between a compromise and an award. A compromise is a settlement of disputes between the parties on a purely voluntary basis whilst an award has the same measure of compulsion as a decree of Court, the difference being that in the case of award it is a decision of a tribunal selected by the parties themselves. In the case of compromises the parties are at liberty to decide whatever they please, whilst in the case of arbitrations through the intervention of the Court it is only the dispute before the Court that can be referred to arbitration: 23 A. I. R. 1936 Sind 79 (F. B); 29 A. I. R. 1942 Bom 132 and 29 A. I. R. 1942 Oudh 258, *Rel. on.* [Para 39]

Annotation : ('45-Com.) Reg. Act, S. 17, N. 59.

(d) Registration Act (1908), S 17 (2) (vi) —Incorporation of document in decree or order — What amounts to.

A reference to a document in a decree or order in such a manner as to indicate that it was the intention of the Court to give effect to it is sufficient incorporation of it in the decree or order: 27 A. I. R. 1940 Lah. 107; 23 A. I R. 1936 Pesh 125 and 19 A. I. R. 1932 Lah. 24, *Rel. on.* [Para 42]

Annotation : ('45-Com.) Reg. Act, S. 17, N. 59, Pts. 2 and 3.

(e) Registration Act (1908), S. 17 (2) (vi) —Incorporation of document in decree or order—Document to what extent exempt from registration.

Even when a document becomes admissible by being incorporated in a decree or order, it is not the whole of it but only that portion of it upon which the Court bases its decision and which may be deemed to be a part of the decree or order that is admissible: 22 Mad. 508 (P C.), *Rel. on.* [Para 42]

Where a revenue Court in a mutation case refers the mutation dispute to arbitration but the arbitrators decide not only the mutation dispute but also the question of title, the portion of the award relating to the adjudication on the question of title cannot be incorporated in the mutation order as the power of the revenue Court to refer to arbitration in a mutation case under S. 203, U. P. Land Revenue Act (3 [III] of 1901) is restricted to the question of possession or *prima facie* title and is, therefore, inadmissible for want of registration : 29 A. I. R. 1942 Oudh 258, *Rel. on.* [Paras 45]

Annotation: ('45-Com.) Reg. Act, S. 17, N. 59, pt. 12.

(f) Civil P. C. (1908), O. 20, R. 4 — Appreciation of evidence — Portion of evidence of witness false.

The maxim "*falsus in uno, falsus in omnibus*" does not apply to conditions prevalent in India and it is only if a witness is found to be wholly untrustworthy that no part of his evidence can be accepted. [Para 26]

(g) Civil P. C. (1908), S. 11 — "Heard and finally decided" — Appeal from decision of lower Court — Finality of decision of lower Court.

Where an appeal has been preferred from a decision in an Encumbered Estates Act case, the decision does not operate as *res judicata* since the appeal having been preferred it cannot be said that it operates as a final decision. [Para 11]

Annotation : ('44-Com.) Civil P. C., S. 11, N. 111, pt. 1.

Cases referred :

1. ('42) 1942 O. W. N. 30 : 29 A. I. R. 1942 Oudh 258: 17 Luck. 558 : 198 I. C. 553, Girja Dat Singh v. Gangotri Dat Singh.
2. ('47) 1947 O. W. N. 97 : 35 A. I. R 1948 Oudh 54 : 229 I. C. 421, United Provinces Government v. Church Missionary Trust Association Ltd., London and Allahabad.
3. ('29) 51 All 79: 15 A. I. R. 1928 All. 641: 116 I. C. 861 (F. B.), Ram Gopal v. Tulsi Ram.
4. ('37) I L. R. (1937) All. 817 : 24 A. I. R. 1937 All. 578 : 170 I. C. 843 (F. B.), Mt. Mahdei Kunwar v. Padarath Choube
5. ('46) 226 I. C. 129 : 33 A. I. R. 1946 Pat. 55, Lal Mohan v Onkar Mall.
6. ('39) 1939 A. L. J. 433 : 26 A. I. R. 1939 All. 529 : 184 I. C. 91, Tulshi Ram v. Gobind Singh.
7. ('81) 5 Bom. 232, Sakharam Krishnaji v. Madan Krishnaji.
8. ('32) 59 I. A. 130 : 19 A. I. R. 1932 P. C. 55 : 11 Pat. 272 : 136 I. C 798 (P. C.), Bageshwari Charan Singh v. Jagarnath Kuari.
9. ('16) 43 I. A. 122: 3 A. I. R. 1916 P. C. 115: 43 Cal. 895 : 35 I. C. 190 (P. C.), Pranjivandas Mehta v. Chan Ma Phee.
10. ('23) 50 I. A. 77 : 10 A. I. R. 1923 P. C. 50 : 1 Rang. 66 : 50 Cal. 338 : 71 I. C. 650 (P. C.), Subramanian v. Lutchman.
11. ('43) 1943 O. W. N. 523 : 31 A. I. R. 1944 Oudh 49: 19 Luck. 57: 212 I. C. 585 (FB), Mt. Kalawati v. Sri Krishna.
12. ('26) 53 I. A. 220 : 13 A. I. R. 1926 P. C. 100 : 48 All. 529 : 29 O. C. 316 : 1 Luck. 389 : 98 I. C. 1013 (P. C.), Nirman Singh v. Rudra Partab Narain Singh.

13. ('36) 23 A. I. R. 1936 Sind 79 : 30 S. L. R. 115 : 163 I. C. 455 (F. B.), Assanand Naraindas v. Jodhomal Chengomal.
14. ('42) 29 A. I. R. 1942 Bom. 132 : I. L. R. (1942) Bom. 183 : 200 I. C. 456, Krishnaji Kondo v. Narayan Anant.
15. ('24) 11 A. I. R. 1924 Cal. 567 : 83 I. C. 300, Ram Pratap Chamaria v. Durgaprasad.
16. ('26) 53 I. A. 1 : 12 A I. R. 1925 P. C. 293 : 53 Cal. 258 : 92 I. C. 633 (P. C.), Ram Protap v. Durga Prosad.
17. ('40) 27 A. I. R. 1940 Lah. 107, Hans Raj v. Amarchand.
18. ('36) 23 A. I. R. 1936 Pesh. 125 : 163 I. C. 64, Ghulam Daud Khan v. Habibullah Khan.
19. ('32) 19 A. I R. 1932 Lah. 24 : 135 I. C. 203, Mahbub v. Munshi.
20. ('99) 26 I. A. 101 : 22 Mad. 508 : 7 Sar. 516, Pranul Annee v. Lakshmi Annee.

P. L. Banerji, S. Ali Zaheer, Suraj Narain, S. C. Das and Imdad Husain — for Appellant.

Sir Iqbal Ahmad, Naimullah and Uma Shanker Srivastava — for Respondent.

Judgment.— The property in dispute in these appeals belonged to one Bhaiya Baleswhar Datt of village Nagwa, Tahsil Tarabganj, District Gonda, who died issueless on 15th May 1933. He left no widow and, on his death, disputes arose as to succession to his property, Girja Datt, appellant 1, claiming as the nearest *sapinda*, and Gangotri Datt, the respondent, setting up a will in his favour During the course of mutation proceedings, there was a settlement through the intermediation of arbitrators. The mutation Court acted upon the award of the arbitrators and ordered mutation of six annas share in all the properties left by Bhaiya Baleshwar Datt Singh in favour of Gangotri Datt Singh, the remaining ten annas share being entered in the name of Girja Datt, who was also to become the administrator of an endowment created by Baleshwar Datt in his lifetime.

[2] On 11th April 1936, Girja Datt Singh made an application under S. 4 Encumbered Estates Act which was duly forwarded to the Special Judge, 1st Grade, of Gonda. Appellants 2 and 3, who are the son and grandson respectively of Girja Datt, joined in the application as being members of a joint Hindu family with Girja Datt. The appellants filed a written statement in the Court of the Special Judge on 21st May 1936, and in the list of properties attached to this written statement they also showed the ten annas share of the properties left by Baleshwar Datt which had been entered in the name of Girja Datt.

[3] Gangotri Datt, the respondent, objected to the list and, on 22nd May 1937, he filed a claim under S. 11, Encumbered Estates Act, alleging that he was the owner of this property and that it was consequently not liable to attachment sale or mortgage for the satisfaction of the debts of Girja Datt. He based his claim upon a will which, he alleged, Baleshwar Datt Singh had executed on 17th March 1933. He pleaded that he was not bound by the award upon which the mutation Court had acted for a large number of reasons which he gave in detail in his written statement of claim. They may briefly be summarised as follows : (a) That he was induced to refer the case to arbitration by reason of undue pressure and coercion ; (b) That, in any case, he had revoked his agreement to refer to arbitration before anything was done under the reference ; (c) That the arbitrators had misconducted themselves and had acted in collusion with Girja Datt Singh ; hence the award was vitiated and should not have effect given to it ; (d) That the arbitration was only for the purposes of the mutation case and effect could not be given in a civil case to the award which resulted from it; and (e) That the reference related only to village Nagwa and not to all the property.

[4] In his written reply dated 26th October 1937, Girja Datt traversed all the allegations about the award and pleaded that it was valid and binding and conclusively determined the rights of the parties. He pleaded that the decision of the mutation case operated as *res judicata* and that a fresh enquiry was barred both under S. 11, Civil P. C. as well as under S. 207, U. P. Land Revenue Act. He denied the execution, completion and validity of the will and alleged that, even if it was proved, it was invalid for various reasons, the principal being: (1) that Gangotri and his uncle, Tribhuwan Datt, were the servants of Baleshwar Datt and found an opportunity of getting him to execute the will which he did not understand properly "on account of weakness of mind, constant ailments and old age"; (2) that Babu Gur Charan Lal, a lawyer of Gonda, had considerable influence over Baleshwar and, in conspiracy with Gangotri and Tribhuwan, he used that influence to get the will executed in order to cause loss to Girja Datt to whom he was hostile. Baleshwar Datt did not realise the consequences of his acts ; and (3) that an owner has, by custom, no power to make a will so as to deprive his legal heir.

[5] Upon these pleadings the Court framed the following issues :

"(1) Did Bhaiya Baleshwar Dutt Singh execute a will as alleged ?

(2) Is it invalid for the reasons alleged by the applicants ?

(3) Are the objectors' application for reference to arbitration and the award of the arbitrators null and void as alleged ?

(4) Even if not, were they for village Nagwa only ? If so, its effect ? Is the point *res judicata* ?

(5) Do the agreement for reference to arbitration and award, amount to a family settlement ? If so, its effect?

5 (a) Is it invalid as alleged ?

(b) Can the objector plead against it ?

(6) Is the rent Court's decision about the award res judicata? Does no civil suit lie as alleged?"

[6] At the request of the appellants, issue 6 was treated as a preliminary issue and the learned Special Judge decided that there was no *res judicata* nor was a civil suit barred. Girja Datt brought the matter up in appeal to this Court and on 14th December 1941, a Bench of which one of us was a member, held that neither S. 11, Civil P. C., nor S. 207, U. P. Land Revenue Act, barred the claim of Gangotri Datt under the Encumbered Estates Act: *vide* 1942 O. W. N. 30.[1]

[7] The case was then again taken up by the Special Judge and he held: (1) That the will was proved to have been duly and intelligently executed and attested; (2) That there was no reliable evidence to support the allegation that Babu Gur Charan Lal exercised any undue influence; (3) That Bhaiya Baleshwar Datt was neither an idiot nor feeble-minded; (4) That there was no conspiracy between Babu Gur Charan Lal, Tribhuwan and Gangotri to cause Baleshwar Datt to execute a will; (5) That in the mutation Court there was a *bona fide* dispute as to succession and there was room for a family settlement; but the award in the present case was not a family settlement; (6) That the reference to arbitration was made by Bhaiya Gangotri Datt of his own free will and he could not withdraw from it; (7) That the revenue Courts could not refer a dispute relating to title to arbitration and the award does not bind the parties in a civil suit; (8) That the award was not vitiated by fraud or partiality of the arbitrators; and (9) That the award not being registered could not have effect in a civil Court.

[8] The Special Judge accordingly allowed the objections and First Civil Appeal No. 66 of 1942 is directed against his order.

[9] Very shortly before he filed the claim in the Encumbered Estates Act proceedings, Gangotri Datt had, on 18th May 1937, instituted a suit in the Court of Civil Judge, Gonda, against Girja Datt. The pleadings of the parties in that suit were practically the same as those in the Encumbered Estates Act case. The trial of that suit was at first stayed and then the following issue was framed :

"How far the findings on issues 1 and 5 in the objection case under S. 11 in Encumbered Estates Act suit No: 11 of 1936 would operate as res judicata in this case?"

[10] After having given judgment in the Encumbered Estates Act case the same learned Judge, in his capacity of Civil Judge, disposed of the suit and held that the decision in the Encumbered Estates Act case operated as *res judicata* and barred the suit. First Civil Appeal No. 65 of 1942 is directed against the decree in that suit.

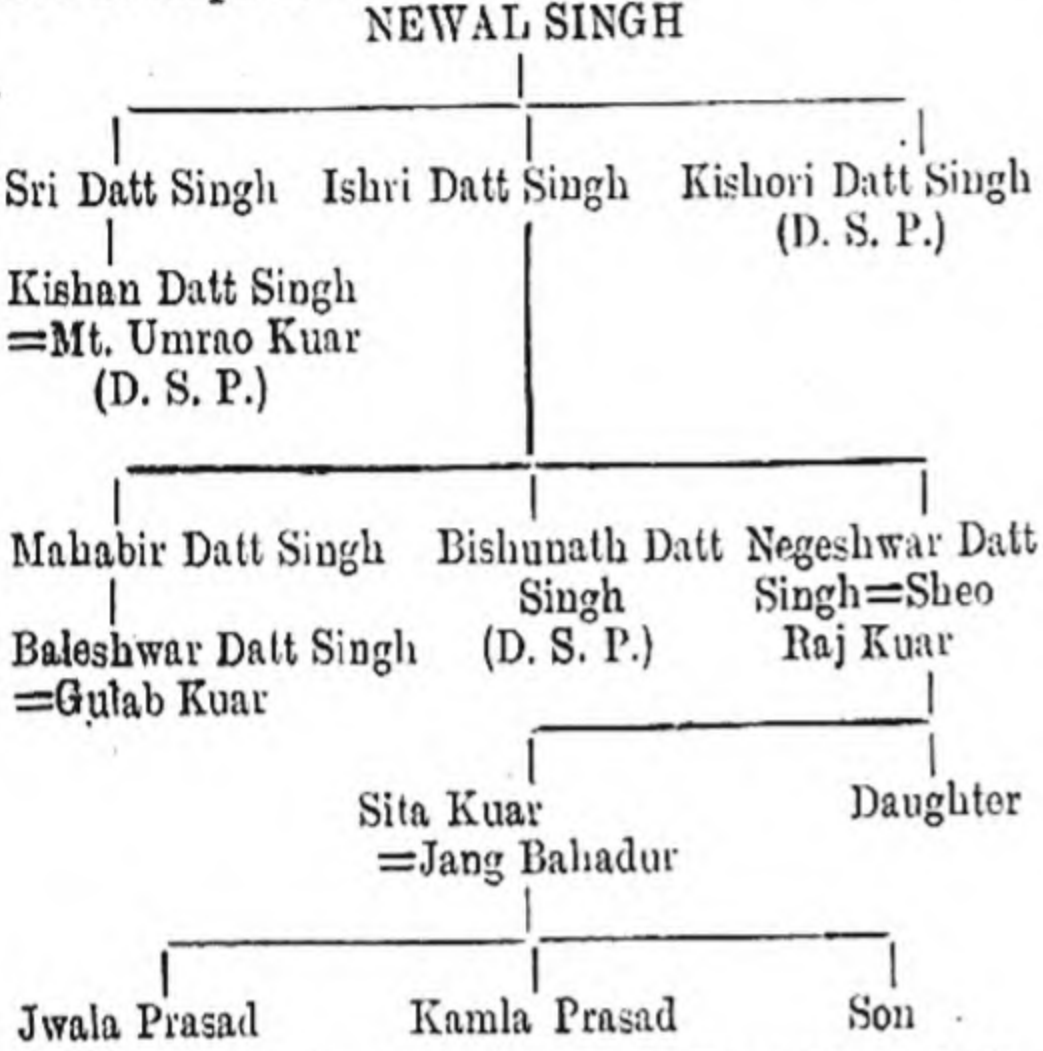
[11] The grounds taken in both the appeals are the same. The only point argued in First Civil Appeal No 65 of 1942, apart from the points which are common to both the appeals, is that the decision in the Encumbered Estates Act case does not operate as *res judicata*, since, an appeal having been preferred from that decision, it cannot be said that it operates as a final decision. Technically the objection is correct since it is only the decision of the Court of appeal that will be operative but this makes no difference on the merits. In the civil suit, the learned advocates for the parties agreed that the result of the suit should follow the result of the Encumbered Estates Act case. As a matter of fact the trial Court disposed of both the cases at one and the same time and both the appeals have been heard together in this Court and this judgment will dispose of both of them.

[12] On the merits, the appellant's learned advocate contended that due attestation and execution of the will upon which Gangotri Datt relied had not been established. While, however, in the trial Court, emphasis was laid upon the alleged exercise of undue influence by Babu Gur Charan Lal, in this Court the connection of that gentleman with the will was only relied upon to create a suspicion as to the attestation of the will and to challenge the credibility of the attesting witnesses. The plea that, at the time of the execution of the will, Bhaiya Baleshwar Datt was an idiot, incapable of understanding what he was doing, was not reiterated. It was also contended that the award conclusively determined the rights of the parties and must be upheld even in civil litigation, though unregistered because an order of the Court is exempt from registration by reason of S. 17 (2) (vi), Registration Act, and the award had been incorporated in an order of Court. It was further contended that the reference to arbitration and the award amounted to a family settlement and must be upheld on that ground too.

[13] On the other hand, the learned advocate for the respondent urged that the findings of the trial Court on the question of proof of the will, having been given on an appreciation of the oral evidence which it itself had recorded, should not be set aside, and that they were fully justified. He also pleaded that the award could not operate to bind the parties since the reference was only of the dispute pending in the mutation Court and the scope of the award could not be extended beyond that of a decision of the mutation Court, nor did the award operate as a family settlement. He also contended that the award required registration and that the exemption granted by S. 17 (2) (vi) did not apply to it.

[14] In order fully to appreciate the circum-

stages which led to the execution of the will it will be useful to consider the state of Baleshwar Datt's family and to recapitulate some of the principal events which led up to the execution of the disputed will. The following pedigree is not in dispute:



[15] It is admitted that Girja Datt Singh is the sole survivor, apart from his own descendants, in the line of Sanwal Singh, brother of Newal Singh, being his great great-grandson and that there are no nearer heirs alive. Mahabir Datt Singh died a considerable time ago, and his two brothers. Bishunath and Nageshwar, were insane. Bishunath's wife had also died before 1904 and he was childless while Nageshwar's wife was alive but he had only two daughters by her and both of them had already been married. Baleswar Datt was accordingly in sole charge of the entire family property.

[16] On 27th August 1901, Baleshwar Datt, then a childless man of about 39 years, executed a will (EX. A-34) providing for various contingencies and devising his entire property, in the state of his family as it then existed, to his wife Mt. Gulab Kuar in absolute right. He reserved to himself power to adopt a son and, in case he failed to do so, he authorised his wife to adopt. In this will no provision was made for the daughters of Nageshwar Datt. By 1915, however, his feelings had undergone a change and, on 1st December 1915, he executed another will (EX. A-35). This will, after reciting, among other things, that the testator was not pleased with his nearest relation, Girja Datt, proceeded to dispose of the property in favour of his wife, Mt. Gulab Kuar, and the sons of Sita Kuar. The reason given by the testator for the execution of this will is his desire to avoid disputes and to prevent his properties falling "into the hands of such a person as the executant never likes that he should get it."

[17] After the execution of his second will the testator's wife died and the respondent Gangotri Datt, a distant relation, became a member of his household when quite young—at the age of about 10 or 12 years. A. W. 3 Jageshwar Singh, Girja Datt's own witness, would place the date of this event somewhere in 1923. The appellant's case is that Gangotri was only employed as a cook or sirwar whilst the respondent contends that he was brought up by Baleshwar as a son.

[18] The above statement of the facts of the case makes it clear that, at the advanced age of about sixty years, Baleshwar Datt found himself a lonely old man without wife or children or any close relative. He had nephews, the sons of his cousin, Sita Kuar, but their house was far off in a different district and his relations with his next heir were not good. It is not surprising that, in the state of affairs, Baleshwar Datt should think of taking a boy in adoption. He had clearly contemplated an adoption either by himself or by his wife as early as 1904 and it is probable that the matter would recur to him after the death of his wife, when he had no hope of any issue left. In view of the terms of EX. 32 the validity of an adoption would, however, be doubtful and consequently the execution of a will would be considered advisable. It was in this state of affairs that EX. A-36, the third will, was executed. It was not executed to deprive Girja Datt—that had already been done by EX. A-35, the second will. The sole object was to benefit Gangotri to whom the will refers in the following words: "With whom I am very much pleased and who is living with me as my son and is being brought up by me." Quite apart from the words of the will, there are other indications to show that Gangotri was treated as the son of the house and it is not possible to believe that Baleshwar Datt would have brought a young boy of about 10 or 12 years, a distant relation of his own and one whose father was a zamindar having at least 25 acres of agricultural land in his possession, merely for the purpose of transforming him into a cook. It is also impossible to believe that the responsible duties of a *sirwar*, involving the management and control of agricultural operations, would be entrusted to a youth of 10 or 12 years who could have no real experience or knowledge of farming.

[19] As early as 1925, that is to say, a year or two after Gangotri had been brought into Baleshwar's household it was stated by Tribhuwan that the boy had been adopted by Baleshwar: *vide* EX. 50. It is alleged that this evidence was deliberately created by Babu Gur Charan Lal, the cross-examining pleader in that case, for future use, since it did not arise in the case. The pleadings, EXS. 86 and 87, show that many points, including the pedigree, were disputed and the ques-

tions might well have been put to show that the witness was personally interested in the dispute. At any rate, Babu Gur Charan Lal is not shown to have had any reason to enter into a conspiracy for a boy then aged about 15 years of whom no one could be certain. Further the effect of such a proceeding would not be to deprive Girja Datt of anything but to deprive the sons of Sita Kuar. Thus even if it is assumed, though it is not proved, that Babu Gur Charan Lal was hostile to Girja Datt that would be no reason for him to create an heir of Baleshwar Datt to the loss of his legatees under the will of 1915.

[20] Next we find that in EX. A-37, which is a power of attorney executed by Baleshwar Datt in 1932, the will in favour of Gangotri is recited and he is then appointed an agent but special powers are conferred upon him. These special powers included practically all the powers of a landlord and they were not conferred upon any other agent appointed either under the same document or under the previous power, EX. 52. They would be appropriate if Gangotri were treated as the son of the house, then about 22 years of age, about to enter upon the management of an estate which would one day be his but they would be wholly inappropriate if they were conferred upon a cook or a *sirwar*.

[21] It was suggested that this power was not really required but was the result of the machinations of Babu Gur Charan Lal. We find no justification for this allegation. The only other power on the record is EX. 52 which was executed in 1921. Two of the persons named in that power were not appointed under EX. A-37 and several new persons were appointed. Moreover, as the power itself indicates, Baleshwar had become old—he was well over 60—and it was necessary to confer upon some one powers that no one then possessed. Thus the execution of EX. A-37 was necessary and that Gangotri should have been selected to exercise the additional power clearly indicates the high position which he occupied in Baleshwar's household.

[22] Evidence was also led to show that, although at one time the relations between Baleshwar and Girja were not good, there had been a change in the position. The trial Court has not accepted that evidence and we agree that it is not worthy of credit. Exhibits A-85, A-86, A-87 and A-89 are all copies of orders and decrees between the years 1918 and 1922 which show that litigation was continuing even then between Baleshwar and Girja. Further, if Baleshwar's objection to Girja getting his property had in fact been removed EX. A-35 would require to be revoked and substituted by another will. It is not even suggested that this was ever contemplated.

[23] A consideration of the above facts leads us to the conclusion that the will, EX. A-36, was a natural will and the dispositions which it contains are not open to suspicion. We have next to consider whether the fact that Babu Gur Charan Lal had a hand in its execution makes it a suspicious document. It is said that he was moved by hostility to Girja Datt and by advantage to himself in getting the will in favour of Gangotri. It is not suggested that he had any particular interest in Gangotri or Tribhuwan Datt. Hostility to Girja Datt would not be a motive because, in view of the previous will EX. A-35, Girja was already excluded. It is not, therefore, necessary for us to examine the point in detail beyond saying that we agree with the finding of the trial Court on this point. As to any personal advantage, which Babu Gur Charan Lal might have expected there is no satisfactory evidence. We realise that this is a matter which it is difficult to prove by direct evidence but, in the present case, there are no circumstances which would lead to such an inference. Gangotri could not be bound by any promise which he made before the will came into operation and there is no suggestion that Babu Gur Charan Lal ever tried to obtain any deed of transfer in favour of any nominee of his after the death of Baleshwar. Babu Gur Charan Lal, being a lawyer, must have been well aware that he could not sue for possession of any property in the circumstances alleged: he would, therefore, have safeguarded his position by getting a document executed by Gangotri in favour of some nominee of his before he allowed any of the witnesses under his influence to be produced. Yet it is not even alleged that he did this. Further the connection of Babu Gur Charan Lal with the will was never sought to be concealed: it was apparent on the face of the document since it was in the handwriting of his clerk who signed it as the scribe.

[24] On the other hand, it is quite natural that Babu Gur Charan Lal should have interested himself in the will. It is agreed that he occupied the position of a standing counsel for Baleshwar Datt, who would naturally approach him to prepare a draft of the will. As things stand in this part of the country it would be quite natural for the client to seek the advice of his lawyer in the matter of attesting witnesses also or for the lawyer to suggest them of his own accord. Obviously trustworthy witnesses would be required and this would mean that they would have to be well known. Thus if Babu Gur Charan Lal suggested some old clients of his who resided in the locality and were also known to the testator, there can be nothing suspicious about this.

[25] We have thus come to the conclusion that there are no suspicious circumstances attaching to the execution of the will in question. There remains the question whether the witnesses who have been produced to prove attestation are truthful witnesses. The trial Court, before whom they gave their evidence, has accepted their testimony and it would require strong reasons for us to disagree with the trial Court on this point. It is strongly urged that these reasons are to be found in the document, EX. A-36, itself read side by side with another document, EX A-23 a deed creating a *wakf* of a small portion of the property, registered on the same date. The ink used in writing EX. A-36 is of a bluish colour and the three signatures of the executant and six signatures of the attesting witnesses are in ink of the same shade while the ink used in writing EX. A-23 is black and the signatures of the executant and the attesting witnesses, who are all the same as on EX. A-36, are also in that shade of ink. It is thus contended that the version of the attesting witnesses that the documents had been scribed earlier but both were executed and attested at one and the same time under a Bargad tree in the compound of the registration office at Tarabganj cannot be accepted and if that is rejected then the whole attestation must fail. We cannot agree with this contention.

[26] It is true that the difference in the inks used makes it highly improbable that the executant and the attesting witnesses who signed the two documents should have signed them all at one time. Even if there were two inkpots and two sets of pen it would have not happened by chance that one shade of ink was used in putting all the signatures on one document and another shade in all the signatures on the other document. This does not, however, mean that due attestation is not proved. Girja Datt's first witness, Hasinuddin, deposes that EX. A-23 was completed, signed and attested in his presence at Gonda, while EX. A-36 was being faired out at the house of Babu Gur Charan Lal. This statement might well be true and thus it happened when the will came to be signed and attested later on a different coloured ink, resembling that used by the scribe, was available and was used. This would, of course, mean that the attesting witnesses are not telling the truth when they give the reasons why the will was not signed and attested at Gonda but it has repeatedly been laid down that the maxim "*falsus in uno, falsus in omnibus*" does not apply to conditions prevalent in India. It is only if the witness is found to be wholly untrustworthy that no part of his evidence can be accepted. In the present case we do not find that the witnesses to prove attestation can be classed a set of wholly untrustworthy witnesses. The witnesses support their allegation of due attestation : it is admitted that the will bears their signatures as attesting witnesses and that the signature of the executant is also genuine ; it is further proved by Hasinuddin that all the three were present at one place and that EX A-23, which was written at about the same time, was duly executed and attested; in these circumstances there is no reason to suppose that O W. 3, Uma Datt Singh and O. W. 4 Badri Singh, are not telling the truth when they say that they saw Baleshwar Datt Singh (EX A-36) and that they also signed in his presence. In agreement with the trial Court we, therefore, hold the will, EX. A-36, to be duly executed and attested.

[27] We come then to deal with the next question, namely, whether the rights of Gangotri Datt under the will, EX. A-36, have been displaced by the award in the mutation proceedings, EX. A-20. The circumstances in which the latter document came into existence may briefly be stated.

[28] Bhaiya Baleshwar Datt, having died on 15-5-1933 Girja Datt and Gangotri Datt applied for mutation of names on 15th and 22nd May 1933, respectively. After about 30 witnesses had been examined by each of the parties, the Tahsildar reported on 8-11-1933, that the possession of Gangotri and the will which he set up, EX. A-36, were proved: *vide* EX. A-50. It seems, however, that the parties were still trying to assert or maintain their possession and a serious situation had arisen in village Nagwa with regard to the reaping of the late paddy (jarhan) crop. Consequently on 7-11-1933, the Sub-Inspector in charge of Police circle, Wazirganj within which Nagwa lay, reported for action against both the parties under S. 107, Criminal P. C.: *vide* EX. A 3. A Deputy Superintendent of Police visited the place at the instance of two advocates of Gangotri Datt and he also reported on 13-11-1933, that the situation was serious and that, apart from action under S. 107, Criminal P. C., the property should also be attached. On the basis of these reports, the Sub-Divisional Magistrate, the officer who was dealing with the mutation case ordered, on 14-11-1933, that the matter should be put up at Wazirganj on 15-11-1933, (EX. A-6). Then came three applications for reference to arbitration, EXS. 57, 58 and 59. The first was made by Girja Datt alone : the second by Gangotri Datt alone and the third by both of them jointly. The applications were verified on the same day but they were ordered to be put up on 15th NOVEMBER—*vide* EXS. 65, 66 and 67—and on that date the case was referred to the arbitration of Bhaiya Lal Baksh Singh and Bhaiya Raghuraj Singh, Taluqdars of Majhgawan: *vide* EX. 64. On the

same day the same officer, in his capacity of Sub-Divisional Magistrate, passed a preliminary order under S. 107, Criminal P. C, demanding security to the extent of Rs. 20,000 each from Girja Datt and Gangotri Datt and Rs. 12,000 from Tribhuwan Datt. Securities were offered on the same day but enquiries were ordered as to their sufficiency. The file of the mutation case was sent to the arbitrators and reached them on 17-11-1933; *vide* Exs. A-15 and A-13. On the same day, Tribhuwan and Gangotri applied that fresh securities which they were filing should be accepted and they were accepted: *vide* Exs. A-8 and A-9. On 18-11-1933, Gangotri applied stating that he had been coerced into agreeing to the arbitration and praying that the reference be withdrawn: *vide* Ex. A-10. This the Court refused to allow and its order was upheld up to the Board of Revenue: *vide* Exs. 55, 54, 60 and 45. The arbitration, therefore, proceeded and the arbitrators gave their award on 17-1-1933: Ex. A-20. This award was immediately challenged by Gangotri on the same grounds on which he challenges it now: *vide* Ex. 34 and the mutation Court enquired into the matter, recorded evidence and upheld the award: *vide* Exs. 36 to 40, 70, 96, 46, 68 and 97; the Deputy Commissioner, however, stated that

"it is possible and perhaps even probable that injustice has been done to the appellant by the arbitrators, but that is a point which cannot be taken up in appeal as under S. 207, Land Revenue Act the appellate Court is only to confine itself to certain points. This dispute sooner or later is bound to go to the civil Court. The sooner it goes the better for the revenue Courts"—*vide* Ex. 97.

The last order is dated 14-5-1935, and two years later the proceedings giving rise to the present appeals commenced.

[29] The trial Court has found, as did the revenue Courts, that the evidence did not substantiate the case of coercion set up by Gangotri. We agree with this finding. No doubt action was being taken by the Police and the Magistrate under the preventive sections of the Code of Criminal Procedure side by side with the mutation proceedings but that cannot be considered to be the exercise of coercion by Girja Datt on Gangotri particularly when it is found that the Police action commenced at the instance of the counsel of Gangotri himself: *vide* Ex. A-5.

[30] Further this evidence establishes the fact that the parties would have a motive to refer the whole dispute to arbitration and not merely the mutation dispute. This is further strengthened by the terms in which Ex. 59 is drafted and it has been held by the Courts below that as a matter of fact the whole dispute—as to title as well as to mutation—was referred to the arbitrators. This decision was upheld by a Bench of this Court in 1942 O. W. N. 30[1] at p. 31 and is binding upon the parties.

[31] Before us it was not even contended by the respondent's learned advocate that, if there had been a valid reference to arbitration, Gangotri could subsequently withdraw from it at his pleasure or that there was any fraud or misconduct on the part of the arbitrators. Thus, on this part of the case, we have come to the conclusion that, if the award is admissible in evidence even though it is not registered, it is operative and binding on the parties. We come then to a consideration of the question whether the award required registration.

[32] The learned advocate for the appellant seeks to exempt it from registration on two grounds: firstly, he urges that, even though not copied into the mutation order, it was incorporated in it and must be read as a part of it and was consequently exempt from registration under S. 17 (2) (VI), Registration Act, and, secondly he contends that the reference to arbitration and award amount to a family settlement and so do not require registration. We shall deal with the second point first.

[33] It has no doubt often been laid down that a compromise or a family settlement, inasmuch as it operates as a recognition of pre-existing title, does not require registration. The latest decision on this point is one of this Court in 1947 O. W. N. 97.[2] From this it does not follow, however, that no deed of family settlement requires registration. In the case of family settlements of the ordinary type, the deed only states the rights of the parties as they understand them to be and it does not "purport or operate to create, declare, assign, limit or extinguish . . . . . any right, title or interest." It is only such documents that have been held to be exempt from registration since they do not come within the purview of S. 17 (1) (b), Registration Act. To compromises or settlements which do "operate to create, declare, assign, limit or extinguish . . . . . any right, title or interest," S. 17 (1), Registration Act does apply and such documents require registration: *vide* 51 ALL. 79;[3] I. L. R. (1937) ALL. 817;[4] 226 I. C. 129[5] and 1939 A. L. J. 433.[6] We must, therefore, examine the set of documents which, it is urged, constitute a family settlement in this case in order to determine whether, assuming them in fact to constitute a compromise or a family settlement, they or any of them required registration. Before doing this, however, it will be advisable to consider the meaning that has been given to the word "declare" in S. 17 (1) (b).

[34] In an early Bombay case, 5 Bom. 232,[7] West J. considered the meaning of the word and said:

"Here, however, the document is not itself one which declares a right in immovable property, in the sense probably intended by S. 17. There 'declare' is placed along with 'create,' 'assign,' 'limit,' or 'extinguish' a right, title or 'interest,' and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word 'declare.' It implies a declaration of will, not a mere statement of fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not 'declare' a right within the meaning of the section. It does in one sense 'declare' a right; that is, the existence of the right is directly or indirectly stated by the writing, but it is not the expression or declaration of will by which the right is constituted."

[35] Subsequently to this decision there was some conflict of views but when the matter came up for consideration before the Judicial Committee in 59 I. A. 130[8] their Lordships agreed with the view expressed in the above passage by West J., which they quoted and then, at p. 137 they say:

"The distinction is between a mere recital of a fact and something which in itself creates a title. The distinction has been acted on in cases connected with mortgages by deposit of documents of title. A comparison of the case in 43 I. A. 122[9] with that in 50 I. A. 77[10] will show that, according to this distinction, a document requires registration or not. In the present case the statement in the petition of the respondent did not create any right in the Thakur. It merely acknowledged as a fact that such right was his."

[36] The matter came up for consideration by a Full Bench of this Court in 1943 O. W. N. 523[11] and in that case also the distinction was maintained. The compromise, which, it was agreed, operated as a family settlement and had been incorporated by reference in the mutation order, was held not to cause any change of legal relation to property and not to constitute a declaration of will. It was, therefore, held not to require registration.

[37] In the case before us, the position is entirely different. Exhibit 59, the agreement to refer and Ex. 46, the mutation order no doubt do not operate to change the relation to the property but Ex. A-20, the award, which is a necessary part of the alleged family settlement, not only operates to change the relations of the parties to the property but also purports to do so. It is clearly not merely a statement of fact but a declaration of will. It negatives the right of Gangotri under the terms of the will of Bhaiya Baleshwar Datt which it holds to be illegal and against family custom and then, in order, it is said, to avoid a serious litigation likely to waste the property of the family, it proceeds:

"We decide that out of the entire property of Baleshwar Datt, only ten annas of the entire villages be given to Bhaiya Girja Datt Singh and six annas to Bhaiya Gangotri Datt Singh."

Thus it purports to create in both Girja and Gangotri rights in respect of the portions allotted to them, and clearly comes within the scope of S. 17 (1) (b), Registration Act, whether it is construed as a family settlement or not. In this view of the case, it is not necessary for us to decide whether Ex. 59 read with Ex. A-20 can be deemed to be a family settlement or not.

[38] There thus remains for decision only the question whether Ex. A-20, the award, can be deemed to be incorporated in the mutation order to such an extent as to be admissible in evidence without registration by virtue of the provisions of S. 17 (2) (vi), Registration Act. At one time the learned advocate for the respondent attempted to argue that the order in the present case does not come within the purview of S. 17 (2) (vi) because their Lordships have held in 53 I. A. 220[12] that proceedings in the revenue Courts for mutation of names are not judicial proceedings. Subsequently, however, in view of the numerous decisions of this Court in which the remarks of their Lordships have been explained and mutation orders have been held to come within the scope of S. 17 (2) (vi), Registration Act, the latest being the Full Bench case in 1943 O. W. N. 523,[11] this position was abandoned and the argument proceeded on the assumption that mutation orders also come within the scope of the section.

[39] A large number of cases of this Court, including the Full Bench case mentioned above, have been placed before us in support of the proposition that compromises arranged in mutation proceedings, to which reference is made in, and which form the basis of, the order of mutation are admissible in evidence without registration even for a decision of a question of title in civil Courts. These cases are not directly applicable to the present case because we are not dealing with the document embodying the compromise—that is Ex. 59 the reference to arbitration—but with the award given by the arbitrators. The distinction between the two is very great and has always been recognised: *vide* A. I. R. 1936 Sind 79[13] at p. 81, A. I. R. 1942 Bom. 132[14] at p. 133. A compromise is a settlement of the disputes between the parties on a purely voluntary basis whilst an award has the same measure of compulsion as a decree of Court; the difference being that, in the case of an award, it is a decision of a Tribunal selected by the parties themselves. When this very case came before this Court at an earlier stage, 1942 O. W. N. 30,[1] a Bench of this Court, of which one of us was a member, clearly recognised the difference and refused to extend to awards the principles applicable to compromises in matters of registration. Further, in the case of compromises the parties

are at liberty to decide whatever they please, whilst in the case of arbitrations through the intervention of the Court it is only the dispute before the Court that can be referred to arbitration.

[40] It was remarked in 1942 O. W. N. 30[1] at page 33:

"The only dispute which the Revenue Court can refer to arbitration in a mutation case within the meaning of S. 203, Land Revenue Act is the dispute relating to possession or *prima facie* title. Under S. 40 of the Act, if the Collector is unable to satisfy himself as to which party is in possession, 'he shall ascertain by summary enquiry who is the person best entitled to the property and shall put such person in possession.' He has no power to decide the question of title finally and any finding by him on this question cannot bind the Civil Courts. The Revenue Court cannot confer on arbitrators a power which it does not itself possess. As was held by the Calcutta High Court in A. I. R. 1924 Cal. 567[15] the arbitrators in a dispute are limited to the question in dispute between the parties in the cause referred. The decision in this case was upheld in appeal by their Lordships of the Privy Council in 53 I. A. 1,[16] who observed:

'Whatever may have been the desire of the parties .... the Court had on that application no power to refer to arbitration any questions between the parties to the suit other than those in question in the suit.'"

[41] Thus the set of authorities relating to effect of compromises in the revenue Courts will not govern this case and we need not examine them in detail. We may, however, note that on this question the decisions of this Court are consistently in favour of the admissibility of such compromises without their being registered, if they form the basis of the mutation order, but the opinion of the Allahabad High Court is consistently against admissibility.

[42] The learned advocate for the appellant next drew our attention to some cases in which the question whether a particular document could be deemed to be a part of the order or decree was discussed and decided. In A. I. R. 1940 Lah. 107;[17] A. I. R. 1936 Pesh. 125[18] and A. I. R. 1932 Lah. 24[19] it was laid down that it was not necessary that the whole document should be copied out into the decree or order before the benefit of S. 17 (2) (vi), Registration Act could be claimed for it. We have no doubt that, although it is always better that the decree or order should be complete in itself, yet a reference to a document in such a manner as to indicate that it was the intention of the Court to give effect to it is sufficient incorporation. At the same time we must not lose sight of the fact that, even when a document does become admissible by being incorporated in a decree, it is not the whole of it that is admissible but only that portion of it upon which the Court bases its decision. Section 17 (2) (vi), Registration Act, grants exemption from registration only to the order or decree. Thus it is not the award or other document *per se* which is admissible in evidence but only so much of it as may be deemed to be a part of the order or decree.

[43] In 26 I. A. 101[20] some of the parties arrived at a compromise which dealt also with properties not included in the suit and they applied "that a decree may be passed in accordance with the razinama." The deed or petition of compromise was not registered. The Court, in giving effect to the terms of the compromise stated that two of the parties had "put in a razinamah in respect to items 1, 3, 5, and 7 and a decree has been passed." Subsequently, in a suit brought in respect of the properties included in the compromise it was pleaded that the compromise was inadmissible for want of registration. Their Lordships of the Judicial Committee upheld this plea and said

"the razinamah was not registered in accordance with the Act of 1877; but the objection founded on its non-registration does not, in their Lordships' opinion, apply to its stipulations and provisions, *in so far as these were incorporated with, and given effect to by,* the order made upon it by the Subordinate Judge in the suit of 1885."

We have, therefore, to see in this case how far EX. A-20 was, or could be, incorporated in the mutation order.

[44] The Court before which the case was pending was a Court of limited jurisdiction having power only to decide the question of title after a summary enquiry and S. 40, Land Revenue Act, specially provides that the order passed shall not debar any person from establishing his right in a civil Court. The fact that the order was passed on the basis of an award would not vest the Court with any greater jurisdiction. The Court and the parties were well aware of this position because we find that the parties took two parallel proceedings side by side; firstly, they made application for reference to arbitration specifically under S. 203, U. P. Land Revenue Act: *vide* EXS. 57 and 58 and, secondly, they made an application for general reference to arbitration of the whole dispute: *vide* EX. 59. As pointed out by their Lordships of the Judicial Committee in the *Chamria case*,[8] even in the face of this intention, the Court could not refer the whole dispute to arbitration but only so much of it as lay within the purview of the dispute before it. Thus we find that the Court, in its order of reference specifically mentions S. 203, U. P. Land Revenue Act. When the reference reached the arbitrators, they undoubtedly proceeded to decide the whole dispute and not only the mutation dispute. In doing so they clearly exceeded their authority, because, in spite of the wish of the parties expressed in EX. 59, the mutation Court had not, and could not, refer anything more than the mutation dispute to arbitration.

[45] When the matter again came before the Assistant Collector he considered the various objections to the award and finally ordered "mutation in the names of Girja Datt Singh and Gangotri Datt Singh to be effected in terms of the award . . . ." (*vide* Ex. 46). Thus the revenue Court gave effect to the award only in so far as it related to mutation of names and nothing more. This position is further clarified by the judgment of the Deputy Commissioner, Ex. 97 in which he clearly indicates that the mutation Court was not dealing with the final question of title about which he says that that is bound to go sooner or later to the civil Court and "the sooner it goes the better for the revenue Courts." We have, therefore, come to the conclusion that the order of the mutation Court only incorporates that portion of the award which related to the mutation case and nothing more. Thus that portion which relates to an adjudication on the question of title binding on the civil Courts was not, and could not be, included in the mutation order and is inadmissible for want of registration.

[46] In this view of the matter the judgment of the trial Court must be maintained. We accordingly dismiss both the appeals with costs.

D.H. *Appeals dismissed.*

A. I. R. (35) 1948 Oudh 97 *[C. N. 32.]*

KIDWAI J.

B. Sri Ram and another — Applicants v. *Emperor.*

Criminal Ref. No. 51 of 1946, Decided on 19-5-1947, made by Sessions Judge, Rae Bareli, D/- 22-10-1946.

Penal Code (1860), S. 425—Digging a ditch upon ones land so as to affect right of way — Offence of mischief if committed.

Where a person digs up a ditch upon the land in his possession with knowledge that it would obstruct an easement of a right of way in favour of a third person and thus affect its utility to him he commits mischief within the meaning of S. 425 : 31 A.I.R. 1944 All. 60 : 26 A.I.R. 1939 Oudh 38 and 17 A.I.R. 1930 Mad. 973, *Ref.* [Paras 5, 6]

Cases referred : —

1. ('44) 1944 A. L. J. 6 : 31 A.I.R. 1944 All. 60 : I.L.R. (1944) All. 189 : 211 I. C. 621, Ali Ahmad v. Ibadatullah Khan.
2. ('38) 1938 O.W.N. 1127 : 26 A.I.R. 1939 Oudh 38 : 178 I. C. 665 : 40 Cr.L.J. 138, Ram Roop v. Emperor.
3. ('30) 1930 M. W. N. 909 : 17 A.I.R. 1930 Mad. 973: 129 I. C. 77 : 32 Cr. L. J. 225, Rudraraju Ramaraju v. Emperor.

N. Banerji for S. N. Srivastava — for Applicants.

S. D. Narain — for the Crown.

Order. — Har Narain Lal had obtained a compromise decree, by the terms of which he was allowed a right of way over the land, marked D in the site plan accompanying the award of an arbitrator, and he was allowed a clear cart way over a particular portion of certain plots, belonging to Sri Ram and Baboo. This decree was enforced in execution proceedings. Thereafter Sri Ram and Baboo dug out some earth from one of the plots, over which a clear cart way had been allowed and dug a new ditch on it. The result was that a pit was created and the passage of bullock-carts became impossible. Har Narain Lal thereupon instituted a complaint agatnst Sri Ram and Baboo under S. 426/431, Penal Code. Sardar Samarjit Singh, Honorary Special Magistrate, First Class, Rae Bareli, tried the case, and convicted both the accused under S. 426, Penal Code and sentenced them to pay a fine of Rs. 25 each.

[2] Sri Ram and Baboo applied in revision to the Sessions Judge of Rae Bareli who has referred the case to this Court with the recommendation that the conviction and sentence of the applicants should be set aside since the case does not fall within the purview of S. 426, Penal Code. According to the view of the learned Sessions Judge, the word 'property', in S. 425, Penal Code means some tangible or corporeal property and does not include an easement. The learned Sessions Judge proceeds to hold that the right of passage accorded to Har Narain Lal, was merely an easement and the blocking this passage, though it injuriously affected the easement, could not be said to be a mischief within the meaning of S. 425, Penal Code. The learned Sessions Judge relies upon three authorities in support of this proposition, namely 1944 A.L.J. 6,[1] 1938 O.W.N. 1127[2] and 1930 M.W.N. 909, which corresponds to A.I.R. 1930 Mad. 973.[3] The learned counsel, supporting the reference, has also referred to these three authorities.

[3] 1944 A. L. J. 6[1] has absolutely no application since nothing has been done upon land itself which may be said to have changed its nature or character or to have diminished its value or utility. The act, complained of, was something done on an adjoining piece of property. Section 425, Penal Code, could obviously, therefore, not be applicable.

[4] The case, reported in 1938 O. W. N. 1127[2] also has no application. In that case a ditch, which had been dug by the owner of the land, was filled up by other persons. A learned Single Judge of this Court held that the filling up of the ditch did not affect any property injuriously so as to diminish its value or utility. The learned Magistrate had in that case held that the filling up of the ditch was a mischief within the meaning of S. 425, Penal Code because it resulted in destroying the fruits of the complaintant's labour in making a ditch. It was in this connection that the learned Judge stated 'property' in S. 425, Penal Code means tangible property capable of being forcibly destroyed.

[5] There remains the case. reported in 1930 M. W. N. 909.[3] In that case earth was thrown on land in such a way as to interfere with the right of way over it. The learned Single Judge of the Madras High Court held that this was not a mischief within the meaning of S. 425, Penal Code, because that section refers only to tangible property but does not include an easement. The learned Judge then says :

"The only value which is diminished or utility which is destroyed is that of the right of thoroughfare because there is nothing to show that the land itself has lost either its value or its utility or is in any way affected injuriously."

In the present case it cannot be said that the land has not been affected injuriously by the creation of a pit upon it. Moreover, a reference to the words in S. 425, Penal Code makes it clear that if the property is changed in such a way as to diminish its utility, the person, who effects the change, commits mischief. The explanation makes it clear that the utility affected need not be to its owner. The following words are used in explanation 1 :

"It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not."

[6] The facts of this case clearly show that Sri Ram and Baboo knew that their act in respect of the property would cause loss to the complainant. They have, therefore, clearly committed mischief with regard to the property in their possession within the meaning of S. 425, Penal Code. The right of easement has also been affected, but that is not the principal matter to be considered. The easement has only been affected because the nature of the property itself has been changed in such a way as to affect its utility. If the learned Judge of the Madras High Court can be taken to mean that even in such a case mischief has not been caused, I respectfully beg to differ from his opinion. As, however, I have already stated, the facts of that case were different and the learned Judge himself considered that no diminution had taken place in the utility of the property as such. In that view the principle, laid down in that case, would not be applicable to the present case. The conviction of the accused was, therefore, not illegal. I therefore reject this reference and uphold the sentence, passed by the learned Honorary Special Magistrate, First Class, Rae Bareli.

K.S. *Sentence upheld.*

A. I. R. (35) 1948 Oudh 98 [C. N. 33.]

MADELEY J.

Darbari Singh and others — Applicants v. *Sheo Shankar Lal — Opposite Party.*

Civil Revn. Appln. No. 109 of 1944, Decided on 14-2-1947, from order of Dist. Judge, Lucknow, D/- 12-4-1944.

(a) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 12—Occupancy tenancy created by special agreement or decree—Mortgage of—Redemption.

There is a clear cut distinction between an occupancy tenancy under S. 5, Oudh Rent Act and one created by special agreement or by a decree of the Court. In the latter, a transfer is not void *ab initio* but if there is a condition forbidding transfers, it can be enforced by the superior proprietor : 28 A. I. R. 1941 Oudh 526, *Foll.* [Para 2]

The mortgage of an occupancy tenancy created by special agreement or by a decree of the Court not being void an application for redemption is maintainable under S. 12. [Paras 2, 3]

(b) Civil P. C. (1908), S. 115—Material irregularity —New point of fact in appeal.

The first Appellate Court commits an irregularity in the exercise of its jurisdiction in allowing a fresh question of fact which was never taken in the trial Court, to be taken before it and deciding the appeal on the basis of the same. The High Court can interfere in revision in such a case. [Para 4]

Annotation ('44-Com.) Civil P. C., S. 115, N. 12.

Case referred :

1. ('41) 28 A. I. R. 1941 Oudh 526 : 17 Luck. 139 : 195 I. C. 784, Mir Mahomed Husain v. Mahomed Habib Khan.

Moti Lal Tilhari — for Applicants.

Rajeshwari Prasad and Raj Bahadur — for Opposite Party.

Order.—This was an application for redemption under S. 12, Agriculturists' Relief Act. It was dismissed by the trial Court on the ground that it was not proved that Gobre Singh, predecessor-in-interest of the applicants, was an agriculturist at the time of the mortgage. The applicants went in appeal and prayed that a "khetauni" of 1304 Fasli which shows that Gobre Singh was an agriculturist when the mortgage was effected, should be accepted. This document had been filed late before the trial Court and had been rejected for that reason. The document was accepted by the lower appellate Court which thereupon dismissed the appeal on the ground that Gobre Singh was an occupancy tenant of the land mortgaged and therefore the mortgage was void and an application under S. 12, Agriculturists' Relief Act could not lie.

[2] Against this decision the applicants have come in revision. It is urged that there is no finding of the lower appellate Court that the applicants are occupancy tenants under S. 5, Oudh Rent Act. In A. I. R. 1941 Oudh 526[1] it was held that there was a clear-cut distinction between an occupancy tenancy under S. 5, Oudh Rent Act and one created by special agreement or by a

decree of the Court. In the latter a transfer was not void ab initio but if there was a condition forbidding transfers, it could be enforced by the superior proprietor.

[3] The khetauni of 1304 Fasli is inconclusive as to the nature of the tenancy. The lower Court has taken it to be occupancy apparently on the basis of other documents on the file. Exhibits 7 and 8 indicate that this land is held under a special agreement or a decree of the Court. Moreover, admittedly part of the land mortgaged is grove land. Therefore the mortgage as a whole cannot be invalid on the ground that the property is occupancy.

[4] The ground on which the appeal was dismissed depends on a question of fact which was never agitated in the trial Court. The consequence of this is that the proper evidence on the point which was necessary for the decision of this issue is not upon the file. The Court below has committed an irregularity in the exercise of its jurisdiction in allowing a fresh question of fact which was never taken in the trial Court, to be taken before it.

[5] I, therefore, allow this revision application and set aside the decision of the learned lower appellate Court. The case will be returned to the trial Court for decision de novo on the merits after framing the proper issues; the parties will be at liberty to produce fresh evidence. Costs in all Courts will abide the result.

G.N. *Case remanded.*

A. I. R. (35) 1948 Oudh 99 *[C. N. 34.]*

KIDWAI J.

Samarendra Singh and others—Accused — Appellants v. *Emperor.*

Criminal Appeal No. 73 of 1947, Decided on 2-6-1947, from order of Addl. Sessions Judge, Kheri, D/-15-2-1947.

(a) Criminal P. C. (1898), Ss. 290 and 342 — Written statement filed on behalf of accused in Court of Committing Magistrate—Value of.

Written statements filed on behalf of the accused are generally evolved out of the brains of the counsel for the accused helped by his friends and seldom represent the ideas of the accused or the facts as known to him. Little or no importance should therefore be attached to the written statements filed on behalf of the accused : 23 A. I. R. 1936 Oudh 405, *Rel. on.* [Para 10]

There is no provision in Chaps. 18, 23 and 24, Criminal P. C., which contemplates the filing of a written statement on behalf of the accused. Therefore, written statements filed on behalf of the accused in the Court of the Committing Magistrate should not be taken into consideration at all. [Para 10]

Annotation : ('46-Com.) Cri. P. C. S. 290 N. 6 and S. 342 N 18.

(b) Criminal P. C. (1898), Ss. 287 and 342 — Oral statements by accused before Committing Magistrate withdrawn in Sessions Court—Evidentiary value of.

Where oral statements made by the accused in the Court of the Committing Magistrate are not recorded by the Magistrate as confessions with all the formalities required by S. 164 but are merely recorded in pursuance of the directions given by S. 342 for giving the accused an opportunity of explaining any circumstances which might appear against him, then even though the statements are withdrawn in the Sessions Court they still remain as evidence in the case to be considered along with other evidence. Such statements must, however, be read as a whole and it is not a sound principle to reject those portions which are in favour of the accused and rely only upon those which are against the accused unless other evidence on the record justifies a differentiation. [Para 11]

Annotation : ('46-Com.) Cri. P. C. S. 287 N. 1.

Case referred : —

1. ('36) 1936 O. W. N. 691 : 23 A. I. R. 1936 Oudh 405 : 12 Luck. 261 : 164 I. C. 482, Mahomed Anis v. Emperor.

R. F. Bahadurji, H. K. Ghose and Onkar Nath Srivastava — for Appellants.

P. N. Chaudhari, Asst. Government Advocate — for the Crown.

Judgment. — The eleven appellants and 32 other persons were committed to the Court of Session at Kheri for trial on charges under Ss. 147, 148, 323, 324 and 436 read with S. 149, Penal Code. All the accused except the appellants have been acquitted and the appellants have been convicted under Ss. 147, 323 and 436 read with S. 149, Penal Code.

[2] In order to appreciate the facts fully it is necessary to give a little history. From the evidence adduced both by the prosecution as well as by the defence it appears that the relations between Kunwar Sri Prakash Singh, Taluqdar of Tikra and the Kurmi tenants of village Arusarai, which belongs to him and is at a distance of about 3 miles from his house, Tikra have been strained for some time past. The Kurmis had complained to the Deputy Commissioner that he was making illegal exactions whilst he alleged that the tenants refused to pay the legal rents and he got the Deputy Commissioner to enforce payment. Numerous other causes of ill-feeling were also alleged.

[3] On 13-12-1945, an incident took place in Arusarai which further exacerbated feelings. The prosecution alleged that on that day, in the evening, all the appellants, accompanied by numerous other persons, including one Jai Dayal Brahman of Ulra, went to village and demanded to know where Sumergir was. Gur Baksh, from whom the enquiry was made, said that he did not know. The party thereupon began beating the villagers who retaliated and captured Jai Dayal, the rest of the attackers withdrawing. Although Police Station Biswan is only six miles away, no report of this incident was made till the morning of 14th December when Sumergir went to make the report after he had seen an assemblage in his village on that morn-

ing. It is worthy of note that even then he did not take Jai Dayal who was said to have been detained in connection with this offence to the police station. This riot was the subject of a separate prosecution with which we are not concerned.

[4] On the other side, the defence version of this affair is that one Bhagwati Singh, a person of the Tikra estate, was coming in the evening from Ulra bringing Rs. 300 from the ziladar for the taluqdar. He was accompanied by a Pasi and Jai Dayal. They were waylaid near Arusarai by the Kurmis who beat them and robbed them of the money. Bhagwati Singh went on to Tikra from where he, accompanied by Sumrendra Singh and others, went to Police Station Biswan and lodged a report of the alleged dacoity. It is said that the whereabouts of Jai Dayal and the Pasi were not known but they were later discovered to have been captured by the Kurmis of Arusarai. This dacoity is also the subject of a separate prosecution.

[5] The prosecution alleges that Jai Dayal is connected with the Tikra estate and that the taluqdar, in order to rescue him and to avenge himself on the Kurmis collected a force of some 200 to 250 persons, some of whom are tenants of villages owned by him whilst others do not reside in his villages, during the night and sent them forward to Arusarai where they posted themselves in a grove belonging to one Murli, getting to it about the time of sunrise on 14th December. At Arusarai the Pasi appellants, out of whom Nos. 2 to 9 are residents of the village joined this group and later on the taluqdar and a relation of his, Sumrendra Singh, rode up armed with guns and they were accompanied by two other members of the taluqdar's staff, Ujagar Singh and Shambhu Dayal, also armed with guns. On his arrival at the grove the taluqdar ordered the men to attack and burn the village and to beat anyone whom they met and to rescue Jai Dayal. Thereupon, one Puttu of Ramkund (of which village Arusarai is a hamlet) set fire to a pile of straw and he and some of the Pasi appellants who are themselves residents of Arusarai proceeded to set fire to various houses in the village. It is said that bows and arrows, lathis and brickbats were freely used by the assailants so that the inhabitants of the village ran away and Jai Dayal was rescued from near a Kolhaura in the middle of the village.

[6] Among the persons who were sent up for trial were the taluqdar himself, his servants, Ujagar and Shambhu Dayal, Puttu Pasi of Ramkund, who is supposed to have taken the lead in setting fire to the village, and residents of widely scattered villages, chiefly Pasis and Kurmis but including also two Muslims and one Brahman. All the accused pleaded not guilty in the Sessions Court and the learned Sessions Judge was of the opinion that the evidence was not sufficient to convict any of the accused except the appellants. He has held the appellants guilty mainly because of the statements which they made in the Court of the Committing Magistrate: the learned Sessions Judge being of the opinion that, although the prosecution evidence was generally unreliable, it could nevertheless be relied upon in respect of these persons who had, at one time admitted their participation in the incident.

[7] With regard to the main incidents of the prosecution case the learned Sessions Judge has held :

1. That the Kurmi witnesses have many grievances against Kunwar Sri Prakash Singh and have named him out of malice.

2. That Ujagar and Shambhu Dayal have been implicated only because they are in the service of the Raja.

3. That Puttu Pasi of Ramkund has been falsely named by the witnesses and his presence at the time of the incident is extremely doubtful.

4. That a large number of other accused persons have been implicated by reason of enmity with some one or other of the witnesses although they were not there.

5. That no one among the attackers had any guns or bows and arrows.

6. That brickbats were not thrown.

7. That only slight injuries were inflicted on one man, Jagan (P. W. 1) during the occurrence, which leads to the inference that the villagers ran away and not much weight can be attached to their identification of the various accused persons.

8. That the number of persons alleged to be present has been grossly exaggerated.

9. That there is no doubt that Jai Dayal Brahman was captured by the Kurmis of Arusarai on the evening of 13th December and detained by them though it is not shown that he was captured during a riot or rightly detained.

10. That it is also satisfactorily established that a body of persons did go to Arusarai in the morning of 14th December 1945, to rescue Jai Dayal and did rescue him.

[8] The learned Sessions Judge has also considered the weight to be attached to the evidence of each of the witnesses and has held that some of the witnesses are wholly unreliable whilst others, although they tell lies in many particulars, may nevertheless be believed. There is no doubt that the finding of the learned Sessions Judge with regard to (a) the hostility between the Tikra estate and the Kurmis of Arusarai,

(b) the fact of Jai Dayal's detention by the Kurmis and (c) his rescue on the morning of 14th December are fully supported by the evidence. It will be remembered that a report of the alleged dacoity had been lodged by Bhagwati Singh on the night of 13th December. In order to investigate this the Station Officer of Biswan (P. W. 27) reached the spot on the morning of 14th December at about 9-30 A. M. and he found the village still burning. Thus the only question which has to be determined is whether the appellants were members of the party which went and rescued Jai Dayal.

[9] All the appellants made oral statements and filed written statements in the Court of the Committing Magistrate. They subsequently withdrew them and Sumrendra Singh pleaded that both of them were the work of his counsel. With regard to these statements the appellants' learned counsel contended :

(a) that the written statements should not be believed at all and,

(b) that the oral statements having been withdrawn no importance should be attached to them. He, therefore, contended that the case of the appellants was on the same footing as that of the other accused and the Court itself having held that evidence was not sufficient to justify conviction should have acquitted the appellants also.

[10] On the first point the learned counsel relied upon the following remarks of a Bench of this Court in 1936 O. W. N. 691[1] at page 694 :

"Written statements filed on behalf of accused persons are evolved out of the brains of the counsel for the accused helped by the *pairokars* and friends of the accused, and seldom represent the ideas of the accused or the facts as known to the accused. We, therefore, attach little or no importance to these written statements filed on behalf of the accused and we would therefore ask all Magistrates and Sessions Judges in Oudh sternly to discountenance the practice of filing written statements on behalf of accused persons."

No exception can be taken to the reasoning contained in the above remarks. Moreover, the only section which contemplates the filing of a written statement is S. 256 (2), Criminal P. C., which occurs in the chapter describing the procedure to be followed in the trial of warrant cases by a Magistrate. There is no provision in chaps. 18, 23 or 24 laying down procedure to be followed in 'inquiries into cases triable by the Court of Session or High Court' and in 'trials before High Courts and Courts of Session' and 'general provisions as to inquiries and trials,' which contemplate the filing of a written statement. In the present case, the written statements were filed in the Court of the Committing Magistrate. They cannot, therefore, be taken into consideration at all.

[11] As to the oral statements in the Court of the Committing Magistrate, it is to be noticed that they were not recorded by the Magistrate as confessions with all the formalities required by S. 164, Criminal P. C. : they were merely recorded in pursuance of the directions given by S. 342, Criminal P. C., for giving the accused an opportunity of explaining any circumstances which might appear against them. Under the provisions of S. 287, Criminal P. C., such statements shall be tendered by the prosecutor and read as evidence. Thus even though the statements were withdrawn in the Court of Session they nevertheless remain as evidence in the case to be considered along with other evidence. Such statements must, however, be read as a whole and, as has so often been said, it is not a sound principle to reject those portions which are in favour of the accused and rely only upon those which are against the accused unless other evidence on the record justifies a differentiation.

[12] It is necessary, therefore, first of all to consider the statements made by the various appellants. An omnibus question embracing all the charges against them was put to each of the accused by the learned Committing Magistrate. The reply of Sumarendra Singh was, 'Yeh sab ghalat hai laikin mai gaya aur Jai Dayal ko chora laya. Mere pas bandook nahin thi—Chalis pachas admi mere sath the jo ki meri madat ke liye the' (*see* Ex. 138). Jangoo stated : 'Han main ne Jai Dayal ko churaya laikin main ne ag nahin lagai. Main ne Kurmiyon ko mara' (*see* Ex. 139). Mohan stated : 'Main ne na marpit ki na balwa kiya na ag lagai balki Jai Dayal ko chhura laya. Sumérgir (a mistake for Sumarendra Singh) ne chhura lane ko kaha tha keonki uski jan ka khatra tha' (*see* Ex. 140). Ishuri stated : 'Main ne koi balwa nahin kiya aur na ag lagai na marpit ki balki pandra bis admiyon ko lekar Jai Dayal ko chhura laya' (*see* Ex. 141). Newaz said : 'Main ne balwa kiya tha. Ag nahin lagai thi. Aur jab Jai Dayal ke chhurane men deri hui to Kurmiyon se marpit kiya—donoon taraf se marpit hui' (*see* Ex. 145). Pohkar stated : 'Na balwa kiya na ag lagai. Jai Dayal ko chhurane men marpit hui—donoon party men marpit hui' (Ex. 146). Autar stated : 'Main ne balwa kiya magar ag nahin lagai. Jai Dayal ko chhura laya tha' (Ex. 148). Palau stated : 'Main ne balwa kiya magar ag nahin lagai aur Jai Dayal ko chhura laya jismen marpit hui' (Ex. 149). Gajadhar said : 'Main ne kuchh nahin kiya sewai iske ki Jai Dayal ko marpit kar chhura liya' (Ex. 150). Mullu said : 'Main sirf Jai Dayal ko chhura laya our kuchh nahin kiya. Larai nahin hui thi' (Ex. 156). Rupan said : 'Main ne suna balwa hua—main ne ag nahin lagai—main ne koi marpit nahin ki. Jai Dayal ko beghair marpit kiya huwe chhura liya. Main ne kisi ko nahin mara' (Ex. 171).

[13] It will be seen that everyone of the appellants denied the charge of arson. The statements are, therefore, no evidence and cannot justify the conviction of the appellants under this charge unless it is proved that there was a common object of committing arson. There is no evidence to prove any such common object. It was the case of the prosecution that the whole thing was planned to rescue Jai Dayal. In such an eventuality, it might be supposed that a riot might have ensued but arson was not a necessary element. Indeed in the situation in which Jai Dayal was—at the Kolhaura in the centre of the village—the setting fire to houses in the immediate vicinity of the Kolhaura was a dangerous thing so far as Jai Dayal was concerned. Moreover, the only evidence of any such common object was the alleged shouting out by Kunwar Sri Prakash Singh that the men should set fire to the villages. This story has been totally disbelieved by the Sessions Judge. Consequently there is no evidence at all that any of the appellants had any knowledge even that arson would be committed : much less can it be said that they came with an intention to commit arson. It must also be remembered that the Pasi appellants are said by the prosecution to have joined the crowd at the village itself. They at least could, therefore, be no parties to any common intention to commit arson formed at some place prior to the arrival at the village.

[14] When the evidence as to the participation of the individual accused in acts of arson is considered, it is found that none of the witnesses whom the Sessions Judge has believed names Sumarendra Singh either as one of those who set fire or as one who ordered the setting of fire to houses. Some of the prosecution witnesses have stated that they saw some of the Pasi appellants who reside in this village setting fire to houses. This evidence is not corroborated and on the principles which the Sessions Judge has rightly laid down for the appreciation of the evidence in this particular case, it cannot be accepted to bring home the guilt of arson to any of the accused. Moreover, the evidence is wholly incredible in this matter. A look at the accurate site plan produced by defence EX. P, shows that the houses which were set on fire were in the immediate vicinity of the houses of the Pasi appellants. It cannot be believed that these appellants would jeopardise their own houses by their own acts. Further it is said that the houses were set on fire when the attack began, i. e., before Jai Dayal was set free. Exhibit P shows that the houses on all the four sides of the Kolhaura in which Jai Dayal was confined were burnt. It is hardly likely that the attackers would have surrounded Jai Dayal by a wall of fire because this would not only have effectively prevented his escape but endangered his life. In this case the offence of arson is, therefore, not brought home to any of the accused.

[15] With regard to the offence under S. 147, it cannot be doubted that Jai Dayal was rescued and that one person at least Jagan (P. W. 1) received some ir uries during the course of the transaction. Thus the statements of the accused in the Court of the Committing Magistrate are substantially true and there is no reason to reject them as untrue. Moreover, even if Jai Dayal was held in wrongful confinement by the Kurmis the attackers were not justified in taking the law into their own hands. It was not a case in which persons were trying to capture another man and his companion used violence in the defence of his person. Here the capture had already been effected sometime previously and no right of private defence of the person arose, particularly when we find that the police station was only a short distance off and police help could easily be obtained indeed the police did reach the place very shortly after the incident took place.

[16] The statements of the appellants read with the whole evidence in the case show that they were members of the unlawful assembly whose object was to rescue Jai Dayal, if need be by force, and that one or more members of that assembly did use force and caused injuries in the prosecution of the common object. They have, therefore, rightly been convicted of an offence under S. 147, Penal Code. Even, however, if it was conceded that as a matter of fact no force was used in the prosecution of the common object, the appellants, though they would in that case not be guilty of rioting would nevertheless be guilty under S. 147, Penal Code, since they were at least members of an unlawful assembly, and they would be liable to receive a sentence of six months' imprisonment.

[17] Thus the appellants are not guilty of the offence under S. 436, Penal Code, even if it is read with S. 149, Penal Code and the sentence passed on them in respect of the offence under that section must be set aside. They are, however, guilty under S. 147 and S. 323/149, Penal Code and their conviction under those sections must be upheld. The sentences passed upon them under that section are, however, too severe. It is not even alleged that the accused had motives of their own for the attack : the whole thing was alleged to have been manoeuvred by the Taluqdar of Tikra yet he and members of his staff have been acquitted, presumably on the ground that they had no hand in the affair. Then it has been held that there is no evidence to show that Jai Dayal was in lawful custody.

His confinement must, therefore, be held to be illegal and his companions, apprehensive of serious consequences if he was allowed to remain in the custody of his enemies for any length of time, took the law into their own hands and went and rescued him, they have undoubtedly committed an offence and must be punished; but the punishment will not be so severe as it would be in other circumstances. Moreover, the Sessions Judge finds that the number of persons participating in the attack has been very grossly exaggerated and the injuries that are said to have been caused are very minor ones on one person only. Moreover all the more serious element—the use of bows and arrows and brickbats and the presence of guns in the hands of some of the rioters—have been held by the Sessions Judge not to have existed. It is no doubt true that some houses were burnt during the course of the attack but I have already held that the accused were not responsible for them nor was this done in pursuance of any common object of the assembly. Indeed, it is quite possible as alleged by the defence, that the fire was the result of the confusion caused by the attack and was due to the wind blowing the flames or some sparks from the Kolhaura to some thatches and setting them alight. It is significant that it is only houses in the immediate vicinity of the Kolhaura and on all sides of it that have been burnt. In these circumstances, a sentence of fine only might well have been considered justified. I am, however, informed that all the appellants have been in jail from the date of the judgment of the Sessions Judge, i. e., for over three and a half months. This punishment is quite sufficient.

[18] The result, therefore, is that the appeal is partly allowed and the conviction of, and sentences passed on, all the appellants under S. 436/149, Penal Code, are set aside and the conviction of all the appellants under Ss. 323/149 and 147, Penal Code is upheld but the sentences are reduced to the period of imprisonment already undergone.

N.S.D. *Order accordingly.*

A. I. R. (35) 1948 Oudh 103 *[C. N. 35.]*

KIDWAI J.

Chunni Lal — Accused — Applicant v. *Emperor.*

Criminal Misc. Appln. No. 54 of 1947, Decided on 12-5-1947, from order of Addl. Sessions Judge, Lucknow.

Criminal P. C. (1898), S. 526 — Murder case — Transfer of — Mere feeling of apprehension, not justified by action of Court, is not sufficient.

The position of a person being tried of a serious offence is such as to create impressions in his mind which might not exist in the mind of a normal person but in order to justify a transfer the Court must be satisfied that there is reasonable ground for apprehension in the mind of the accused. A mere feeling, which is not justified by the action of the Court trying the case, cannot be sufficient. The Court has powers to see that proper evidence is before it which will enable it to do justice. It should not be the object of a Court necessarily to secure conviction and to fill up the gaps in the evidence of the prosecution. At the same time, it cannot be the business of the Court to bring about a failure of justice by not exercising its powers in clearing up what is not evident from the record merely from a fear that an accused person might possibly take it as an indication of the working of the Court's mind against him. [Para 3]

In this case it was found that all the facts taken together did not lead to the conclusion that the Court was acting with any prejudice against the accused or that it was doing anything but its duty in ascertaining the truth. [Para 3]

Annotation : ('46-Com.) Criminal P. C., S. 526, N. 5.

Nazir Ahmad — for Applicant.

Badruzzaman for Asst. Government Advocate — for the Crown.

Order. — This is an application for transfer of a case pending against the applicant in the Court of the Additional Sessions Judge, Lucknow. The accused stands charged with an offence under S. 302, Penal Code, on the allegation that he had killed his brother's wife, Mt. Munni. The first information report was made by the accused himself and the case taken up by him in defence was one of grave and sudden provocation which induced him to kill his brother's wife. During the course of the trial, a police constable, Muhammad Quddus, was examined by the Court as P. W. 3. The application states that this witness was examined on the motion of the Court itself while the learned Judge in his explanation states that he was examined at the request of the prosecution. The witness's statement is of formal nature and it is only concerned with the arrest of the accused and the recovery of the articles of attack. Then it is suggested in another paragraph of the application that certain questions were put to witnesses by the Court. In para. 4 of the application, the questions are given and their answers. This is not how the record stands. By looking at the questions it would appear as if they were all leading questions and the only answer that the witness had to give was 'yes.' All the questions, it may be noted, are of a formal nature. The Court in its explanation says that it did not put these questions but that they were put by the prosecution. Again it is said that the first information report being of a confessional character was not admissible in evidence and the Government pleader pointed out that it was not admissible but that the Court, nevertheless, wanted to have portions of it admitted as being admissions. In reply the learned Additional Sessions Judge says that he was alive to the fact that so much of the first

information report as was of a confessional nature could not be admitted but that he thought that certain portions of it which were of a non-incriminating nature should be admitted; but eventually no portion of the first information report was admitted. It is difficult to understand what the applicant means when he says that the learned Judge was anxious to get some of the portions of the first information report proved as admissions. It is only the admissions that are not admissible, and there appears to be some misapprehension in the mind of the applicant in this matter. In fact, the applicant's case is the same now, to a large extent, as it was in the first information report, namely, that he was moved by grave and sudden provocation. It is, therefore, extremely probable that the motive of the learned Additional Sessions Judge was that which he gives in his explanation and that, far from seeking to prove a fact against the accused, the Court sought to prove something in his favour.

[2] In para. 7 of the application, it is said that the Court put a large number of questions to Motilal, husband of the deceased, after his cross-examination was over. In his cross-examination Motilal had stated that he had heard of the bad character of his wife and had made some statement as to the circumstances of her having been killed. In reply to court questions he adhered to much what he had said, but in reply to some other questions he has made statements which might be detrimental to the defence. Even, however, if they are detrimental, it cannot be presumed that the Court would know what reply the witness would give, and the Court was fully justified in putting questions to the witness under S. 165, Evidence Act, to ascertain whether statements made by him during the course of his examination and cross-examination were of such a nature as to be admissible in evidence.

[3] It is argued on the basis of these facts that the general effect of them all taken together on the mind of a person being tried for an offence of murder would be to make it appear as if the Court was prejudiced against him and that the result of the putting of many questions by the Court might induce a belief in his mind that the Court was determined to convict him. It is obvious that the position of a person being tried of a serious offence is such as to create impressions in his mind which might not exist in the mind of a normal person but in order to justsfy a transfer, the Court must be satisfied that there is reasonable ground for apprehension in the mind of the accused. A mere feeling, which is not justified by the action of the Court trying the case, cannot be sufficient. The Court has powers to see that proper evidence is before it which will enable it to do justice. It should not be the object of a Court necessarily to secure conviction and to fill up the gaps in the evidence of the prosecution. At the same time, it cannot be the business of the Court to bring about a failure of justice by not exercising its powers in clearing up what is not evident from the record merely from a fear that an accused person might possibly take it as an indication of the working of the Court's mind against him. In the present case all the facts taken together do not lead to the conclusion that the Court is acting with any prejudice against the accused or that it was doing anything but its duty in ascertaining the truth.

[4] Sufficient grounds are, therefore, not made out for the transfer, and I reject this application.

N.S.D. *Application rejected.*

A. I. R. (35) 1948 Oudh 104 *[C. N. 36.]*

KIDWAI J.

Nanhey Mal Narottam Dass — Accused — Applicant v. *Emperor.*

Criminal Revn. No. 37 of 1947, Decided on 1-8-1947, against order of Sessions Judge, Lucknow, D/- 20-2-1947.

(a) U. P. Municipalities Act (2 [II] of 1916), S. 128 (viii)—Terminal tax schedule — Exemption from terminal tax — "Salt" — "Denatured salt" if exempted.

When salt is treated in such a way as to render it unusable as salt it cannot be said that it still remains salt. It cannot be that if there is even a little intermixture of salt the commodity prepared from it still remains salt and is exempt from taxation. Hence denatured salt is not exempt from the terminal tax as salt. [Para 5]

(b) U. P. Municipalities Act (2 [II] of 1916), S. 155 —'Intention', if essential for offence.

For an offence under S. 155, intention to evade the duty is not essential. Where it is shown that a person did introduce within municipal limits goods liable to payment of terminal tax without paying that tax, he is guilty of an offence under S. 155 : 33 A. I. R. 1946 Oudh 13, *Disting.* [Paras 6 & 7]

Case referred :—

1. ('45) 1945 O. W. N. 255 : 33 A. I. R. 1946 Oudh 13: 20 Luck. 562 : 221 I. C. 221 : 47 Cr. L. J. 121, Krishna Kumar v. Emperor.

K. P. Misra — for Applicant.

Asst. Government Advocate — for the Crown.

Order. — The applicant is a firm which carries on business as salt merchants in the city of Lucknow. The firm also deals in the substance known as denatured salt, which is used in connection with the industry of tanning hides. It is composed of the following materials in the proportions mentioned. One maund of common salt, 1 lb. of commercial naphthalene and .01 lb. of patent blue, methylene blue or malachite

green: *vide*, Ex. 11. For sometime past a controversy has been going on between the Lucknow Municipal Board and various salt merchants with regard to the question whether denatured salt, when it is imported within municipal limits, is liable to terminal tax or whether it comes within the category of salt and is, as such exempt from the tax. Two firms of salt merchants, Messrs. Maula Bakhsh Qadir Bakhsh and Ramadhin Mathura Prasad took the matter up to the Government and on 7-8-1945, the officers of the Central Salt and Excise Department wrote to the Municipal Board stating

"denatured salt is actually salt that has been rendered unfit by Government for human consumption by mixing certain ingredients in very small proportion and, therefore, it should remain exempted from terminal tax like the ordinary salt:" *vide* Ex. 9.

The Municipal Board did not accept this recommendation of the Collector of Central Excise, who thereupon moved the Provincial Government for its intervention in the matter. The file relating to this could not be produced during the trial of the case but it was summoned in this Court by the Hon'ble Chief Judge and is before me. As a result of the reference to the Provincial Government, the Board was informed that "denatured salt is 'salt' for all purposes of taxation as it is just ordinary salt containing a slight mixture of other substances which make it unfit for human consumption." The Government order also pointed out that salt was exempt from taxation under the terminal tax schedule and that it was a central subject in respect of which the Municipal authority could not legislate. The Municipal Board did not accept this recommendation of the Provincial Government to treat denatured salt in the same way as common salt and asked for permission to test the matter in the Courts of law to determine whether this article was exempt from taxation or not. In the meanwhile on 27-5-1945, the applicants had brought into the limits of the city of Lucknow 891 maunds and 15 seers of denatured salt. The matter was reported by the Superintendent of terminal tax to the highter authorities of the municipality and the prosecution of the applicants was ordered.

[2] The case was tried by Chaudhri Irfan Husain, Special Magistrate, First Class, Lucknow, who held that denatured salt was not salt within the meaning of that word contained in the schedule attached to Government Notification No. 1195/XI, D. T.-81, dated 24-4-1930, in the list of goods exempted from payment of terminal tax. He accordingly held it to be liable to tax under the head "Disinfectants" which is item 56 of the Terminal Tax Schedule. He thus came to the conclusion that the offence had been committed by the applicant and he imposed a sentence of Rs. 1000 fine, the maximum sentence in such a case being ten times the extent of the tax evaded, which, in the present case was Rs. 220.

[3] The applicants appealed to the Sessions Judge who upheld the conviction but reduced the fine to Rs. 400 only. The applicants have now applied to this Court in revision and their learned counsel has contended that denatured salt remained salt for all purposes and is, therefore, exempt from treminal tax.

[4] In the course of arguments I was referred to Exs. A to I to show that common salt, denatured salt and bittern salt are all salts manufactured by the Central Government and are treated in the same manner. Oral evidence has also been produced by the applicants to indicate that all these three kinds of salt are dealt with in the same account by the Central Government and that the licences etc., required for common salt are also required for dealing with denatured salt. I am, however, not concerned with the manner in which the Central or Provincial Government deal with the denatured salt or whether it is salt within the description of that commodity given in the Central Excise and Salt Act (No. 1 of 1944): I am only called upon to determine what is meant by "salt" in the list of exempted articles attached to the Terminal Tax Schedule. I may note at once that no question arises of the levy infringing the provisions of the Government of India Act. The terminal tax was imposed in the year 1930 and if denatured salt was taxable under it the effect of the Government of India Act was not to exempt it from taxation. The Municipal Board has done nothing fresh after the enforcement of that Act which might make this commodity liable to taxation. There is, therefore, no infringement of the provisions of the Government of India Act.

[5] I come then to a consideration of the question whether denatured salt can be said to be "salt" for the purposes of the Terminal Tax Schedule. I have not been referred by either party to any decision on this question and the first question which arises is to consider what are the ingredients necessary to take a preparation of salt out of the description of "salt." It cannot be that if there is even a little intermixture of salt the commodity prepared from it still remains salt and is exempt from taxation. How then are we to determine when salt ceases to be salt? The lower Courts have examined this position very thoroughly and the learned Sessions Judge has referred to the Oxford Concise Dictionary which gives the meaning of "to denature" as being "to change nature or essential qualities." He has, therefore, held that the very name "denatured salt" indicates that it is a pre-

paration in which salt has changed its nature. This argument cannot be objected to and when salt is treated in such a way as to render it unusable as salt it cannot be said that it still remains salt. In this connexion it may be pointed out that the evidence on the record establishes that the duty chargeable on salt by the Central Government under the provisions of the Central Excise and Salt Act is not charged in respect of denatured salt. Thus, for the purposes of taxation, the Central Government itself does not treat denatured salt as salt. The confusion has really arisen owing to the name which has been given to the article as well as owing to the fact that it is manufactured by the Central Government as a part of its salt monopoly. I have, therefore, come to the conclusion that denatured salt is not exempt from the terminal tax as salt and that, therefore, the applicants infringed the provisions of law in introducing it within the municipal limits without paying tax in respect of it.

[6] It is also argued that there was no *mens rea* and, therefore, there could be no crime. The applicants were under a *bona fide* misapprehension that denatured salt was also exempt from tax. This argument too cannot be accepted because in such a case the intention to evade the duty is no longer essential. Section 155, U. P. Municipalities Act, provides as follows:

"155. A person introducing or attempting to introduce within octroi limits, or abetting the introduction within octroi limits, of any goods or animals liable to the payment of octroi for which the octroi due on introduction has neither been paid nor tendered, shall be punished with a fine which may extend either to ten times the value of such octroi or to fifty rupees, whichever is greater and which shall not be less than twice the value of such octroi."

[7] In the present case, it is shown that the applicant firm did introduce within the municipal limits goods liable to payment of terminal tax without paying that tax. They are, therefore, guilty of the offence with which they were charged.

[8] The learned counsel for the applicants relied upon 1945 O. W. N. 255[1] for the proposition that if a person has no intention to defraud he should not be held guilty of the offence. The facts of that case were entirely different. In that case the person accused had brought cloth within the municipal limits and he had taken that cloth to the octroi post for being assessed to duty. It was found that the amonut of duty exceeded the sum which the clerk at the octroi post could levy. According to the rules, therefore, a memorandum was prepared and he was directed to present himself at the head office for payment of duty. He did not present himself on the same day and his prosecution was ordered on the next day under S. 155, U. P. Municipalities Act. It appeared that the accused had in fact appeared before the junior Vice-Chairman either on the next day or within a day or two and asked him to get the duty assessed and levied and had complained to him that the people at the headquarters office had refused to take the memorandum and were harassing him. In those circumstances it was held that there was no attempt at evasion of duty; indeed it was shown that the person introducing the cloth within the municipal limits had done his best to pay the duty. It was in these circumstances that the accused was acquitted. In the present case there is no evidence to show that, at the time of introducing the goods within the municipal limits the applicant firm ever offered to pay the duty. It is, no doubt, true that when they had been detected and a report had been made they did at one stage offer to pay up the duty but subsequently decided to put the matter to the test of a decision by the Courts of law. It can, therefore, not be held that the applicants are not guilty of the offence with which they are charged.

[9] It was also contended that, in any case, the infringement is a mere technical infringement of the law since the matter had not been clarified up till then and finally the applicants refused to pay the duty merely with a view to get at a final decision on the point from the Courts. This is perfectly true and it is because of this consideration that the learned Sessions Judge has reduced the fine to Rs. 400 only. Under S. 155, U. P. Municipalities Act, the fine should not be less than double the value of the terminal tax. In the present case the fine should have been Rs. 440. The learned Sessions Judge has reduced it to Rs. 400. There can, therefore, be no further reduction. At the same time there is no application before me for enhancement of the sentence. The result is that the conviction and sentence are maintained and this application in revision is dismissed.

R.G.D. *Revision dismissed.*

A. I. R. (35) 1948 Oudh 106 [C. N. 37.]

MADELEY J.

Ram Manorath Tewari and others—Defendants — Appellants v. *Mohammad Zafar — Plaintiff—Respondent.*

Second Rent Appeal No. 69 of 1942, Decided on 30th January 1947, from order of Civil Judge, Sultanpur, D/- 24-10-1942.

U. P. Tenancy Act (17 [XVII] of 1939), S. 245 — Cosharer lambardar transferring major part of property — Right of, to sue for under-proprietary rent.

The mere fact that a cosharer lambardar transferred to his son a major part of the property while retaining certain specific plots for himself will not alter his joint and several liability for the payment of revenue. He does not cease to be lambardar merely because of such transfer and under S. 245 he is entitled in the absence of any contract or usage to the contrary to collect rents and other dues from under-proprietors: 1936 R. D. 455 (B.R.), *Disting.*; 7 A.I.R. 1920 All. 162 and 14 A. I. R. 1927 All. 641, *Rel. on.* [Paras 4 and 5]

Cases referred:—

1. ('36) 1936 R. D. 455 (B.R.), Bakht Bahadur v. Baldeo.
2. ('20) 18 A. L. J. 121 : 7 A. I. R. 1920 All. 162 : 42 All. 311 : 55 I. C. 74, Murli Dhar v. Babu Ram.
3. ('27) 11 R. D. 336 : 14 A. I. R. 1927 All. 641 : 103 I. C. 305, Bhore v. Habibur Rahman Khan.

R. K. Agnihotri — for Appellants.

Ghulam Imam — for Respondent.

Judgment. — This is a defendants' second appeal in a suit for arrears of rent brought by the lambardar of an undivided mahal. The facts briefly are that there were two cosharers in the mahal, the plaintiff lambardar and his brother-in-law. The plaintiff lambardar made a gift of his property in favour of his son, exempting certain plots of which he remains the proprietor. He was lambardar before this transaction and was not removed from this position thereafter. He has sued the present defendants-appellants, who are under-proprietors of the mahal, in his capacity as lambardar, for under-proprietary rent.

[2] The appellants mainly rely, upon a number of rulings, the citation of one of which will be sufficient to show the trend of them all. We may take 1936 R. D. 455[1] as an example. "A lambardar has no right to collect rents or to settle land in a patti, in which admittedly he has no interest." This decision like the other decisions cited by the appellants' learned counsel is not on all fours with the present case. There is no question of the respondent being lambardar in part of this mahal and not lambardar in another part of this mahal. He is either lambardar of the whole mahal or he is not lambardar at all. The mahal is not divided into pattis. Realising this position, the appellants' learned counsel has argued that the respondent is not lambardar at all, and that upon his transferring all his property excepting certain specific plots in favour of his son, his position of lambardar automatically came to an end. As respondent's learned counsel points out, however, there is no provision for his lambardari coming to an end in this way. The appointment to be a lambardar is made by Government and entails certain responsibilities as well as certain rights and powers. It could not be contended that the lambardar would get rid of all his responsibilities merely by making a transfer of this nature.

[3] It may also be noted that the fact that the plaintiff was lambardar of the mahal was admitted before the lower appellate Court. Counsel, however, attempted to argue here that it is not proved that the plaintiff is even a plot proprietor in this mahal. This is a question of fact which was not argued before the lower appellate Court. Moreover, the evidence on the file clearly shows that the plaintiff is a plot proprietor in this mahal.

[4] The question whether a plot proprietor can be said to be a cosharer in a mahal is one which has led to certain differences of opinion. In 18 A. L. J. 121[2] it was held by a Bench of the Hon'ble High Court at Allahabad :

"The word 'cosharer' in S. 159, Agra Tenancy Act, means a person holding proprietary rights in the mahal, who is jointly and severally liable for land revenue with other proprietors in the mahal and whose revenue is payable through the lambardar under the provisions of S. 144, Land Revenue Act (3) [III] of 1901)."

The mere fact that the plaintiff transferred to his son a major part of the property while retaining certain specific plots for himself will not alter his joint and several liability for the payment of revenue. In 11 R. D. 336[3] a single Judge of the same Court held that plot proprietors, i. e., those holding specific plots which are assessed to revenue are included in the term "cosharers" as used in S. 159 and the following sections of the Tenancy Act of 1901.

[5] It does not appear therefore that there is any illegality in the plaintiff remaining lambardar after the transfer to his son, since he certainly has proprietary interest in this undivided mahal. Under S. 245, U. P. Tenancy Act, he is entitled, in the absence of any contract or usage to the contrary, to collect rents and other dues. It follows that this case is rightly decided and I dismiss this appeal with costs.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 107 *[C. N. 38.]*

MISRA AND KIDWAI JJ.

Raj Bahadur Singh — Plaintiff—Appellant v. *Mt. Ram Dasi and others — Defendants — Respondents.*

Misc. Appeal No. 52 of 1945, Decided on 8th November 1946, against order of Dist. Judge, Rae Bareli, D/- 31st May 1945.

Civil P. C. (1908), O. 41, R. 23 (Oudh amendment) — Plea in answer to defence of limitation invoked by plaintiff not decided by trial Court — Remand by appellate Court—Appeal.

In a suit for pre-emption one of the issues related to limitation. There were two pleas underlying it. Only one of these pleas was considered and decided by the trial Court and the other plea regarding the aid of S. 14, Limitation Act, invoked by the plaintiff and contested by the defendant was not decided. The appellate Court thought that this plea ought to have been decided and therefore it set aside the decree of the trial

Court and sent back the file to the trial Court for trial *de novo* with the direction that the plea regarding S. 14, Limitation Act, should be decided :

Held that the remand order fell under O. 41, R. 23 and was appealable notwithstanding the fact that the trial Court purported to decide all the issues. [Para 3]

Case referred :—

1. ('44) 19 Luck. 411: 31 A. I. R. 1944 Oudh 117: 211 I. C. 396, Mahabir Singh v. Pitambar Das.

K. P. Misra — for Appellant.

Siraj Husain — for Respondents.

Judgment. — This appeal is directed against an order of remand. The suit out of which it arises was for pre-emption. It was decreed by the learned Civil Judge, Rae Bareli, on payment of Rs. 2600. One of the issues related to limitation. There were two pleas underlying it. Only one of these pleas was considered and decided. The learned District Judge in appeal thought that the other plea of limitation which related to the applicability of S. 14, Limitation Act should have been also decided. He accordingly set aside the decree of the trial Court and sent back the file to the learned Civil Judge for trial *de novo* with the direction that the question regarding the availability of the benefit of S. 14 to the plaintiff should be decided after giving further opportunity to the parties to produce such evidence as they deem fit. The pre-emptor has appealed.

[2] The first question which arises for consideration is whether the order of remand was one under O. 41, R. 23 so as to be appealable under O. 43, R. (1) (u). Rule 23 of O. 41 as amended in Oudh is as follows:

"Where an appellate Court has reversed a decree and all questions arising in the case have not been decided, it may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

[3] In 19 Luck. 411,[1] a Division Bench of this Court observed :

"Rule 23 in our opinion must be held to refer to questions which were raised by the parties on their pleadings in the trial Court and not to questions which may be raised subsequently at the stage of the appeal from any cause whatsoever. It is a matter of daily occurrence that parties sometimes raise fresh pleas in the appellate Court although no such pleas were raised in the trial Court. These pleas are sometimes allowed to be raised and the trial Court is directed to determine these pleas. It cannot be said however that these pleas which are entertained at the appellate stage for the first time were pleas arising in the case and had not been decided."

In the case before us, the plaintiff in his pleadings invoked the aid of S. 14, and the defendants contested his right to avail himself of it. It must, therefore, be held that the question thus raised not having been decided by the learned Civil Judge the remand order fell under O. 41, R. 23, Civil P. C., and is appealable notwithstanding the fact that the trial Court purported to decide all the issues.

[4] On the merits, however, the appeal must fail. Section 14 (1) prescribes that :

"in computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

We may mention that the plaint was in the first instance filed in the Court of the Munsif, Dalmau on the last day of limitation on a court-fee of Rs. 24 only. There was admittedly a deficiency of Rs. 123-8-0 and this was not made good till 9th August 1943. The valuation for purposes of jurisdiction was said to be Rs. 1222-8-0 only. The plaintiff asserted that the price entered in the deed was fictitious and that the proportionate market value of a portion of the property sold was not more than the sum mentioned above. During the course of the trial the learned Munsif discovered that the valuation of the property of which pre-emption was desired was above his pecuniary jurisdiction. He, therefore, returned the plaint on 10th January 1944, for presentation to the proper Court. On the same day the suit was filed in the Court of the Civil Judge, Rae Bareli. By that time obviously the limitation prescribed for instituting a suit for pre-emption had expired, and unless the plaintiff could establish that the proceedings in the Court of the learned Munsif were prosecuted with due diligence and in good faith he could not obtain the exclusion of time under S. 14, and the suit was liable to be dismissed. The decision on this point depended upon the evidence which the parties might bring before the Court. Some defect was also discovered in the plaint, and its amendment was necessary. The lower Court, in our opinion, was justified in passing the order of remand. The appeal has no substance. It fails and is accordingly dismissed with costs.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 108 [C. N. 39.]

MISRA J.

Mt. Ganga Dei — Appellant v. *Jagannath and others — Respondents.*

Second Appeal No. 9 of 1943, Decided on 27-3-1947, from order of Addl. Civil Judge, Gonda, D/- 8-12-1942.

Hindu Law—Maintenance—Widowed daughter-in-law—Joint family not possessed of ancestral property — Obligation of father-in-law and his sons or son's sons inheriting his property to provide maintenance including residence.

When a joint Hindu family consists of father and sons who possess no ancestral property the father is under a moral obligation to maintain the widow of one of the predeceased sons. After the death of the father the widowed daughter-in-law is legally entitled to maintenance against his property which comes into the possession of his sons or sons' sons either by inheritance or by survivorship : 16 A. I. R. 1929 Oudh 251 (FB.) and 21 A.I.R. 1934 P. C. 29, *Rel. on.* [Paras 4, 5]

The right of residence is one of the rights included in the right of maintenance the others being raiment and other necessities of life according to the station in life of the widow and her husband. [Para 4]

Hence where the sons inherit the family dwelling house from their father the widow of a predeceased son has a right of residence in the house and her right cannot be legally disregarded and the house cannot be sold by the surviving coparcener or coparceners without legal necessity. If such sale is made it does not affect the widow's right and the purchaser cannot evict her unless another suitable residence is provided for her: 6 Mad. 130 and 3 All. 353, *Rel. on.* [Para 4]

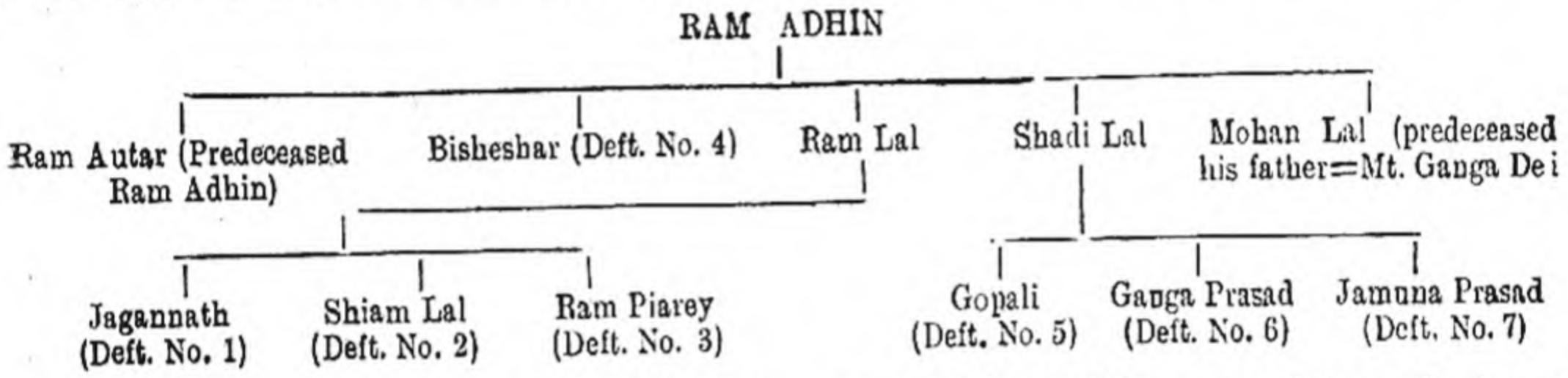
Cases referred :—

1. ('29) 4 Luck. 491 : 16 A. I. R. 1929 Oudh 251 : 118 I. C. 419 (F.B.), Jai Nand v. Mt. Puran Dei.
2. ('34) 61 I. A. 29 : 21 A. I. R. 1934 P. C. 29: 61 Cal. 221 : 147 I. C. 438 (P.C.), Rajani Kanta Pal v. Sajani Sundary Dassya.
3. ('83) 6 Mad. 130, Venkatammal v. Andyappa Chetti.
4. ('81) 3 All. 353, Talemand Singh v. Rukmina.

Mahabir Prasad—for Appellant.

P. N. Chaudhari—for Respondent No. 1.

Judgment. — The plaintiff-appellant Mt. Ganga Dei, is the widow of Mohan Lal, a predeceased son of Ram Adhin. Ram Adhin, as the following pedigree will show, left three sons, namely Bisheshar, Ram Lal and Shadi Lal.


RAM ADHIN
Ram Autar (Predeceased Ram Adhin)
Bisheshar (Deft. No. 4)
Ram Lal
Shadi Lal
Mohan Lal (predeceased his father=Mt. Ganga Dei
Jagannath (Deft. No. 1)
Shiam Lal (Deft. No. 2)
Ram Piarey (Deft. No. 3)
Gopali (Deft. No. 5)
Ganga Prasad (Deft. No. 6)
Jamuna Prasad (Deft. No. 7)

Ram Adhin and his sons constituted a joint Hindu family. There was no joint estate. The father had two houses, one near the thana and the other near the tahsil in Utraula. The evidence which has been believed by the Court below shows that for some time Ram Adhin, Mohan Lal and Mt. Ganga Dei lived in the house near the thana. Subsequently, Mohan Lal and Mt. Ganga Dei took up their residence in the other house, namely the one near the tahsil. There is nothing to show whether or not the other members of the family also shifted to the tahsil house. As it is a larger house, it is likely that they did. After Ram Adhin's death in 1921 Bisheshar, Ram Lal and Shadi Lal inherited the aforesaid house. Mt. Ganga Dei, it appears, went to her brother's place for a time. On 24-9-1935, Bisheshar sold his share in the tahsil house to Jagannath, defendant 1 and when Mt. Ganga Dei returned she found that Jagannath did not permit her to live in it. She had, therefore, to enforce her right of residence in her old dwelling house through the aid of the police.

[2] In 1941 Jagannath instituted a suit against Mt. Ganga Dei for possession under S. 9, Specific Relief Act. That suit was still pending when on 7-5-1942, Mt. Ganga Dei commenced her action out of which the present appeal arises. She sought a declaration that she had the right of residence in the aforesaid house which she characterised as joint ancestral family property and that the sale deed of 1935 did not adversely affect that right. The suit was resisted on a variety of grounds. They will be apparent from the issues which were as follows :

"1. Is the house joint ancestral property of Ram Adhin and his descendants ?
2. Has the plaintiff a right of residence in the house?
3. Is the suit barred by O. 23 R. 1, Civil P. C. ?
4. Is the court-fee paid insufficient ?
5. To what relief, if any, is the plaintiff entitled ?"

The learned Munsif who investigated the case decreed the suit. He held that the house was ancestral in the hands of Ram Adhin's sons, that the plaintiff was entitled to the right she claimed in the house in suit, that the suit was not barred by O. 23, R. 1 and that the court-fee was sufficient. It may be mentioned that the main contestant was defendant 1 Jagannath. The proceedings against the other defendants were ex parte.

[3] Jagannath absented himself from the suit which he had filed under the Specific Relief Act, and it was dismissed for default on 14-10-1942. Against the decree of the learned Munsif in the present case, he went up in appeal. The learned lower Court reversed the Munsif's decree holding that the house was not ancestral and that Mt. Ganga Dei had no right to reside in it. On the question of bar of O. 23, R. 1 and the court-fee it upheld the view taken by the trial Court. Aggrieved by the decision of the learned Additional Civil Judge Mt. Ganga Dei has come up in appeal. During the pendency of it Bisheshwar defendant 4 died. No substitution was made in his place, and the appeal abated against his legal representatives. The question as to whether the entire appeal abated in consequence of that abate-

ment was left over for decision at the time of hearing. It is conceded by the learned counsel for the respondents that the appeal has not abated. It is unnecessary, therefore, to refer to that matter any more.

[4] The rule of Hindu law in such cases is clear and precise. It is to the effect that when a joint Hindu family consists of a father and sons who are possessed of no family property the widow of one of the predeceased sons is entitled to maintenance as against the property which on the death of the father comes into the possession and enjoyment of the surviving sons either by inheritance or by survivorship: *see* 4 Luck. 491.[1] Their Lordships of the Privy Council in 61 I. A. 29[2] while dealing with Dayabhag law have laid down a similar rule, and there appears to be hardly any difference in this respect between the Mitakshara law and the Dayabhag law. It is also clear that the right of residence is one of the rights included in the right of maintenance, the others being food raiment and other necessities of life according to the station in life of the widow and her husband. The right of Mt. Ganga Dei to live in her family dwelling house could not, I am satisfied, be legally disregarded either by Bisheshar or by the other heirs of Ram Adhin, and the house could not be sold by the surviving coparcener or coparceners without necessity. If such a sale is made obviously it does not affect the widow's right and the purchaser cannot evict her, unless another suitable residence is provided for her: *vide* 6 Mad. 130[3] and 3 ALL. 353.[4] There is no doubt that the purchase of Bisheshar's share by Jagannath was with the full knowledge of Mt. Ganga Dei's right of residence and there is no proof that the sale was for legal necessity.

[5] Apart from this consideration, there is the further point that Jagannath as an heir of Ram Adhin through his father was bound by the legal obligation to maintain Mt. Ganga Dei. The lower appellate Court, however, thought that the legal aspect of the matter need not be considered. It further thought that since Ram Adhin, Mohan Lal and Mt. Ganga Dei lived at one time in the house near the thana it is that house which must be regarded as the family dwelling house. It does not seem to have occurred to the learned Additional Civil Judge that the subsequent change of residence would render the house in suit a dwelling house of Mohan Lal and Mt. Ganga Dei and that Mt. Ganga Dei would therefore have every right to live in it after the death of her husband.

[6] The learned lower Court's view apparently was that where there is no ancestral property the Mitakshara father-in-law is under no obligation to maintain his daughter-in-law, and the plaintiff would not be entitled to claim any maintenance from the defendants. The reasoning behind this conclusion is obscure. That there was a moral obligation on Ram Adhin to support his widowed daughter-in-law cannot be denied. After his death the moral obligation was transformed into a legal obligation of his sons who inherited Ram Adhin's property. They must, therefore, provide residence to Mt. Ganga Dei as a part of her maintenance, notwithstanding the fact that the property is not ancestral and the further fact that Jagannath has acquired by sale the share of Bisheshar.

[7] I allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court. The plaintiff is entitled to her costs of this Court and of the Courts below.

G.N. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 110 *[C. N. 40.]*

MISRA AND KAUL JJ.

Mt. Maina—Plaintiff — Appellant v. *Sri Bhushan — Defendant — Respondent.*

Appeal No. 3 of 1946, Decided on 5-3-1947, from judgment of Ghulam Hasan C. J., Lucknow, D/- 10-1-1946.

(a) U. P. Regularization of Remissions Act (14 [XIV] of 1938), S. 2—Remission to tenants—Thekadar whether can claim remission of theka money.

Where the rent payable by the tenants to the zamindar is remitted but no order for remission of theka money payable by a thekadar to the zamindar is made by the executive authority the thekadar cannot claim a remission of theka money in suit for recovering of the same, under S. 2 of the Act. [Para 6]

(b) U. P. Tenancy Act (17 [XVII] of 1939), Ss. 123 and 124—Order of remission—Necessity of.

An order of remission or suspension can only be made by the Provincial Government or authority empowered by it. If no order is passed by the proper authority it is not open to the Courts to proceed on the assumption that such an order ought to have been passed and to grant relief of remission. [Para 8]

Where the rents payable by the tenants were remitted by Government but no order for remission of the theka money payable by the thekadar to the zamindar was made, the thekadar cannot in a suit for recovery of theka money ask the civil Court to grant the relief. [Para 8]

Sri Ram — for Appellant.

D. N. Roy — for Respondent.

Judgment.—This is an appeal under S. 12(2), Oudh Courts Act, against the decision of a learned single Judge of this Court in Second Rent Appeal No. 3 of 1941.

[2] The facts material for the determination of the present appeal are as follows:

[3] Mt. Maina, appellant, granted a theka in respect of two villages Khiraba and Gird Gonda, to the respondent Sri Bhushan. Out of the annual theka money reserved by the lease, Rs. 800, Rs. 514 was to be applied to the pay-

ment of the land revenue and the balance of Rs. 286 was to be paid every year to the lessor Mt. Maina. The suit which gave rise to this appeal was brought by Mt. Maina for recovery of Rs. 429 arrears of theka money due for the year 1346F. and for kharif 1347, and Rs. 20-11-0 interest—total Rs. 449-11-0. A number of pleas were raised in defence, but in the present appeal we are concerned only with one of them. It was alleged by the thekadar that remissions were allowed by the Government to tenants in these villages on account of floods in 1346F. and also for slump in prices in both the years, 1346 and 1347F. He contended that he was entitled to similar remissions in the theka money on account of floods and slump in prices. The trial Court decreed the whole claim of the pukhtadaria without allowing any deduction to the thekadar on account of remissions made by Government orders for the benefit of tenants on account of floods and slump in prices. In appeal the learned Civil Judge of Gonda held that the suit for recovery of theka money having been instituted on 8-3-1940, after the present U. P. Tenancy Act had come into force, any claim for remission on account of slump in prices could be made only under S. 151 of that Act, and as that section was not applicable to thekadars, Sri Bhushan was not entitled to claim any deduction on account of slump in prices. As regards the argument based on the provisions of Act 14 [XIV] of 1938, U. P. Regularization of Remissions Act, he found that no order for remission of theka money was made either by the Provincial Government or by any authority empowered by such Government in that behalf. With regard to the claim for remission on account of floods, it was argued before him that the thekadar was entitled to relief under S. 123, U. P. Tenancy Act or S. 4 of Act 17 [XVII] of 1938, U. P. Rent and Revenue Relief Act. This argument also did not find favour with the learned Civil Judge as he observed that relief under these provisions of law could be granted only by the executive authority, and inasmuch as the Deputy Commissioner had rejected the thekadar's application for grant of remission in the theka money, the Court in which a suit for arrears of theka dues was brought could not grant him any relief. The decree of the trial Court was accordingly confirmed.

[4] A second appeal was preferred by Sri Bhushan, and the same points which were urged before the first appellate Court were pressed before this Court. As regards the contention based on the provisions of the U. P. Regularization of Remissions Act, 1938, the learned Judge who disposed of the appeal referred to the provisions of S. 2 of the Act and observed as follows :

"It is clear from this section that whatever the rights of the parties may be under the Oudh Rent Act of 1886 (*see* S. 19A) there can be no doubt that where rent has been remitted on account of slump in prices under the orders of the Provincial Government or any authority empowered by it in this behalf that order, whether passed before or after the Act, shall not be questioned in any civil or revenue Court. It is not denied that in the present case the rent was remitted on account of fall in prices. The order must, therefore, be treated to be binding on the Courts. The effect of this section, therefore, is that rent remitted cannot be realised by the landlord."

It was pointed out by the learned Judge that the appellant before him did not claim remission of rent under S. 151 of the Tenancy Act. The learned Judge then observed as follows :

"His (Sri Bhushan) contention is that the right of the landlord to realise the full rent is negatived by S. 2, U. P. Regularization of Remissions Act, 1938, and he cannot claim the rent which has been remitted on account of the slump in prices. I am of opinion that this contention is well-founded. Section 2 makes no reference to a tenant or a thekadar, and I can see no ground why the landlord should be held disentitled to claim from a tenant the rent remitted by the Government but should be entitled to claim the rent remitted from a thekadar. The position of a thekadar is no better than that of a collector of rent from the tenants. I hold, therefore, that the appellant is entitled to the remission in rent on account of slump in prices."

As regards the claim for remission due to floods, the learned Judge referred to Ss. 4 and 5, U. P. Rent and Revenue Relief Act, 1938, and to Ss. 123 and 124, U. P. Tenancy Act, and inasmuch as by S. 219, U. P. Tenancy Act, Ss. 123 and 124 of the Act were applicable to thekadars, he held that the claim for remission on account of floods made by thekadar was well founded.

[5] Reference was made in the judgment of the Court of first appeal to the rejection of the thekadar's application for remission made to the Deputy Commissioner of Gonda, and it was held by the learned Civil Judge who disposed of the first appeal that in view of the order passed by the Deputy Commissioner refusing to grant thekadar any relief, the Court in which the claim for recovery of theka money was brought could not grant it. With regard to this argument the learned single Judge of this Court observed as follows :

"I attach little importance to the order of the Collector refusing remission as he merely proceeded upon the judgment of the sub-divisional officer. The lower appellate Court while recognising that relief was permissible to the appellant wrongly thought that it was powerless to grant it in view of the fact that the collector had refused the remissions. To refuse relief to the appellant in respect of the remissions both on account of slump in prices and on account of agricultural calamity such as floods would be to defeat the very object of the Acts of 1938 which were passed with the express purpose of affording relief."

The decision of the Court of first appeal was accordingly set aside and the remissions claimed by the thekadar were allowed.

[6] It was argued before us by the learned counsel for Mt. Maina, that the provisions of S. 2, U. P. Regularization of Remissions Act (14 [XIV] of 1938), could not form the basis of any claim for remission by the defendant-respondent. This Act received the assent of the Governor on 16-9-1938, and was published in the U. P. Gazette on 24-9-1938. Section 2 of the Act is as follows :

"Notwithstanding anything in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or in any other law for the time being in force where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act, under the order of the Provincial Government or any authority empowered by it in that behalf, such order, whether passed before or after the commencement of this Act, shall not be called in question in any civil or revenue Court . . . ."

The circumstances which led to the passing of this Act were mentioned in the Statement of Objects and Reasons appended to the Bill which was subsequently enacted. These were as follows :

"The legality of the remissions in the rent ordered by Government on account of the fall in prices which took place in 1930-31 was recently called in question in a suit filed by zamindar of the Bareilly district claiming damages from Government on account of the remissions ordered in the rents due to him for his tenants. The case was dismissed by the lower Court but the High Court in appeal while holding that no case lay against Government held that the remissions in rent were ultra vires as they had not been made in accordance with the provisions of S. 73, Agra Tenancy Act. The result is that it is now open to any zamindar to sue and obtain a decree for arrears of rent including the remissions and such cases have been filed. Difficulties will also arise in profit cases as a lambardar may be held responsible for not having collected the remitted rent. It is therefore necessary to legalize the remissions ordered for the fall in prices and this Bill has been drafted to do so."

It will thus be seen that the only object of the Act was to legalize certain orders remitting the rents of tenants which had been made by the Government and whereof the legality was doubted. There was no provision in the Act authorising any Court to remit any rent, or to treat as remitted any rent in respect of which an order was not made by the Provincial Government or by an authority empowered by it in that behalf. Obviously therefore advantage of this Act can be taken only by a person from whom a demand is made to recover rent which has been remitted by an order of the Provincial Government or other authority. If no order of the Provincial Government or some authority empowered by it in that behalf has been made, there is no room for basing an argument for relief in a suit for rent on the provisions of this Act. Dealing with this part of the case, the learned single Judge of this Court observed as follows :

"It is not denied that in the present case the rent was remitted on account of fall in prices. That order, must, therefore, be treated to be binding on the Courts."

This is not strictly accurate. The matter is dealt with in the judgment of the learned Civil Judge of Gonda thus :

"Had there been any orders for remission of theka money made by the executive authority for the year in suit, i. e. 1346 Fasli, and 1347 Fasli kharif, the defendant appellant would have been clearly entitled to them. In the absence of such executive order in favour of the defendant appellant he cannot be given any remissions owing to slump in prices, although from Misc. File No. 22 (1) of the Court of the D. C., Gonda, which has been summoned in this appeal and has been shown to me, I do gather that Rs. 237-5-1 was the amount of remissions in rent allowed to the tenants for the years in suit in respect of the land covered by the theka. In spite of this fact, the executive authorities seem to have given no relief to the defendant appellant in respect of the slump in prices and his claim for reduction of theka rent due to slump in prices must fail."

That no order remitting the rent of the thekadar was made is clear from an application made by Sri Bhushan to the Deputy Commissioner, Gonda, on 14-5-1940, praying for such an order. The relevant portion of this application is as follows:

"Remission of rent allowed to tenants in villages Khiraba is 0-4-0 in the rupee for the year. As regards the land in Gird Gonda it is 0-7-0 in the rupee. That the applicant thekadar allows these remissions to tenants. It is therefore prayed that the thekadar should be allowed the same remission in the theka money Rs. 800 annually from Mt. Maina zamindar. You, Sir, have the authority to allow this remission in the theka money. . . ."

It could not be denied that the rent payable by the tenants to the zamindars was remitted by an order of the executive authority. The amount remitted, as we find from the judgment of the first appellate Court, was Rs. 237-5-1 but it was never admitted that any order allowing a remission of the theka money payable by the thekadar was ever passed-in fact this was Mt. Maina's main reply to Sri Bhushan's claim for remission of a portion of the theka money. In the absence of any such order by the executive authorities Sri Bhushan cannot derive any benefit from the provisions of S. 2 of Act 14 [XIV] of 1938.

[7] As regards the remission claimed on account of floods, reference was made by the learned single Judge of this Court to the provisions of Ss. 4 and 5, U. P. Rent and Revenue Relief Act, 1938, and to Ss. 123 and 124, U. P. Tenancy Act. He further referred to Para. 2 of the Schedule which forms part of that Act, and to Para. 3 of Sch. 6, U. P. Tenancy Act. Sections 123 and 124, U. P. Tenancy Act, as pointed out by the learned Judge, are practically a verbatim reproduction of Ss. 4 and 5, U. P. Rent and Revenue Relief Act, 1938. Similarly Para. 3 of Sch. 6 of the Tenancy Act, is the same as Para. 2 of the schedule found in the U. P. Rent and Revenue Relief Act, 1938. Sections 123 and 124, U. P. Tenancy Act are as follows :

"*123.* (1) On the occurrence of an agricultural calamity affecting the crops of any mahal or portion of a mahal the Provincial Government or any authority

empowered by it in this behalf-may, in accordance with the provisions of Sch. 6 remit or suspend for any period the whole or any portion of the rent of any holding affected by such calamity whether such holding is held mediately or immediately from the landlord.

(2) When the Provincial Government or any authority empowered by it in this behalf, remits or suspends rent under the provisions of sub-s. (1) it shall in accordance with the provisions of Sch. 6 remit or suspend for a like period the whole or a portion of the revenue assessed on such mahal."

"*124.* (1) An order passed under S. 123 shall not be questioned in any civil or revenue Court.

(2) No suit or application shall lie for the recovery of any sum the payment of which has been remitted under the provisions of S. 123 or, during the period of suspension of any sum the payment of which has been suspended under the provisions of that section."

It will be seen that under S. 123, the Provincial Government or any authority empowered by it in this behalf is authorised to remit or suspend for any period the whole or any portion of the rent of any holding on the occurrence of an agricultural calamity. If any rent is thus remitted or suspended the authority remitting or suspending it is directed to remit or suspend the whole or any portion of the revenue assessed on the mahal in which the holding lies. The remission of revenue is to be made in accordance with the provisions of Sch. 6.

[8] Under S. 124 such an order cannot be questioned in any civil or revenue Court, and no suit or application will lie for recovery of any sum the payment of which has been remitted under S. 123. Paragraph 3 of Sch. 6 runs thus:

"The relief in rent payable by under-proprietor, permanent lessee, permanent tenure-holder or thekadar shall be calculated in accordance with the provisions of Para. 2 and Para. 4 as if the rent payable by such under-proprietor, permanent lessee, permanent tenure-holder, or thekadar were revenue and as if the rent payable to such under-proprietor, permanent lessee, permanent tenure-holder or thekadar were payable to the landlord, and as if the sir or khudkasht of such under-proprietor, permanent lessee, permanent tenure-holder or thekadar were the sir or khudkasht of the landlord."

It follows therefore that the theka money payable by Sri Bhushan to Mt. Maina should be taken as if it were revenue and relief in respect thereof could be granted under the provisions of S. 4, U. P. Rent and Revenue Relief Act and S. 123, U. P. Tenancy Act. But the question arises, who can make an order for remission of the whole or part of the theka money payable by Sri Bhushan. Clearly under both the Acts, it is only the Provincial Government, or an authority empowered by it in this behalf that could do so, and once the order was made it will be binding on the Courts. It is further true that no suit or application could lie for recovery of any sum, the payment of which was remitted under the provisions of these sections. But it is only the existence of an order allowing remission or suspension of rent that can be pleaded as a bar to Mt. Maina's claim. In the case of Khiraba and Gird Gonda, remissions on account of floods were made in the rents payable by tenants, but there was no order passed by any authority remitting the theka money payable by Sri Bhushan to Mt. Maina which under Para. 3 of Sch. 6, U. P. Tenancy Act and Para. 2 of the Schedule appended to Act 17 [XVII] of 1938 must be treated as revenue. There is considerable force in the following argument of the learned single Judge of this Court:

"To refuse relief to the appellant in respect of the remissions both on account of slump in prices and on account of agricultural calamity such as floods would be to defeat the very object of the Acts of 1938 which were passed with the express purpose of affording relief."

But the Rent and Revenue Relief Act as well as the U. P. Tenancy Act have prescribed special machinery for the grant of such relief. Orders in this behalf can be made only by the Provincial Government or by an authority empowered by it. Any order made in this regard is binding upon the Courts, and no suit or application can lie for recovery of any rent which is thus remitted or suspended so long as the period of suspension lasts. But if there is no order passed by the proper authority in this behalf, it is not open to the Courts to proceed on the assumption that such an order ought to have been passed. We are, therefore, unable to agree with the conclusion arrived at by the learned Judge of this Court.

[9] The result, therefore, is that the appeal is allowed and the decree of the first appellate Court is restored. The appellant shall get her costs from the respondent throughout.

G.B. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 113 *[C. N. 41.]*

KIDWAI J.

Angne and another — *Accused—Applicants* v. *Emperor.*

Criminal Revn. No. 18 of 1947, Decided on 28th July 1947, from order of Addl. Sessions Judge, Kheri, D/- 29th January 1947.

(a) Penal Code (1860), S. 429 — "Horse" — Mare comes within the meaning of the word "horse". [Para 2]

(b) Penal Code (1860), S. 429 — "Maiming"—Accused striking animal with dandas for some time and fracturing its bone—Intention to maim animal presumed.

When the accused were using even dandas to strike the animal and they kept on doing it for some time they must be deemed to have knowledge of the possible consequence of that act and, if the dandas striking the leg of the mare fractured the bone, it cannot be said that there was no intention to maim the animal. [Para 3]

R. K. Srivastava — for Applicants.

Asst. Government Advocate — for the Crown.

Order. — The applicants, Angne and Ram Bharosey, have been convicted by the Sub-divi-

sional Magistrate, Nighasan, District Kheri, under Ss. 323 and 429, Penal Code for having caused injuries to a mare, belonging to Gobardhan, which broke her leg and eventually resulted in her death. The conviction was upheld on appeal by the learned Additional Sessions Judge of Kheri and the applicants have now come up to this Court in revision.

[2] It is contended on their behalf that S. 429 does not apply to this case because the value of the mare has not been shown to be over Rs. 50 and a mare is not one of the animals specially specified in that section. Section 429 provides that

"whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both."

It is contended that a mare does not come within the meaning of the word "horse." Under S. 13, U. P. General Clauses Act "words importing the masculine gender shall be taken to include females." Consequently a horse would include a mare. The learned advocate for the applicant, however, contends that in this case there is something in the context to the contrary because the word "cow" has been used although the words "bull" and "ox" are also to be found. The use of the word "cow" is due to peculiar circumstances inasmuch as it was necessary to use the word "bull" as well as the word "ox" and neither of the two words could in these circumstances, be taken to denote the species. In order, therefore, to make the position clear the word "cow" is also inserted. In the case of a "horse" there was no such difficulty and in the same way as the words elephant, camel and buffalo have been used to indicate both the male and female of the species the word "horse" has also been used to indicate both the male and the female. Thus a mare is covered by the use of the word "horse."

[3] It is next contended that the evidence shows that only dandas were used by the accused in beating the mare, and therefore it could not be said that they had an intention to maim the mare. The dandas mentioned were both two cubits in length and one cannot say how heavy they were. According to the evidence which has been accepted by the Courts below the animal was beaten mercilessly. When the accused were using even dandas to strike the animal and they kept on doing it for sometime they must be deemed to have knowledge of the possible consequence of that act and, if the dandas striking the leg of the mare fractured the bone, it cannot be said that there was no intention to maim the animal. The conviction of both the accused under S. 429, Penal Code, must, therefore, be upheld.

[4] With regard to Ram Bharosey, it is pointed out that Gobardhan, P. W. 1, himself stated in the cross-examination that it was only Angne that gave him all the seven blows with the danda and that Ram Bharosey did not strike him. There is no evidence to indicate that there was any common intention to strike Gobardhan. In the face of this evidence, the conviction of Ram Bharosey under S. 323, Penal Code, cannot be upheld and must be set aside.

[5] Learned counsel for the applicants also urged that the sentences imposed, namely, three months' rigorous imprisonment together with a fine of Rs. 50 in each case under S. 429 and three months' rigorous imprisonment under S. 323, Penal Code were not justified in the circumstances of the case since the evidence shows that the squabble took place near a field belonging to Angne and it is quite possible that it was the result of Angne's efforts to ward off the complainant's animals from the neighbourhood of his field. In the present case, however, the evidence shows that the accused caught hold of the mare and administered a merciless beating. Thus they set about to punish the animal for the supposed fault of its master for which there can be no justification and there is no reason to show any greater leniency than that which the Magistrate has himself shown in the case. I accordingly do not think that there is any reason for reducing the sentence imposed.

[6] The result is that this application in revision is partly allowed and the conviction of Ram Bharosey under S. 323, Penal Code, and the sentence passed on him under the section are set aside but the conviction of both the applicants under S. 429, Penal Code, and the sentence passed upon them under the section as well as the conviction of Angne under S. 323, Penal Code and the sentence passed upon him under that section are maintained. The accused will surrender to their bails to undergo the rest of the sentences.

N.S.D. *Order accordingly.*

A. I. R. (35) 1948 Oudh 114 [C. N. 42.]

GHULAM HASAN C. J. AND MISRA J.

Additional Sessions Judge, Hardoi — Applicant v. *Banwari Lal—Opposite Party.*

Criminal Misc. Appln. No. 107 of 1947, Decided on 26-8-1947.

(a) Contempt of Courts Act (1926), S. 2 (2)—Oudh Chief Court, if can punish contempt of subordinate Court.

Section 2 (2), Contempt of Courts Act, leaves intact the inherent jurisdiction of the Oudh Chief Court as a Court of Record to punish contempts of subordinate Courts: 26 A. I. R. 1939 Oudh 131 (F.B.), *Rel. on.* [Para 4]

(b) Contempt of Courts Act (1926), S. 1—Contempt, what amounts to — Communication with Judge.

A private communication by a stranger or a witness, addressed to a Judge which is calculated to influence his decision in a pending case constitutes the grossest form of contempt: (1849) 41 E. R. 1207 and (1865) 4 W. R. 86, *Rel. on.* [Para 3]

(c) Contempt of Courts Act (1926), S. 3 — Apology, if entitles the offender to discharge as of right —Contempt of grave nature—Offender sentenced.

An apology, though it often mitigates the offence, does not entitle the offender to a discharge as a matter of right, and where the contempt is of a grave character in that he addressed a private communication to the Judge in order to influence him in the decision of the case pending before him, in the interest of administration of justice the gravity of the offence requires that he should be punished, in spite of his unqualified apology. (Offender was sentenced to suffer a fine of Rs. 100 and pay Rs. 120 as costs to the Government Advocate, or in default of payment of fine within two weeks to undergo one month's simple imprisonment.) [Para 4]

Cases referred :—

1. (1849) 41 E. R. 1207, In re Dycesombre.
2. (1865) 4 W. R. 86, Taylor v. Asmedh Koonwar.
3. ('39) 1939 O. W. N. 296 : 26 A. I. R. 1939 Oudh 131 : 14 Luck. 492 : 180 I. C. 745 : 40 Cr. L. J. 421 (F.B.), Mahomed Yusuf v. Imtiaz Ahmad Khan.

Government Advocate—for Applicant.

S. Rahman and Babu Ram Gir—for Opposite Party.

Order. — These are proceedings under S. 2, Contempt of Courts Act. They have been commenced on the complaint of the learned Additional Sessions Judge, Hardoi. Banwari Lal, opposite party, is the President of the Congress Mandal, Sandi and the Secretary of the Arya Samaj. He was examined as a prosecution witness in the Court of the learned Judge in Sessions Trial No. 14/13 of 1947 in which four persons, namely Chandika Prasad, Bhim Shanker, Sia Ram and Sri Ram were charged under S. 302, Penal Code, for the murder of one Mathura Prasad. The case was adjourned on 15th April 1947 for judgment. Two days later, Banwari Lal sent to the learned Judge a letter now marked Ex. 1 by post containing private information of matters which were the subject of enquiry at the trial. The letter runs thus:

"Mandal Congress Committee Sandi, Hardoi,
Head Office Mohalla Munshiganj,
Bilgram, Sandi.
Dated 17th April 1947.

To

The Additional Sessions Judge,

Jai Hind,

For some time past the idea has been coming to my mind to communicate to you the true facts relating to the case under section 302 against the accused Chandika Prasad and others of Sandi and also to mention to you the origin of the case. I want to draw your attention to the fact that except Sri Ram the three accused participated in the offence when it was committed but Sri Ram at that time was in his licensed liquor shop. The witnesses have given false evidence. Pandit Lakshmi Narain Trivedi, teacher of Adampur Tulshi, Pandit Jugal Kishore, head constable pensioner, and Chotey Lal Bhat were not even present at the scene of occurrence. All the remaining witnesses, residents of Mohalla Naushera, participated in the riot. The persons, besides the residents of Mohalla Naushera, did not commit the aforesaid offence. Besides this there were many other persons who participated in the riot on behalf of the parties but they were let off. Bhim Shankar came as soon as the accused Chandika Prasad and Sia Ram were injured and at that very time the serious Faujdari took place as a result of which innocent Pandit Mathura Prasad was beaten unarmed. Sri Ram came immediately after Mathura Prasad fell down and went away after making reproachful utterances. At the time when all these incidents took place, Hajju, resident of Manimau and Munshi Ram's son, resident of Jasmai, were present at the scene of occurrence. I came to know these facts from them as well as from other persons. I am sending this to you so that you may know the true facts although you have gone deep into the matter.

I hope full justice would be done.

(Sd.) Banwari Lal,
President Mandal Congress
Committee, Sandi."

Fortunately the above communication proved to be abortive as it reached its destination three days after the judgment was pronounced. The learned Judge, however, as he was bound to do, made a report to this Court and sent with it the letter of 17th April 1947, in original and some other relevant documents. The report was treated as an application, and a rule was issued against Banwari Lal.

[2] Banwari Lal has appeared to-day in answer to the notice to show cause. In his statement made before us he admits that he wrote the letter, dated 17th April 1947 and sent it by post to the learned Additional Sessions Judge. He says that according to his way of thinking he acted rightly but he now realises and admits that his action was wrong. He has tendered an unqualified apology and thrown himself on the mercy of the Court.

[3] There can be no doubt that a private communication which is calculated to influence the decision of a Judge in a pending case constitutes the grossest form of contempt: *see* (1849) 41 E. R. 1207.[1] As remarked by Norman J. in (1865) 4 W. R. 86:[2]

"It is contrary to the practice of all Courts and highly dangerous to the administration of justice that a suitor on any pretext whatever should communicate with a Judge either by letter or any conversation or in any manner whatsoever other than by public proceedings in open Court respecting the merits of any case in which he is interested and which is either pending in the Court of such Judge or likely to come before him."

The rule applies with equal force to a private communication addressed to a Judge by a witness or even a stranger to the cause. Banwari Lal had no right either as a witness, or as a private individual or as a President of a Mandal Congress Committee, Sandi, to interfere with the course of justice, and his conduct in trying to influence the decision of the Judge amounts to grossest form of perversity. We hold, therefore, that he is

guilty of contempt of Court of the Additional Sessions Judge, Hardoi.

[4] Section 2 (2), Contempt of Courts Act, leaves intact the inherent jurisdiction of this Court as a Court of record to punish contempts of subordinate Courts: *vide* 1939 O. W. N 296.[3] The sole question which, therefore, falls to be considered is that of sentence. Proviso 1 to S. 3 of the Act lays down that an accused person may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court. Banwari Lal's apology is, in our opinion, genuine. The contempt, however, is, as we have said above, of a grave character. Notwithstanding therefore the expression of sorrow he should be required to purge it adequately. An apology, though it often mitigates the offence, does not entitle the offender to a discharge as a matter of right, and in the interest of administration of justice we think that the gravity of the offence requires that Banwari Lal should suffer a fine of Rs. 100 and pay Rs. 120 as costs to the Government Advocate. We order accordingly. In default of payment of fine within two weeks, Banwari Lal shall undergo one month's simple imprisonment.

R.G.D. *Order accordingly.*

A. I. R. (35) 1948 Oudh 116 *[C. N. 43.]*

GHULAM HASAN C. J. AND KAUL J.

Gajraj Singh — Applicant v. *Suraj Bux Singh and another—Opposite party.*

C. M. A. No. 954 of 1946 filed in Ex. Decree Appeal No. 93 of 1944, Decided on 21-8-1947.

(a) Civil P. C. (1908), O. 41, R. 19 — Sufficient cause — Counsel's pre-occupation before another Court.

The fact that when the appeal is called for hearing, the counsel of the appellant was pre-occupied before another Court is no ground for not attending to appeal and is not a sufficient cause within the meaning of R. 19: *Case law referred.* [Para 6]

Annotation—('44-Com.) Civil P. C., O. 41, R. 19, N. 3.

(b) Civil P. C. (1908), O. 41, R. 19 — Sufficient cause—Delay owing to rain.

(Obiter):—The excuse that it was raining and hence the appellant's pleader was a little late in coming to Court, is not a sufficient reason within R. 19 for restoration of the appeal dismissed for default: 13 A. I. R. 1926 Cal. 1152, *Rel. on.* [Para 13]

Annotation — ('44-Com.) Civil P. C., O. 41, R. 19, N. 3.

(c) Civil P. C. (1908), O. 41, R. 19 — Sufficient cause—Case in regular list of appeals shown as likely to occupy two days—Probable list of appeals likely to be heard on same day also published—Counsel absenting himself on assumption that appeal in probable list would not be taken up on that day—No sufficient cause.

The whole object of the probable list is that if the regular list is finished, the probable list would be taken up in the normal course unless there is no time left or for any other reason the case must be adjourned. When a case is shown in the probable list it obviously means that there is a probability or likelihood of its being taken up. Hence where even though a case in the regular list was shown as likely to occupy two days, a probable list of cases likely to be heard was published, and in spite of all this a litigant or his counsel acted on the assumption that no case in the probable list would be taken up by the Court on that day and absented himself accordingly, he cannot but be said to have acted most unreasonably. Such conduct amounts to gross negligence. In any view of the matter he cannot be said to have been prevented by sufficient cause from appearing when the appeal was called, nor can his default in appearance be said to be accidental: *Case law reviewed.* [Paras 15 & 41]

Annotation — ('44-Com.) Civil P. C. O. 41, R. 19, N. 3.

(d) Civil P. C. (1908), O. 41, R. 19 — Sufficient cause — Counsel's negligence in not appearing to argue appeal.

If the appellant entrusts his appeal to a counsel and the latter does not perform his duty to his client, the latter has a remedy against him but the negligence of counsel in not appearing to argue the appeal will not constitute a sufficient cause for re-admitting the appeal nor will it absolve the appellant of his responsibility to prosecute the appeal with due diligence. [Para 15]

Annotation — ('44-Com.) Civil P. C., O. 41, R. 19, N. 3.

(e) Civil P. C. (1908), O. 41, R. 19 — Sufficient cause—Value of precedents.

The question whether sufficient cause for readmission of an appeal dismissed for default has been made out or not is not one which can be decided with the aid of judicial decisions, except in so far as the decisions lay down any principle of universal application. Each case must depend upon its special facts and must be determined upon its own circumstances. There can be no hard and fast rule in determining a simple question of fact as this. *Case law referred.* [Para 16]

Annotation — ('44-Com.) Civil P. C., O. 41, R. 19, N. 3.

(f) Civil P. C. (1908), O. 41, R. 19 — Grounds for restoration of appeal.

It is wrong to say that an appeal should be restored unless something equivalent to misconduct or gross negligence is shown on the part of the defaulting appellant. The sound view to take would be to consider whether the applicant had made out a sufficient cause and where the applicant has failed to show due diligence in the prosecution of his case, he is not entitled to restoration of the appeal. [Para 28]

(g) Civil P. C. (1908), O. 41, R. 19 and S. 151 — There is no inherent power to restore appeal except under provisions of O. 41, R. 19.

There is no inherent power to set aside an ex parte decree, or restore a suit dismissed for default, except under the circumstances and conditions mentioned in O. 9, R. 13 and R. 19 respectively. The same remarks would apply to the provisions applicable to restoration of appeals under O. 41, R. 19, Civil P. C. Even assuming that inherent powers can be invoked, these powers cannot be exercised as a matter of course unless it is necessary in the ends of justice or to prevent an abuse of the process of the Court. Where it is not shown that the litigant or his counsel exercised reasonable diligence in prosecuting the case but on the other hand was guilty of negligence and carelessness, it would be opposed to justice, equity and good conscience to exercise these powers in his favour. [Paras 23, 37 and 43]

Annotation—('44-Com.) Civil P. C. S. 151, N. 2.

Cases referred :—

1. ('23) 10 A. I. R. 1923 Lah. 97 : 68 I. C. 785, Saif Ali v. Chiragh Ali.
2. ('25) 12 A. I. R. 1925 Oudh 234 : 79 I. C. 550, Hari Das v. Praduman Nath.
3. ('40) 27 A. I. R. 1940 All. 248 : I. L. R. (1940) All. 220 : 189 I. C. 163, Mathura Das v. Narain Das.
4. ('25) 3 Rang. 488 : 13 A. I. R. 1926 Rang. 50 : 92 I. C. 208, Maung Than v. Zainat Bibi.
5. ('33) 20 A. I. R. 1933 Lah. 642 : 145 I. C. 528, Mt. Bholi v. Puran Singh.
6. ('33) 20 A. I. R. 1933 Lah. 1043 : 147 I. C. 698, Qadar Bakhsh v. Hakam.
7. ('16) 3 A. I. R. 1916 Pat. 388 : 1 Pat. L. J. 65 : 35 I. C. 429, Rang Behari Lal v. Racheya Lal.
8. ('26) 13 A. I. R. 1926 Cal. 1152 : 96 I. C. 377, Satya Ram Ghosal v. Mahomed Hamedulla.
9. ('39) 1939 O. W. N. 787, Mt. Saheba Khatun v. Anwarul Hasan.
10. ('42) 29 A. I. R. 1942 Oudh 75 : 17 Luck. 243 : 196 I. C. 257, Baijnath v. Iqtidar Fatima.
11. ('32) 19 A. I. R. 1932 All. 450 : 141 I. C. 113, Rama Shankar v. Iqbal Husain.
12. ('29) 16 A. I. R. 1929 Lah. 96 : 10 Lah. 570 : 114 I. C. 76, Abdul Aziz v. Punjab National Bank Ltd.
13. ('39) 26 A. I. R. 1939 Lah. 267, Anjuman Imdad Qarza v. Ahmad Husain.
14. ('40) 1940 O. W. N. 1086 : 28 A. I. R. 1941 Oudh 91 : 16 Luck. 294 : 192 I. C. 332, Badri Prasad v. Ambika Pershad.
15. ('41) 28 A. I. R. 1941 Oudh 367 : 194 I. C. 354, Baijnath v. Ram Narain.
16. ('45) 1945 O. A. 102 : 32 A. I. R. 1945 Oudh 210 : 20 Luck. 317, Bajrang Bahadur Singh v. Suraj Narain.
17. (1901) 1901 A. C. 495 : 70 L. J. P. C. 76 : 85 L. T. 289 : 50 W. R. 139, Quinn v. Leathem.
18. (1898) 1898 A. C. 1, Allen v. Flood.
19. ('28) 15 A. I. R. 1928 All. 301: 108 I. C. 576, Ram Shankar v. Ram Narain.
20. ('12) 34 All. 426 : 14 I. C. 187, Lalta Prasad v. Ram Karan.
21. ('32) 19 A. I. R. 1932 Lah. 387 : 138 I. C. 702, Bhagwan Das v. Mt. Dakhan.
22. ('27) 14 A. I. R. 1927 Lah. 622 : 103 I. C. 425, Khushi Mahomed v. Mt. Barkat Bibi.
23. ('23) 10 A. I. R. 1923 Mad. 63 : 46 Mad. 60 : 68 I. C. 971, Arunachalam Iyer v. Subbaramiah.
24. ('37) 24 A. I. R. 1937 Mad. 503 : ILR (1937) Mad. 607 : 171 I. C. 533, Venkataraju v. Surya Rao.
25. ('21) 8 A. I. R. 1921 Bom. 20 : 45 Bom. 648 : 60 I. C. 919, Sonubai Baburao v. Shivajirao Krishnarao.
26. ('38) 25 A. I. R. 1938 Bom. 199 : 174 I. C. 534 (S.B.), P. D. Shamdasani v. Central Bank of India Ltd.
27. ('42) 29 A. I. R. 1942 Bom. 198 : 201 I. C. 653, Ningappa v. Chandra.
28. ('45) 32 A. I. R. 1945 Bom. 85 : 219 I. C. 192, Bhimappasaheb v. Ramappa.
29. ('16) 43 Cal. 857 : 3 A. I. R. 1916 Cal. 361 : 34 I. C. 634, Mathura Sundari Dasi v. Haran Chandra.
30. ('26) 13 A. I. R. 1926 Rang. 109 : 4 Rang. 18 : 95 I. C. 521, Maung Saw v. Ma Bwin Bya.
31. ('34) 21 A. I. R. 1934 Pesh. 13 : 148 I. C. 917, Jugal Kishore & Bros. v. Pensioner Subedar.

B. K. Dhaon—for Applicant.

R. B. Chaudhri—for Opposite Party No. 1.

Ghulam Hasan C. J.—This is an application under O. 41, R. 19, Civil P. C., for readmission of the appeal which was dismissed for default on 13th August 1946. The appeal arose out of execution proceedings and was filed by the judgment-debtor on 23rd October 1944.

[2] The appeal was set down for hearing on 23rd November 1945, 14th February 1946, and on 16th April 1946, but was adjourned as there was no time. It was fixed for hearing on 13th August 1946, and was shown in the probable list of Bench Cases at No. 2, there being two more cases shown in that list on that date. The appeal was taken up but as no one was present on behalf of the appellant, it was dismissed. The order of dismissal is as follows :

"Gajraj Singh has been called out and is absent. Mr. B. K. Dhaon who filed this appeal is also absent. We accordingly dismiss the appeal for default with costs to respondent No. 1 represented by Mr. R. B. Chaudhri."

[3] On the day when the appeal was dismissed for default, the regular list before the Bench had two first appeals, one of which was shown as part heard for the following day. This appeal was dismissed for want of prosecution and another first appeal was adjourned as counsel represented that owing to postal difficulties they had not been able to communicate with their clients. The third case, a section 115-application was listed for admission and was admitted.

[4] The regular list having been disposed of in the manner referred to above, the probable list was taken up as usual in due course. The appellant Gajraj Singh was called out but was not present. The counsel was also not present. No information was given by counsel or his clerk to the Reader of the Court about the counsel being occupied in another Court and no request was made for adjournment. There was no alternative for the Court but to dismiss the appeal for default. Neither the appellant nor his counsel turned up on that date. The present application was filed the following day along with an affidavit, which purported to have been sworn on 13-8-1946. All the five paragraphs of the application are reproduced in the affidavit. These are as follows:

"1. That a Bench of this Hon'ble Court was pleased to dismiss the abovenoted appeal for default of appearance at about 11. 30 A. M. on 13-8-1946.

2. That the counsel for the applicant was arguing a First Civil Appeal before the Civil Judge, Lucknow at the time of the dismissal of the appeal by this Hon'ble Court.

3. That the case had been shown in the cause list in the probable list as second and the regular case shown in that list before the Bench that has dismissed the appeal was fixed for two days.

4. That the applicant's counsel was (not) and could not be aware that the case was likely to be taken up before the Bench on 13-8-1946.

5. That default in appearance was accidental and not deliberate."

[5] The affidavit was sworn not by Gajraj Singh but by one Shyam Narain Misra, a clerk of Mr. Dhaon. No time is given. Paragraph 4 of the application, as it originally stood did not contain the word "not," but when this was

pointed out to counsel he corrected it and added the word "not." This could not, however, be done in the affidavit which had already been sworn. The value of the affidavit, if any, is destroyed by the carelessness with which it was drawn up. The Commissioner of affidavits appears to have endorsed mechanically without carefully examining its contents, although he appended a certificate, "I have satisfied myself by examining the declarant that he understands the contents of the affidavit." If the Commissioner of affiadvits had performed his duty honestly, he could not possibly have given the certificate which he gave. This is not the first time that this Court has had an opportunity of noticing the utter carelessness and disregard to accuracy with which affidavits are drawn up and verified. The attention of the Commissioner is drawn to Rr. 14, 16 and 17 of Chap. 11 of the Chief Court Rules.

[6] The application is opposed by the other side. Coming to the merits of the application, it is clear that under R. 19, under which the application has been filed, the applicant has to prove that he was prevented by sufficient cause from appearing when the appeal was called on for hearing. It is significant that the inherent powers of the Court were not invoked, though cases have been cited in support of the exercise of powers. So far as the counsel's pre-occupation before another Court is concerned, that is no ground for not attending to the appeal and is irrelevant. This Court has repeatedly followed the practice that it will not wait until the counsel chooses to appear unless he is engaged before some other Judge of this Court.

[7] In A. I. R. 1923 Lah. 97,[1] a counsel was engaged in arguing a case before another Bench of the Lahore High Court and he sent word to the Reader of the Court asking to be allowed ten minutes time. The Court refused and dismissed the appeal for default. In refusing to re-admit the appeal the Bench observed:

"The Court cannot be expected to await the convenience of counsel, and it is time that counsel should understand that it is incumbent on them to see that their clients are properly represented when the case is called on for hearing"

[8] Mr. Dalal, A. J. C., in A. I. R. 1925 Oudh 234[2] in rejecting an application on account of the absence of the pleader remarked that when a pleader is engaged in another Court at a distance, it is due, by way of courtesy to the Court, that some one may be left behind to inform the Court of the fact, so that if it likes it can take up some other business. The disappearance of every person connected with the party in the hope that the Court will be compelled to wait for the pleader, is certainly a wrong method and should not be countenanced.

[9] In A. I. R. 1940 ALL. 248[3] the grounds given in the application for re-admission of the appeal were that two of the vakils were engaged in another Court and the third had only been engaged on the previous day and had not made himself sufficiently acquainted with the record. The appeal had been adjourned once before. The learned Judges held that this was not a sufficient cause despite the fact that the appellant himself appeared at 3 P. M. the same day and asked for an adjournment.

[10] A learned single Judge of the Rangoon High Court, in 3 Rang. 488,[4] held that the laches of an Advocate or the careless mistake of his clerk is not sufficient cause for restoration of an appeal dismissed for default nor is it a good ground for the exercise of the Court's inherent power to restore. In this case the clerk of a counsel had by mistake informed the counsel that the case was fixed for hearing on the 17th or 18th, although it was shown in the cause list for the 16th. This case was followed in A. I. R. 1933 Lah. 642.[5]

[11] In A. I. R. 1933 Lah. 1043[6] it was held that the failure on the part of counsel to ascertain where the case was to be heard was due to negligence and was not a sufficient cause for restoration of the appeal. The case was shown in the weekly cause list before the second Bench on 21-6-1932, but owing to the illness of one of the Judges of the second Bench the case was taken up by the first Bench on the same date. It was shown in the daily cause list issued on 20th June before the first Bench.

[12] In A I. R. 1916 Pat. 388[7] adjournment of an appeal was sought on the ground that the better of the two vakils both of whom represented the appellant, was absent from the station. The Court refused adjournment and proceeded to hear the appeal. The other vakil declined to appear with the result that the appeal was dismissed for default. It was held that the vakil's conduct amounted to a very gross neglect of his client's interests and that there was no ground for setting aside the order dismissing the appeal for default.

[13] The excuse that it was raining and hence the appellant's pleader was a little late in coming to Court, is not a sufficient reason within R. 19 for restoration of the appeal dismissed for default: *see* A. I. R. 1926 Cal. 1152.[8]

[14] I accept the view taken in these cases as in my opinion they lay down a correct view of the law and procedure which I think should be followed in this Court. This view while making for speeding administration of justice will ensure the elimination of cases of carelessness and negligence on the part of counsel and client.

[15] The only other ground which needs consideration is that the counsel was not, and could not be, aware that the case was likely to be taken up on that date. There is no reasonable ground for this assumption. In the first appeal fixed for two days counsel stated that he was unable to press the appeal as the file had been taken away by the client and it was dismissed there and then. The affidavit does not state that counsel in this case was misled by any act of the Court or its officials and hence he was unable to attend to the case. It is difficult to understand why the counsel could not be aware that his case may come up on that date. There was no physical impossibility which could have prevented its being taken up. The whole object of the probable list, as is well known to litigants and the members of the Bar, was—the list is now abolished—that if the regular list is finished, the probable list would be taken up in the normal course unless there is no time left or for any other reason the case must be adjourned. When a case is shown in the probable list, it obviously means that there is a probability or likelihood of its being taken up. It does not mean the contrary as appears to have been assumed by counsel. There was no reason for thinking that the probable list could on no ground whatsoever be taken up by the Court nor could counsel entertain any reasonable belief that the regular appeals will rule out the possibility of the probable list being taken up. No enquiry was made from the Reader or from the Court at any time during the day as to the probable time the Regular list will take. No affidavit is filed to the effect that the counsel who did not press the first appeal fixed for two days encouraged any wrong belief in the mind of the applicant's counsel as to the probable duration of the regular appeal. Indeed, if he had cared to ask Mr. Hyder Husain and Mr. K P. Misra, the two counsel who appeared in the first appeals, he would have easily found out that his appeal in the probable list was bound to be taken up in the early part of the day. There cannot be the slightest doubt, therefore, that the counsel was utterly negligent in not making any enquiry about his appeal which he was briefed to argue before the Court. As far as the applicant himself is concerned, there is nothing whatever to show that he was present in Court at any time during the day. He did not respond when he was called out, and the fact that he did not swear the affidavit himself on that date itself shows that he was not present. Neither the application nor the affidavit makes any reference to his presence in Court. The case was dismissed for default at 11-30 A. M., and if the applicant came later, he could have informed the Court at once that he had arrived late,—that his counsel was busy elsewhere and his appeal should not have been dismissed for default. We do not think that the circumstances disclosed in the present case show due diligence on the part of the applicant to prosecute his appeal. If the applicant entrusted his appeal to the counsel and the latter did not perform his duty by his client, the latter has a remedy against him but the negligence of counsel in not appearing to argue the appeal will not constitute a sufficient cause for re-admitting the appeal nor will it absolve the applicant of his responsibility to prosecute the appeal with due diligence.

[16] The case for the applicant was argued at great length before we issued notice. It has been re-argued in the presence of the opposite party who opposed the application and pressed for costs. Reference in course of the argument is made to a large number of cases of the various High Courts in India, but it cannot be doubted that the question whether sufficient cause for re-admission of an appeal dismissed for default has been made out or not is not one which can be decided with the aid of judicial decisions, except in so far as the decisions lay down any principle of universal application. Each case must depend upon its special facts and must be determined upon its own circumstances. There can be no hard and fast rule in determining a simple question of fact as this. This salutory principle was laid down by several High Courts: *vide* 1939 O. W. N. 787.[9] A. I. R. 1942 Oudh 75,[10] A. I. R. 1932 ALL. 450,[11] A. I. R. 1929 Lah. 96[12] and A. I. R. 1939 Lah. 267.[13]

[17] I shall refer to these cases in detail with a view to showing how utterly futile it is to refer to judicial decisions, which are sometimes called rulings determined upon circumstances wholly dissimilar. The following decisions of this Court were cited: *Oudh cases*, 1940 O W. N. 1086.[14] A. I. R. 1941 Oudh 367[15] and 1945 O. A. 102.[16]

[18] 1940 O. W. N. 1086[14] has not unoften been misunderstood and misquoted. In that case an auction-purchaser applied under O. 21, R. 97, Civil P. C., complaining of resistance in getting possession of property sold to him in execution of a decree. Objections were filed and were fixed for hearing on 3-12-1938, before the Munsif, North Lucknow. The case was first on the cause list and was dismissed for default between 10 and 11 A.M. but the Munsif was not sure of the time. The auction-purchaser applied for restoration under O. 9 R 9, Civil P. C., and S. 151, within *half an hour of* the dismissal. The Munsif accepted the evidence of the auction-purchaser that he arrived late by 15 minutes only, that the case had been dismissed before he

entered the court room at 10-15 A. M., that he applied for restoration within half an hour of the dismissal and that the delay was due to a cycle accident. There was no rebuttal. The Munsif restored the application. The objectors filed a revision under S. 115, Civil P. C. in this Court. The first contention that O. 9, R. 9 did not apply to the case was not decided. The second question was that the Munsif was not competent to restore the application under his inherent powers. Conflicting decisions on the question whether inherent powers could be exercised where an alternative remedy was available to the aggrieved party or not were referred to by both sides. Cases in which inherent powers were exercised were mostly execution cases to which the provisions of O. 9 did not apply. In this conflict of authority, the following observation was made in the judgment :

"After having carefully considered the cases cited on both sides, I am of opinion that the proposition that where an alternative remedy is provided the Court is precluded from exercising its inherent jurisdiction under S. 151, Civil P. C., is too wide and does not take into account cases of a special and exceptional character which may demand the exercise of the equitable jurisdiction in the ends of justice to correct palpable mischiefs . . . There is absolutely no reason for circumscribing the powers of the Court in cases where the Court is moved to correct its own mistake and wants to afford redress to the party who has been made to suffer for such mistake."

This remark cannot be read as being divorced from the facts of the particular case and given a meaning which it is never intended to convey, namely, that it applied to all possible cases of dismissals whether made by the Courts of first instance or by the appellate Courts in the exercise of original or appellate jurisdiction, and irrespective of the circumstances of the case. In the well-known case in 1901 A. C. 495[17] Lord Halsbury laid down the salutary rule in such cases :

"Now, before discussing the case in 1898 A. C. 1[18] and what was decided therein there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

[19] The Munsif had admitted that he was in error in dismissing the application so early in the day when the auction-purchaser was late only by 15 minutes. It is not clear whether the order had been signed. Instances are not wanting in this Court when an order has been passed in the absence of counsel but it has been re-called upon the appearance of counsel the same day before it was signed. In making the above remark reference was made to a decision of Dalal J. in A. I. R. 1928 ALL. 301[19] which was also an execution case and was dismissed on account of the judgment-debtor's default. He immediately appeared in Court afterwards and the Court restored the application under S. 151, Civil P. C. Dalal J. observed in that case that no order of dismissal could be passed till the end of the day when the Court was rising because there could be no default until the Court rose for the day. This observation was clearly intended for the guidance of the subordinate Courts seised with the trial of original cases. It was not intended to lay down that the trial Courts should wait for the party or his counsel till 4 o'clock and then pass an order of dismissal. Such a position would be intolerable and would paralyse the administration of justice. This would be more true in the case of High Courts which deal with the appellate work only and where all appeals are generally represented and the presence of a party is not essential. In referring to this case nothing was said by me in approval of the above observation. On the other hand, a Bench of this Court disagreeing with the observation of Dalal J. observed thus :

"With all respect we are not prepared to subscribe to this view. Litigants are ordinarily required to attend the Court at 10 A. M. and we know no reason why they should not be penalized for failure to do so without sufficient cause. To allow them to attend at any time in the day before the Court rises, that is, usually at 3-30 or 4 P. M., might make it impossible to carry on the work of the Court properly by putting it in the power of litigants to obstruct it." (*Vide* A. I. R. 1942 Oudh 75.[10])

I entirely agree with this observation.

[20] A. I. R. 1942 Oudh 75[10] is equally unhelpful. There an application for permission to sue as a pauper was dismissed for default of the applicant. He applied the same day under O. 9 stating that he was present in the court compound from 10 A. M. but he did not attend the Court as he did not hear the case called out. The Munsif did not believe this story because the witnesses in support of it were contradictory. It was admitted, however, that the applicant was in the court compound but the Munsif held that it was the applicant's own fault if he did not hear the case called out. Consequently, he held that there was no sufficient cause within the meaning of O. 9, R. 9, Civil P. C., but in the interest of justice he restored the case on payment of costs. A revision was filed against this order. It was held that a revision application under S. 115 lay to this Court because the question whether the application had been properly restored could not be raised in an appeal from a decree passed in the suit. Upon the other question whether the Munsif had or had not the power to restore the application the

judgment leaves no doubt whatever that the Bench differed from the view taken by the Munsif in holding that there was no sufficient cause while they no doubt said after referring to the above-mentioned quotation from 1940 O. W. N. 1086[14] that they were not prepared to hold that the Munsif had no power to restore the application. They immediately added :

"We are not indeed satisfied that he was justified in the view that there was no sufficient cause for restoration, that is under O. 9, R. 9."

The decision of the Court, as will appear from the criticism of the action of the Munsif in dealing with the application for restoration, rested upon the substantial ground of disagreement with the view of the Munsif on the question of sufficient cause.

[21] All that 1945 O. A. 102[16] laid down was that although O. 9, Civil P. C., does not govern execution proceedings the Court has jurisdiction to restore an execution application dismissed for default under its inherent powers, even though a fresh application has become time-barred. This view was taken upon a careful examination of the authorities which are referred to in detail in the judgment of the Bench of which I was a member. It is interesting to note that in this case a decree was passed in December 1929, for a heavy amount. Several unsuccessful attempts were made to realise the decree, but after some small payments had been made the balance payable to the decree-holder was Rs. 1,62,391. In December 1941, the decree-holder applied for execution on the last day. He was present with his counsel who applied for time to file papers. The application was allowed and 3-6-1942 was fixed for filing the necessary papers. On this date neither the decree-holder nor his counsel was present. The application was consigned to the records. A telegram was received the same day by the Court asking for postponement. The decree-holder applied for restoration and after explaining his unavoidable absence and the absence of his counsel he urged that he had no other remedy left as the decree had become time barred. The Court accepted the version of the decree-holder and held that his absence was excusable. Order 9, R. 9 not being strictly applicable, action in restoring the application was taken under S. 151, Civil P. C.

[22] *Allahabad Cases* : 34 ALL. 426[20] and A. I. R 1932 ALL. 450.[11] In 34 ALL. 426[20] the lower Court had dismissed the suit for default. Nobody responded when the case was called out repeatedly and the Court waited for 20 minutes. It was admitted that the party was present though not in Court. The lower Court rejected the application for restoration holding that there was no sufficient cause. In appeal the learned Judges remarked that :

"While we think that it might be difficult to hold that there was sufficient cause in view of the fact that the case was actually called and repeatedly called for 20 minutes in the manner in which cases are called in Mofussil Courts both within the court room and outside the court room, so that persons in attendance in the court compound were sure to hear, we are of opinion that the case is one of those in which the Court may exercise its inherent powers of passing orders necessary for the ends of justice."

[23] I am not prepared to follow this case in so far as it holds that apart from the provisions of O. 9 of the Code there is any inherent power in Court to restore suits dismissed for default.

[24] In A.I.R. 1928 ALL. 301[19] the application for restoration was filed on the same date between 12 and 1 P.M. along with an affidavit. The applicant was present but on the case being called he went to search for his vakil and when he came back he found that the suit had been dismissed for default. The Court of Small Causes did not accept this as a sufficient cause. In these circumstances the learned single Judge (Niamatullah J,) made the following observations :

"While litigants would do well to act as the learned Judge says they should, we cannot ignore the somewhat natural tendency among the litigants of hurrying to their pleaders when their cases are called on. They expect to find their pleaders and take them in time for the hearing. In most cases, the litigant himself or his pleader appears in Court shortly afterwards. In some cases the pleader is not forthcoming or is busy elsewhere and if the case is dismissed in the meantime, the rule as to restoration should not be so rigorously enforced as to sacrifice the ends of justice which it is intended to subserve. Award of reasonable costs to the opposite party will in general be found to be a sufficiently deterrent penalty on one side and compensation on the other. I should not be understood as laying down a rule of thumb applicable to all such cases. Each case has to be decided on its own facts, but the exercise of discretion should not be divorced from equitable considerations arising from those facts."

[25] This case only shows that the learned Judge did not agree with the view of the lower Court and held it was a sufficient cause. He interfered under S. 25, Small Cause Courts Act, to advance substantial justice between the parties.

[26] *Lahore cases* : A. I. R. 1932 Lah. 387[21] and A. I. R. 1939 Lah. 267.[13] The case in A. I. R. 1932 Lah. 387[21] was a case in which dismissal of the appeal for default was set aside on appeal by a learned single Judge. The facts were totally different. The case was shown last on the list but it was called earlier in order and in time. The appellant was present and he was given only five minutes to call his counsel who was in another Court. The respondent was not present. It was held that the appeal should have been restored.

[27] In A. I. R. 1939 Lah 267,[13] the appeal which was shown as the last in the cause list

was called out at 11-30 A.M. and was dismissed in default. Within a few minutes of dismissal an application for restoration was made, supported by an affidavit, in which it was stated that the appellant could not be present as he was attending another case in another Court at the time, and that the pleader seeing that the case was the last on the list, had gone away to the Bar room expecting that the case would not be taken up for some time. The learned single Judge, therefore, held that the absence of the appellant or his counsel was not intentional in the peculiar circumstances of the case. He distinguished the case in A.I.R. 1927 Lah. 622[22] on the ground that there counsel or his clerk had not cared to see the cause list which had been exhibited several days before, and was grossly negligent in not ascertaining that the case had been fixed for hearing on that date and concluded with the observation:

"Each case has to be decided on its own facts, and in a matter like this no general rule of universal application can be laid down."

This case is easily distinguishable upon facts.

[28] *Madras cases* : A. I. R. 1923 Mad. 63[23] and A.I.R. 1937 Mad. 503.[24] In the first case the facts are not very clear from the judgment. It appears that the decree was passed *ex parte* against the appellant who was not present on the 13th when the case was fixed for hearing. The appellant had started from Trichinopoly by the evening train on the 12th and if the breach on the railway line had not occurred, he would have been in time for the hearing on the 13th. The learned Judges, Schwabe C. J. and Wallace J. held that this was a sufficient cause. The learned Judges were satisfied that the appellant intended to reach the Court on the 13th to conduct his appeal but was prevented from doing so by an inevitable accident for which he was not responsible. The learned Chief Justice remarked:

". . . . It should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right, so far as the other side is concerned, by making the man to blame pay for it."

I am not prepared to hold that an appeal should be restored unless something equivalent to misconduct or gross negligence is shown on the part of the defaulting appellant. I think the sound view to take would be to consider whether the applicant had made out a sufficient cause and where the applicant has failed to show due diligence in the prosecution of his case, he is not entitled to restoration of the appeal.

[29] The above case was followed in A. I. R. 1937 Mad. 503.[24] In this case the appellant's counsel was arguing a case before a Division Bench of the Madras High Court when his case before a single Judge was called. He did not make any representation to the single Judge personally because he expected his case before the Division Bench to be over earlier but he took the precaution of sending information through his clerk to the learned Judge of the difficulty in which he was placed and stating that he would be present before the Court in a few minutes. The learned single Judge dismissed the appeal for default. In giving leave to appeal against his order the learned single Judge says:

"When it was called on, nobody was present on behalf of the appellant. After some delay, during which the Advocate was sent for, a clerk came and said that the Advocate was engaged in another Court."

The learned Judge took the view that the Advocate should have represented his difficulty to the Court either personally or through some friend but he did not do so. He considered the sending of the clerk as tantamount to allowing an Advocate to dictate to the Court when and where he should appear. It is obvious that the case has no application, as no information was given to the Court in the present case even through the clerk that counsel was engaged elsewhere. The remark made by the Bench in that case,

"It will be unmerited hardship if the party's interests should be irreparably prejudiced by reason of every default on the part of counsel"

must be read in conjunction with the facts of that case. The learned Judges recognised that in dealing with an application of this kind the Court has to consider the position of the party concerned rather than the conduct of the member of the Bar though it may some time be difficult to dissociate one from the other.

[30] *Bombay cases* : A. I. R. 1921 Bom. 20,[25] A.I.R. 1938 Bom. 199,[26] A.I.R. 1942 Bom. 198[27] and A. I. R. 1945 Bom. 85.[28] In the first case the inherent powers of the Court were exercised in discharging the order dismissing the appeal for default. A certain person having died during the pendency of the suit, his widow who was a minor applied to be substituted as an heir. She was represented by her father as next friend. The application was dismissed on the ground that the right to sue did not survive and it was ordered that the suit should abate. An appeal having been preferred by the next friend, a pleader was engaged. The pleader died and notice was served upon the next friend directing him to appear and stating that on failure the appeal would be dismissed for default He did not appear and the appeal was dismissed under O. 41, R. 17 in February 1916. In March 1919 on attaining majority the widow filed an application under R. 19 for readmission of the appeal. The learned

Judges in exercising the inherent powers were largely influenced by the fact that if they did not act the minor was likely to lose a large estate for the gross negligence of her next friend.

[31] The case in A. I. R. 1938 Bom. 199[26] is distinguishable on the facts. The case was restored on two grounds, firstly because the applicant was guilty of slight carelessness owing to some misunderstanding and appeared at 1-15 P. M. instead of 11 A. M. and secondly because he applied the same day for restoration.

[32] In A.I R 1942 Bom. 198,[27] the appeal was dismissed for non-deposit of costs for preparation of the paper book of the appeal by the Subordinate Judge, who had appellate powers. He acted on a certain High Court circular in dismissing the appeal and in refusing to restore it he held that he could not go contrary to the strict rule made by the High Court. The rule merely said that the appeal shall be liable to be dismissed and not that the appeal shall be dismissed. The learned Judge held that there was sufficient reason upon the facts of the case for not depositing the costs on due dates and the Subordinate Judge was wrong in not restoring it. Section 151 was applied, it being held that O. 41, R. 19, Civil P. C., was not exhaustive of the powers of the Court in a proper case to readmit an appeal dismissed for default.

[33] The case in A I.R. 1945 Bom. 85[28] only lays down that the Judge is not precluded from exercising his inherent power under S. 151, merely because there are other remedies open to the decree-holder. The case appears to have arisen in execution proceedings.

[34] *Calcutta case* : 43 Cal. 857[29] at p. 877. In this case the suit was dismissed for default under O. 9, R. 8, Civil P. C. The counsel stated before the Court that he had only instructions to apply for adjournment and when this was refused he withdrew from the case. The plaintiff was a lady. The learned Judge on the original side dismissed the suit. It was admitted that the counsel took a wrong course and that he should have gone on with the case and produced other witnesses and asked for adjournment for the production of the plaintiff who was ill at the time The suit was for a large sum of money and there were serious issues involved in the case. Two of the learned Judges held that the suit should be restored. One of the learned Judges expressed doubt whether the appeal should be allowed, but in view of the fact that other members of the Bench were prepared to give an indulgence to the plaintiff, he did not dissent from the order proposed. The learned Judges agreed that counsel was guilty of a gross error of judgment and should not have withdrawn from the case. Accordingly they held that the client should not be penalised to the extent of the dismissal of the claim without investigation.

[35] *Rangoon case* : A. I. R. 1926 Rang. 109[30] This is a single Judge decision of the Rangoon High Court. In this case the appeal was shown as 17th on the list but was taken up at 12-30 P.M. much earlier than the counsel had anticipated. No other facts are given. Probably the matter was brought to the notice of the Court the same day. The appeal was restored on payment of costs holding that it was eminently a proper case for restoration.

[36] *Peshawar case* : A. I. R. 1934 Pesh. 13.[31] This is a single Judge decision of the Judicial Commissioner's Court of Peshawar. In this case also the application for restoration of the suit dismissed for default was put in on the same day. It also appears that counsel appeared before the Court after the suit had been dismissed.

[37] Lastly it was argued that even if the Court held that there was no sufficient cause, the appeal should be restored under the inherent powers of the Court. I have already indicated sufficiently clearly in the preceding paragraphs that apart from the provisions of O. 9 of the Code, the Court has got no inherent powers to restore suits or appeals dismissed for default. The case of execution proceedings stands on a different footing as O. 9 does not apply to those proceedings. No authoritative decision of this Court is cited to show that apart from execution proceedings inherent powers can be invoked in other cases as well. In any view of the matter, even if inherent powers could be invoked, these powers cannot be exercised as a matter of course unless it is necessary in the ends of justice or to prevent an abuse of the process of the Court. Where it is not shown that the litigant or his counsel exercised reasonable diligence in prosecuting the case, on the other hand it appears that he was guilty of negligence and carelessness, it would be opposed to justice, equity and good conscience to exercise these powers in his favour.

[38] I hold, therefore, that no good ground has been made out for readmission of the appeal. I would dismiss this application with costs.

[39] **Kaul J.** — I have had the advantage of seeing the order about to be pronounced by my Lord the Chief Judge and I agree with the conclusion arrived at by his Lordship that no sufficient cause for restoration has been made out. In view of the elaborate discussion of the case law in his Lordship's judgment, I will content myself with stating very briefly my reasons for the view I take.

[40] The appeal which was dismissed for default, and for the restoration whereof the present application is made, was fixed for 13-8-1946. It was shown in the probable list of Bench cases at

NO. 2. The regular list before the Bench had three cases, two first appeals and a section 115-application. One of the two first appeals was a part-heard case adjourned from the previous day. This was dismissed for want of prosecution, and the other first appeal was adjourned. The third case was taken up in its order and disposed of. The regular list being exhausted, the Bench took up the probable list cases. The present applicant's case was called out in its order, but as no one appeared for him, the case was dismissed for default. The following affidavit containing the grounds on which restoration is applied for was filed with the application. It is sworn by Shyam Narain Misra, clerk of the counsel who appeared for the applicant.

"1. That a Bench of this Hon'ble Court was pleased to dismiss the abovenoted appeal for default of appearance at about 11-30 A. M. on 13-8-1946.

2. That the counsel for the applicant was arguing a first civil appeal before the Civil Judge, Lucknow, at the time of the dismissal of the appeal by this Hon'ble Court.

3. That the case had been shown in the cause list in the probable list as second, and the regular case shown in the list before the Bench that has dismissed the appeal was fixed for two days.

4. That the applicant's counsel was (not) and could not be aware that the case was likely to be taken up before the Bench on 13-8-1946.

5. That default in appearance was accidental and not deliberate."

[41] Paragraph 1 of the affidavit contains a statement of fact. So do paras. 2 and 3. The correctness of these paragraphs was not disputed before us. It is paras. 4 and 5 which mention the grounds in support of the application for restoration. If, as is mentioned in para. 4 of the affidavit,

"the applicant's counsel was not and could not be aware that the case was likely to be taken up before the Bench on 13-8-1946"

I am of opinion that the application should succeed. But is this averment correct? The implication underlying the averment contained in this paragraph is that something led the counsel for the applicant to believe that his case would not be taken up by the Bench on 13-8-1946. Nothing is said expressly as to what induced the counsel to entertain this belief. If the only ground for this belief was the fact mentioned in para. 3 of the affidavit, that a case shown in the regular list before the Bench was fixed for two days, I am clear that there does not exist any ground whatsoever for such a belief. The very fact that, even though a case in the regular list was shown as likely to occupy two days, a probable list of cases likely to be heard was published, was sufficient to negative such a belief. Were it otherwise, there would be no meaning in publishing a probable list at all. If in spite of all this any litigant or his counsel acted on the assumption that no case in the probable list would be taken up by the Bench on 13-8-1946, and absented himself accordingly, he cannot but be said to have acted most unreasonably. Such conduct amounts to gross negligence. In any view of the matter, he cannot be said to have been prevented by sufficient cause from appearing when the appeal was called, nor can his default in appearance be said to be accidental. It is clear from the averments made in the affidavit that the counsel for the applicant assumed (in my opinion without any grounds whatsoever) that his appeal, which was mentioned in the probable list, would not be taken up on 13-8-1946. His absence was, in these circumstances, deliberate. When I say so, I do not mean to suggest that the applicant's counsel wilfully absented himself when the case was called, but he acted in a manner which cannot but be described as altogether unreasonable. An act can be called accidental only when the chain of events in which it occurs is such that it could not be foreseen by exercise of ordinary prudence. It is everyday experience of persons engaged in the business of the Courts that cases which are fixed for any day are either not taken up or are disposed of in much less time than was expected; for instance, if a party dies, or there is a settlement arrived at between the parties and they care not to appear, and allow the case to be dismissed. In the present case we have no material before us to show that the applicant or his counsel consulted the counsel engaged in the appeals mentioned in the regular list for the day as to the probable time those cases were likely to take. It appears from the affidavit that a wholly unwarranted assumption was made that no case mentioned in the probable list would be taken up on 13-8-1946, because one of the cases on the regular list was fixed for two days. If any inquiry had been made from the counsel appearing in the cases on the regular list, the applicant would have no doubt come to know that his case would not only be taken up on 13-8-1946, but might well be taken up in the early part of the day. No such inquiry was made, and it appears that the case was left to take care of itself. From what has been stated above, it is clear that no sufficient cause as contemplated by O. 41, R. 19, Civil P. C., is made out.

[42] It may be hard case that the appellant is prevented from having his appeal heard and decided on merits, but as sufficient cause for the applicant's failure to appear when the case was called has not been made out, the application must be dismissed.

[43] It was argued by the learned counsel for the applicant that apart from the provisions of O. 41, R. 19, Civil P. C., the Court could restore the appeal in exercise of its inherent powers. As

pointed out by Chitaley in his Commentary on S. 151, Civil P. C., (Note 2) it has been held by the High Courts of Allahabad, Calcutta, Lahore, Madras, Patna, Rangoon, and the Judicial Commissioner's Courts of Oudh and Sind that there is no inherent power to set aside an ex parte decree, or restore a suit dismissed for default, except under the circumstances and conditions mentioned in O. 9, R. 13 and R. 19 respectively. The same remarks would apply to the provisions applicable to restoration of appeals under O. 41, R. 19, Civil P. C. I agree with the view thus stated.

[44] For the reasons given above, I am of opinion that this application cannot be allowed and should be dismissed with costs.

By Court. — For reasons given in our separate orders, we dismiss this application with costs.

D.S. *Application dismissed.*

A. I. R. (35) 1948 Oudh 125 *[C. N. 44.]*

GHULAM HASAN C. J.

Ram Bharosey — Defendant—Appellant v. *Ram Bahadur Singh and others — Plaintiffs — Respondents.*

Second Appeal No. 186 of 1942, Decided on 1-9-1947, against order of Dist. Judge, Lucknow, D/- 17-3-1942.

(a) Hindu Law — Joint family — Self-acquired property of father — Devolution of, upon sons — It is not joint family property in their hands.

The self-acquired property of the Hindu father when it devolves upon his sons who are members of a joint Hindu family cannot in their hands be regarded as joint family property: 19 A. I. R. 1932 Oudh 158, *Rel. on.* [Para 5]

(b) Evidence Act (1872), S. 18 — Admission by party on pure question of law is not binding on him — Opinion about character of property is question of law.

An admission made by a party on a pure question of law cannot be held to be binding upon him.

Where the defendant has made a statement that the three plaintiffs with their eldest brother were members of a joint Hindu family when the sale deed in question was executed and that the property in suit was their joint family property, the first portion of the statement may be regarded as a statement of fact within his knowledge but the second portion is clearly his opinion about the character of the property which is a question of law and is not therefore binding on the defendant. It is especially so when the statement was made in answer to plaintiff's counsel's statement setting up for the first time in arguments a new case which was in variance with the pleadings. [Para 5]

(c) Limitation Act (1908), Art. 44—Self-acquired property of Hindu father devolving on sons — Eldest major son and mother on her own behalf and as guardian of minor sons executing sale deed —Suit by minor sons to set aside sale in respect of their share — Art. 44 applies.

A Hindu father died leaving behind him a widow, four minor sons and his self-acquired property. The eldest son *R* who had attained majority and the widow as mother and guardian of her three minor sons *B*, *C* and *D* executed a sale-deed in favour of *P*. Subsequently *B*, *C* and *D* brought a suit for setting aside the sale in so far as their share was concerned on the ground that it was not executed for their benefit. It was alleged in the plaint that their father was the absolute owner of the property and it devolved upon the four sons by inheritance as tenants-in-common. The plaint made no mention that the father formed a joint Hindu family with his sons and that sons succeeded as survivors. Two of the plaintiffs *B* and *C* had attained majority three years before suit:

Held that the suit was governed by Art. 44 and not by Art. 144. The mother acted as a natural guardian of her three minor sons and the adult son acted in his individual capacity and not as manager representing the joint Hindu family. The suit was therefore time barred so far as *B* and *C* were concerned and was within time so far as *D* was concerned: 1 A. I. R. 1914 Oudh 338; 7 A. I. R. 1920 Cal. 776 and 7 A. I. R. 1920 Bom. 1, *Rel. on.*; 5 A. I. R. 1918 Mad. 730 and 25 All. 407 (P. C.), *Disting.* [Paras 5 and 9]

Annotation:—('42-Com.) Lim. Act, Art. 44, Ns 2, 3.

Cases referred.—

1. ('03) 30 I. A. 165 : 25 All. 407 : 8 Sar. 483 (P. C.), Gharib-ullah v. Khalak Singh.
2. ('32) 19 A. I. R. 1932 Oudh 158 : 8 Luck. 28 : 137 I. C. 814, Baijnath v. Maharaj Bahadur.
3. ('36) 23 A. I. R. 1936 Oudh 331 : 12 Luck. 273 : 163 I. C. 935, Mt. Sirtaji v. Algu Upadhyay.
4. ('18) 5 A. I. R. 1918 Mad. 730 : 40 I. C. 145, Appanna Prasada v. Appanna Mahapatro.
5. ('14) 17 O. C. 52 : 1 A. I. R. 1914 Oudh 338 : 23 I. C. 406, Sheonatha v. Sheoraj Singh.
6. ('21) 59 I. C. 589 : 7 A. I. R. 1920 Cal. 776, Brojendra Chandra v. Prosunno Kumar.
7. ('20) 44 Bom. 742 : 7 A. I. R. 1920 Bom. 1 : 58 I. C. 257 (F. B.), Fakirappa Limanna v. Lumanna.

Rajeshwari Prasad — for Appellant.
Krishna Swarup Verma — for Respondents.

Judgment.—The facts giving rise to this second appeal are as follows: One Ratan Singh, who was the original owner of the property had four sons, Ram Autar Singh, Ram Bahadur Singh, Sheo Bakhsh Singh and Bachcha Singh. Ratan Singh died leaving his four sons and his widow Mt. Jairaja. On the death of Ratan Singh all the sons were minors and they were entered in the revenue records under the guardianship of their mother. Ram Autar became major on 16-6-1925, and was so recorded. On 31-1-1931, Ram Autar as major and Mt. Jairaja as mother and guardian of her three minor sons executed a sale of the property in suit in favour of Badri Prasad. On 18-2-1941, the suit giving rise to the present appeal was brought by the three sons of Ratan Singh excluding Ram Autar Singh for setting aside the sale in so far as their share was concerned. It was alleged that the deed was not executed for their benefit and was not binding upon them. In the plaint it was clearly stated that Ratan Singh was the absolute owner of the property and he left at his death four sons as heirs. It is significant that no reference was made in the plaint that Ratan Singh formed a joint Hindu family with his sons or that the sons succeeded to his property as

survivors in the joint family. On the contrary, it was alleged that Ratan Singh was the absolute owner and his property devolved upon his four sons by inheritance.

[2] The suit was resisted by the defendant on the ground that the sale deed was binding on the plaintiffs as the consideration was taken for payment of Government revenue and to meet other necessary charges. It was also pleaded that the suit was time-barred as the plaintiffs attained majority more than three years before the institution of the suit.

[3] The trial Court decreed the suit on 30-8-1941. That Court held that although two of the plaintiffs attained majority more than three years before the suit, Bachcha Singh did not become major till August 1938 and the suit which was filed on 18-2-1941, was, therefore, within time. The trial Court further held that, in any case, Art. 144, Limitation Act applied because the sale was made by the eldest son acting as manager of the joint Hindu family. A sum of Rs. 83-2-0 was found to have been taken for the benefit of the plaintiffs and the suit was decreed upon the payment of this amount along with certain expenses of the sale. The lower appellate Court confirmed the decree.

[4] Both the Courts below relied upon an admission of Ram Bharosey defendant made on 13-8-1941, apparently in answer to the plaintiffs' counsel's statement. The plaintiff's counsel stated for the first time on that date that all the four brothers were joint on the date of the sale deed and the property in suit was ancestral joint family property. Ram Bharosey admitted this fact. The arguments were then heard and the judgment was delivered on 30-8-1941. Reliance was placed on 30 I. A. 165[1] in support of the proposition that no guardian can be appointed for a minor in respect of his share in the property of an undivided Mitakshara family, and any transfer made by mother as guardian is without legal effect. The Courts below, therefore, held that the execution of the deed by Mt. Jairaja as guardian for the minors be disregarded and it should be taken to mean that Ram Autar Singh executed the deed as the karta of the joint Hindu family. In this view Art. 44, Limitation Act was held not to apply and Art. 144 was applied. Article 44 prescribes a period of three years for a ward who has attained majority to set aside a transfer of property by his guardian and time begins to run from the date when the ward attains majority. Article 144 gives 12 years' period.

[5] It is contended before me that the Courts below were wrong in allowing the plaintiffs to set up a new case at the time of the arguments which was in variance with their pleadings. It is further contended that the admission made by Ram Bharosey was one on a pure question of law and was erroneous and should not have been held to be binding upon him. I am of opinion that this contention has force. There is good authority in support of the proposition that the self-acquired property of the Hindu father when it devolves upon his sons who are members of a joint Hindu family cannot in their hands be regarded as joint family property: *vide* A. I. R. 1932 Oudh 158[2] which was explained in A. I. R. 1936 Oudh 331.[3] The statement made by Ram Bharosey is as follows:

"Ram Autar, Ram Bahadur, Sheo Bakhsh and Bachcha Singh were members of a joint Hindu family when the sale deed was executed and the property in suit was their joint family property."

The first portion of the statement may be regarded as a statement of fact within his knowledge but the second portion is clearly his opinion about the character of the property which is a question of law. As regards the first portion, the admission is sought to be explained by the learned counsel for the appellant as meaning that they as brothers were living together and I am not prepared to say that this interpretation of the statement is unreasonable. Be that as it may, the statement is in answer to the plaintiffs' counsel's statement made for the first time after the close of the evidence. It is at best an admission which can be withdrawn or, at any rate, explained that it was due to a mistaken view of the law. In any case the admission is contrary to the plaintiffs' own pleadings and the Courts below were not justified in pressing it into service against the appellant's case. If the admission is disregarded, the position is that Ram Autar, the co-executant of the sale deed, acted in his own individual capacity for himself and not as karta of a joint Hindu family consisting of himself and his minor brothers. There is nothing in the deed to show that Ram Autar was acting as the manager. As a matter of law he could not. The property was the self-acquired property of his father and, according to the plaintiffs' own case, had devolved upon his sons not as members of a joint Hindu family but as tenants-in-common by inheritance. Each of the sons had a definite share which he was entitled to alienate. It is obvious, therefore, that Art. 44 will apply to the case. No suit has been brought by Ram Autar to set aside the sale deed *qua* his own share and the plaintiffs have not asked that the sale should be set aside *in toto* but have confined their claim to three-fourths share in the property and have excluded the one-fourth share of Ram Autar. The decision in 30 I. A. 165[1] is not applicable to the facts and circumstances of the present case. In that case no question of the application of Art. 44, Limitation Act arose.

In that case there were three brothers, one of them was major and the other two minors. The mortgage was made by the major brother on his own behalf and by the mother on behalf of the minors. The mortgagee filed a suit to enforce the mortgage. The mother had obtained a certificate of guardianship from the Court. The question raised before their Lordships was that the mortgage was invalid as the mother did not obtain the sanction of Court before making a mortgage. Their Lordships held that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. They further held that the mortgages were not mortgages by the guardian but mortgages by the family entered into by the karta of the family with the concurrence of the second brother who was also probably an adult member. The mortgage was proved to be for necessity and was, therefore, upheld. In the present case, there is no question of any joint Hindu family or the sale having been made by the karta of the joint family. The case was followed in A. I. R. 1918 Mad. 730[4] which was also a case of a joint Hindu family and Art. 44 was held not to apply to a suit by a minor member of the joint family on attaining majority to declare that the alienation by the natural guardian was not binding upon him.

[6] Stuart A. J. C. (later Sir Louis Stuart, C. J.) in 17 O. C. 52[5] applied Art. 44 to a case where the mother of the minors, acting as their guardian, had sold lands belonging to the minors during their minority and the minors had brought a suit for possession of lands more than three years after attaining majority.

[7] Article 44 was also applied by the Calcutta High Court in 59 I. C. 589[6] to a transfer by the mother as natural guardian of her minor son during minority. That was also a case in which the property which had devolved on the son belonged exclusively to the father and did not belong to the family.

[8] The Bombay High Court in 44 Bom. 742[7] also held that a Hindu minor on his attaining majority cannot sue to recover possession of the property transferred by his mother acting as his natural guardian during his minority without suing to set aside the transfer within the period of limitation provided by Art. 44, Limitation Act.

[9] In the present case the mother acted as a natural guardian of her three minor sons and the adult son acted in his individual capacity and not as manager representing the joint Hindu family. In this view of the matter, the suit will be within time so far as Bachcha Singh is concerned, but it would be beyond time in respect of the other two plaintiffs.

[10] Accordingly I allow the appeal and modify the decree of the Courts below by dismissing the suit of Ram Bahadur Singh and Sheo Bakhsh Singh respondents as time-barred and maintain the decree in favour of Bachcha Singh so far as his share in the property is concerned on payment of the proportionate amount found to have been taken for legal necessity. The parties will bear their costs in proportion to success and failure in all the three Courts.

S. C. *Decree modified.*

A. I. R. (35) 1948 Oudh 127 *[C. N. 45.]*

KIDWAI J.

Kamlapat Sahai—Defendant—Appellant v. *Mt. Manho Bibi—Plaintiff—Respondent.*

Second Appeal No. 593 of 1946, Decided on 30-9 1947, against decree of Addl. Civil Judge, Lucknow, D/- 20-9-1946.

Transfer of Property Act (1882), S. 113—Acceptance by lessor of money for use and occupation during pendency of appeal in ejectment suit, whether waiver of notice.

Once a suit for ejectment has been instituted, it cannot possibly be said that any act of the lessor shows an intention to treat the lease as subsisting unless he withdraws the suit. He may renew the lease, in which case it would not be a question of waiver but a question of fresh lease. Where not only had the lessor instituted the suit but he had obtained a decree for ejectment and he had attempted to execute that decree, and he did not withdraw his suit nor did he withdraw the execution proceedings, it could not be said that his action in receiving the money due for the use and occupation of the rooms during pendency of appeal in suit indicated an intention to waive the notice which had already merged in a decree of Court, though in the receipts the word "rent" had been used instead of the words "damages for use and occupation:" 13 A. I. R. 1926 Cal. 763, *Dissent.* [Para 5]

Annotation. — ('45-Com.) T. P. Act, S. 113, Note 3 Pts. 6 and 7.

Case referred:—

1. ('26) 13 A. I. R. 1926 Cal. 763 : 94 I. C. 156, Manicklal Dey v. Kadambini Dassi.

M. K. Seth—for Appellant.

Mahabir Pd. Srivastava—for Respondent.

Judgment.—This appeal arises out of a suit instituted by the respondent against the appellant for arrears of rent and for ejectment from two rooms occupied by the appellant in a building belonging to the respondent situated in Aminabad in the city of Lucknow. The Munsif (North), Lucknow, decreed the suit on 30-1 1946 but the appellant filed an appeal in the Court of the District Judge, Lucknow, on 26-2 1946. During the pendency of the appeal when it came on for hearing on 12-7-1946, the appellant applied to the Additional Civil Judge, Lucknow, stating that a compromise had been arrived at outside the Court, by which the respondent had waived the notice of ejectment and had re-admitted the

appellant to the tenancy of the rooms by accepting rent. It was accordingly prayed that the appeal might be allowed in terms of the compromise. In support of this alleged compromise, the appellant filed two receipts issued by the respondent's husband to him, in both of which it is mentioned that the payment was being accepted for the rent of the months of May and June respectively.

[2] The respondent denied that any compromise had been arrived at or that the notice of ejectment had been waived and that there had been re-admission to tenancy. The appellant produced himself in the witness-box and the respondent's husband was examined on her behalf. The lower appellate Court, on a consideration of this evidence, has come to the conclusion that there was no compromise. It has also not accepted the case of waiver of notice, since the rent was paid not only after the institution of the suit but also after a decree had been passed in favour of the respondent. The appellant has now come to this Court in second appeal.

[3] With regard to the question of compromise, the decision of the learned Additional Civil Judge, Lucknow, is perfectly correct and is based upon good reasons. It is said that the compromise was arrived at in the end of the month of March, yet we find that on 29th March the respondent filed an application in the lower appellate Court objecting to stay of execution proceedings and alleging that the defendant-appellant had been committing default in payment of rent. After contest, the application for stay was allowed on condition that the appellant deposited in Court a sum of Rs. 260 for rent and Rs. 93 for costs. During all this time, no application was made by the appellant for having a compromise, which is alleged to have been already arrived at, duly recorded in Court. After 9-4-1946, also no application for recording of the compromise was made till the date of the hearing fixed, namely 12-7-1946. In these circumstances, it is difficult to believe that there was in fact a compromise in March 1946. The decision of the lower appellate Court on this point must, therefore, be upheld.

[4] On the question of waiver, the learned advocate for the appellant relied upon a decision of the Calcutta High Court reported in A. I. R. 1926 Cal. 763,[1] in which a learned single Judge of that Court has held that acceptance of rent during the pendency of a suit amounts to a waiver of the notice. The learned Judge points out that, in S. 113, T. P. Act, there is no proviso similar to the second proviso contained in S. 112 of that Act. From this he came to the conclusion that a notice could be waived even after a suit had been brought to enforce the rights which arose by reason of that notice. With all deference to the learned Judge I am unable to agree with this reason.

[5] Section 113 does not contain a proviso because it only relates to an act showing an intention to treat the lease as subsisting. Once a suit has been instituted, it cannot possibly be said that any act of the lessor shows an intention to treat the lease as subsisting unless he withdraws the suit. He may renew the lease, in which case it would not be a question of waiver but a question of fresh lease. In the present case not only had the lessor instituted the suit but she had obtained a decree for ejectment and she had attempted to execute that decree. It was only by reason of an order of the appellate Court that execution proceedings were stayed. She did not withdraw her suit nor did she withdraw the execution proceedings. It cannot, therefore, be said that her action in receiving the money due for the use and occupation of the rooms in the months of May and June indicated an intention to waive the notice which had already merged in a decree of Court. It is no doubt true that in both the receipts the word "rent" is used instead of the words "damages for use and occupation," but in view of her conduct, misuse of the word "rent" would not indicate that the notice had been waived. In the present case even the Court in its order dated 9-2-1946, has used the word "rent" for the amount awarded by it for the period subsequent to the passing of the decree. Moreover, it is to be noticed that the plaintiff has instituted a separate suit for the recovery of the money due to her in respect of five months elapsing since she had obtained the decree for ejectment. A part of the amount claimed in the suit was ordered to be deposited before the stay was granted and Ex. A-8, the first of the receipts relied upon, was merely a receipt for the payment of the amount remaining due after the deposit had been made in the appellate Court, and it also evidences payment of the costs of the suit for arrears. In these circumstances the learned lower appellate Court was quite justified in holding that there had been no waiver of the notice or renewal of the lease though it is wrong in referring to S. 112, T. P. Act.

[6] The result is that the appeal fails and is dismissed with costs. The stay order dated 23-1-1947, is withdrawn, and the respondent will be entitled to obtain all money deposited in respect of the amount due to her under the various orders of this Court as well as of the lower Court.

R.G.D. *Appeal dismissed.*

A. I. R (35) 1948 Oudh 129 *[C. N. 46.]*

KIDWAI J.

Sahib Din—Defendant—Appellant v. *Shri Dhanush Dhariji Bhagwan Brajman Bara Asthan—Plaintiff—Respondent.*

Second Appeal No 282 of 1942, Decided on 30-9-1947, against order of Civil Judge, Bahraich, D/-23-4-1943.

Evidence Act (1872), S. 92 Provisos 2 and 4 — Applicability — Subsequent oral agreement between mortgagor and mortgagee regarding the mode of payment — Mortgage deed silent on the method — Agreement in no way modifying or rescinding terms of mortgage — Oral agreement can be proved.

Where the document evidencing the mortgage is silent as to the manner in which the payment is to be made, and there is nothing inconsistent with an oral agreement subsequently entered into between the mortgagor and the mortgagee under which possession of some property is delivered to the latter to realise the profits and utilise them towards the payment of the interest and principal, and which does not in any way modify or rescind any provision of the agreement evidenced by the mortgage deed, proviso 4 to S. 92 has no application. The mortgagor is not therefore prohibited from proving the terms of the agreement: 14 O. C. 321, *Disting.*; 3 A. I. R. 1916 Oudh 313, *Foll.*; 10 I. C. 196 (Oudh); 13 A. I. R. 1926 Oudh 273 and 33 A. I. R 1946 All. 283, *Ref.* [Para 4]

Cases referred:—

1. ('11) 14 O. C. 321 : 13 I. C. 813, Ajodhya Prasad v. Jagadish Singh.
2. ('16) 19 O. C. 166 : 3 A. I. R. 1916 Oudh 313 : 34 I. C. 745, Jagatpal Singh v. Harnam Singh.
3. ('11) 10 I. C. 196 (Oudh), Kedar Singh v. Sumer Singh.
4. ('26) 13 O. L. J. 95 : 13 A. I. R. 1926 Oudh 273 : 1 Luck 160 : 95 I.C 1019, Sukh Lal v. Murari Lal.
5. ('46) 1946 O. W N (H. C.) 5 : 33 A. I. R. 1946 All. 283 : I L. R. (1946) All. 357 : 225 I. C. 482, Balgovind v. Ram Singh.

Mahabir Pd. Srivastava—for Appellant.

H. Husain and H. D. Srivastava—for Respondent.

Judgment.—On 29-6-1925, Sabib Din appellant, executed a mortgage deed of his half share in grove No. 128 in village Bhakrauli Khapurwa, district Bahraich, in favour of the respondent in consideration of a sum of Rs 181 for a period of 2 years. The mortgage deed provided for interest at the rate of 12 per cent. per annum, and it was provided that interest would continue to run at the rate stipulated even after the expiry of the period of 2 years The mortgagee, respondent, instituted the suit, out of which this appeal arises, for his mortgage money and prayed for the sale of the mortgaged property. The defendant appellant in reply pleaded that about a month after the mortgage deed had been executed, at the instance of the plaintiff, he gave to the plaintiff possession over the plot with a view that all the profits from the fruit, as well as from the wood, of the grove should be utilised towards reduction of the interest as well as the principal of the debt It was pleaded that the profits had been sufficient to discharge the entire debt and that, therefore, no decree could be passed in favour of the plaintiff.

[2] The trial Court framed an issue on this question and evidence was recorded. On a consideration of the oral and documentary evidence on the record the trial Court came to the conclusion that possession was delivered to the plaintiff-respondent in accordance with the agreement mentioned above which the Court found to have been proved. On a calculation of profits from this grove the Court came to the conclusion that the debt had been wiped out and it, therefore, dismissed the suit. The plaintiff appealed and the learned Civil Judge of Bahraich allowed the appeal and decreed the suit for Rs. 313-11-0 with costs to be recovered by sale of the mortgaged property. The learned Civil Judge did not go into the question as to whether any such agreement had been arrived at between the parties or not, and, if such an agreement had been arrived at, whether profits from the property were sufficient to discharge the debt. The learned Civil Judge was of the opinion that proviso 4 to S 92, Evidence Act, bars such an inquiry and that this was not a case to which proviso 2 of S. 92 was applicable. He relied upon a decision of a Bench of the Court of the Judicial Commissioner of Oudh reported in 14 O. C. 321[1] and he distinguished the case upon which the defendant relied, namely 19 O. C. 166.[2]

[3] In the arguments before me the learned advocate for the appellant has contended that the view expressed in 19 O. C. 166[2] is the correct view and has been adopted in other cases both by the Court of the Judicial Commissioner as well as by this Court while the facts in 14 O. C. 321[1] are clearly distinguishable from the present case.

[4] In the present case the oral agreement set up does not in any way modify or rescind any provision of the agreement evidenced by the mortgage deed. The interest remains the same All that is done is that a method of payment is provided, and this is a matter which does not in any way affect any of the provisions of the mortgage deed. On this matter the mortgage deed was entirely silent. It cannot, therefore, be said that proviso 4 to S. 92 has any application to the present case. Since the document is silent as to the manner in which the payment is to be made, there is nothing inconsistent with an agreement between the mortgagor and the mortgagee under which possession of some property is delivered to the latter to realise the profits and utilise them towards the payment of his interest and principal. Thus the defendant is not prohibited by the provisions of S. 92, Evidence Act, from proving the terms of the agreement.

[5] In 14 O. C. 321[1] the agreement originally arrived at was varied, since the subsequent contract stipulated that the entire profits derived by the mortgagee from the property mortgaged would be applied in satisfaction of the interest and that he would be entitled to redeem upon payment merely of the principal sum. Thus the stipulation as to interest in the mortgage deed was substantially varied and the rate which had originally been provided for was modified by confining it to the extent of profits derived from the property over which possession was delivered. The learned Judicial Commissioner, therefore, held that proviso 2 to S. 92 did not apply as this was not a matter on which the document was silent and that this term was inconsistent with the terms of the mortgage deed. As I have already pointed out, in the present case the term as to interest remains unaffected and the mortgagee continued to be entitled to get interest at the rate stipulated for. If the income which he derives is not to be sufficient to satisfy that interest, he will be entitled to recover it under the provisions of the mortgage deed. If, on the other hand, the profits exceed the amount of interest payable, they will be credited towards the principal.

[6] In 19 O. C. 166[2] the position was very similar to that in the present case. The learned Judicial Commissioner states:

"I find, therefore, that even after the period mentioned interest ran on the principal sum. In these circumstances there is nothing illegal in an arrangement between the parties by which the mortgagee is put in possession of the mortgaged property in order that he may enjoy the profits and devote the amount realised towards the satisfaction of the interest. I need not quote authorities in support of this view as it is a view which is generally accepted. There is nothing in such an agreement which varies, contradicts, or adds to the terms of the original deed. It is an arrangement which provides for the satisfaction of one of the conditions of the deed."

The principle enunciated in these words is fully applicable to the case before me. This is also the view which has been taken by the Judicial Commissioner in 10 I. C. 196[3] and by this Court in 13 O. L. J. 95.[4] A recent decision of the Allahabad High Court has also adopted the same view: *vide* 1946 O. W. N. (H. C.)5.[5]

[7] In this view of the matter the learned Civil Judge was clearly wrong in not considering the question as to whether the alleged agreement had been proved and as to whether the profits from the property of which possession was delivered were sufficient to discharge the debt. The result is that the appeal is allowed with costs and the decree of the lower appellate Court is set aside. Since, however, all the points involved in the appeal were not decided by the learned Civil Judge, the case is remanded to the Court of the Civil Judge, Bahraich, for disposal according to law and in the light of the remarks made in this judgment.

R.G.D. *Case remanded.*

A. I. R. (35) 1948 Oudh 130 *[C. N. 47.]*

CHANDIRAMANI J.

Gopi Nath Singh — Accused—Applicant v. *Emperor through Surajpal Singh—Complainant — Opposite Party.*

Criminal Ref. No. 40 of 1947, Decided on 23-9-1947, made by Sessions Judge, Rae Bareli, D/-12-5-1947.

Criminal P. C. (1898), Ss. 145 and 146—Both parties in joint possession — Applicability of Ss. 145 and 146.

Section 145 applies only in cases where the dispute is about actual possession and not about joint possession. Section 146 also deals with actual exclusive possession and when S. 145 cannot be applied to cases of joint possession, S. 146 also cannot be applied to such cases. A Magistrate, therefore, has no power to order an attachment under S. 146, when he finds that both the parties are in joint possession: 8 A. I. R. 1921 Oudh 6; 28 A.I.R. 1941 Oudh 515 and 2 A.I.R. 1915 Mad. 396, *Rel. on.* [Para 3]

Annotation: ('46 Com.) Criminal P. C., S. 145 N. 45, S. 146, N. 6.

Cases referred:—

1. ('21) 24 O. C. 167 : 8 A. I. R. 1921 Oudh 6: 63 I. C. 321: 22 Cr. L. J. 625, Arjun Singh v. Chandan Kuar.
2. ('41) 28 A. I. R. 1941 Oudh 515 : 195 I. C. 236 : 42 Cr. L. J. 710, Mahamood Beg v. Ebsan Beg.
3. ('14) 27 M. L. J. 169 : 2 A. I. R. 1915 Mad. 396 : 25 I. C. 324 : 15 Cr. L. J. 572, Mahomed Koolayappa v. Abdul Khadir.

S. B. Bajpai — for Applicant.
N. Banerji — for Opposite Party.
Assistant Government Advocate—for the Crown.

Order.—This is a reference from the learned Sessions Judge of Rae Bareli recommending that a certain order passed by a Magistrate of the 1st class, Rae Bareli, attaching property under S. 146, Criminal P. C., be set aside.

[2] It would appear that on 29-5-1946, one Surajpal Singh filed a complaint against Gopi Nath, Bajrang and 19 others under S. 379/109, Penal Code, alleging that on 27-5-1946 these persons had wrongfully plucked and appropriated fruits of *kathal* and *mahua* trees which belonged to him and one Sheo Kumar Singh. The police after inquiry reported on 12-6-1946, that the accused persons were taking forcible possession of the mango and mahua groves and of 5 bighas land, and it was requested that the land and grove should be attached under S. 145 and the parties be bound over under S. 107, Criminal P. C. The learned Magistrate, Mr. Acharya, on receiving the report of the police directed the property to be attached and issued notice under S. 145, Criminal P. C. In reply to the notice a written statement was filed only by one Fakiray Singh who denied that there was any apprehen-

sion of a breach of the peace or that the complainant Surajpal Singh and Shiv Kumar had any claim to the property. The evidence which was eventually led in the case proved the joint possession of the complainants and of Gopi Nath Singh and others. The learned Magistrate was satisfied that there was an apprehension of a breach of the peace but he held that the parties were in joint possession and under the circumstances ordered the groves in dispute to be attached under S. 146, Criminal P. C. The learned Sessions Judge in his referring order has stated that according to the authorities of this Court S. 145, Criminal P. C., does not apply to cases of joint possession and in such circumstances the order under S. 146 was without jurisdiction and should be quashed.

[3] I have heard the learned counsel for the parties and am satisfied that the reference must be accepted. There cannot be the least doubt from the terms of sub-ss. (1) and (6) of S. 145, Criminal P. C., that S. 145 applies only in cases where the dispute is about actual possession and not about joint possession. This view was taken in the late Judicial Commissioner's Court of Oudh in 24 O. C. 167.[1] The same view was taken in A. I. R. 1941 Oudh 515[2] and it was held that the possession should be actual and exclusive possession. Section 146, Criminal P. C., also deals with actual exclusive possession and if S. 145, Criminal P. C., cannot be applied, S. 146 also cannot be applied. This view finds support in the Madras decision in 27 M. L. J. 169[3] where it was held that a Magistrate has no power to order an attachment under S. 146, Criminal P. C., when he finds that both the parties are in joint possession.

[4] Accordingly I accept the recommendation of the learned Sessions Judge, set aside the order under S. 146, Criminal P. C., and quash the proceedings under S. 145, Criminal P. C. If the district authorities fear a breach of the peace, they may, if so advised, take action under S. 107, Criminal P. C., against the party or parties at fault.

S.C. *Order set aside.*

A. I. R. (35) 1948 Oudh 131 *[C. N. 48.]*

GHULAM HASAN C. J. AND MISRA J.

Mohammad Ibrahim—Applicant v. *Bhopal Singh and another—Opposite Party.*

Criminal Misc. Application No. 58 of 1947, Decided on 30-9-1947.

Contempt of Courts Act (1926), S. 3 — Interference with course of justice—Prejudicial publication during pendency of suit.

The question whether the publication by the other party during the pendency of a suit has resulted in any prejudice to the applicant's defence is immaterial. What is essential under the law is that the publication should be calculated to create an atmosphere of prejudice against a party or such prejudice as may interfere with the course of a fair trial. [Para 9]

A, a taluqdar, sued *B* for declaration of his title to certain plots as part of his estate. While suits in respect of such plots were pending, *C*, the Superintendent of the estate and *D*, standing counsel, estate issued a public notice in papers asserting that the land within the boundary given (which included the plots in suits) belonged to the estate and that the persons entering into transactions with *B* did so at their own risk. Four more suits against *B* for similar declaration were also filed by *A* for other plots transferred by *B* from the same land. In an application under S. 3 by *B* against *C* and *D* that the publication of the said notices amounted to contempt of Court:

Held, that the action of *C* and *D* in publicizing the assertion of title while the matter was *sub judice* amounted to contempt of Court, caused real prejudice to *B* and substantially interfered with due course of justice: *Case law discussed.* [Para 19]

Cases referred:—

1. ('40) 41 Cr. L. J. 584 : 28 A. I. R. 1941 Oudh 14 : 16 Luck. 61 : 188 I. C. 408, Radha Krishna v. Raja Ram.
2. ('31) 18 A. I. R. 1931 All. 420 : 53 All. 712 : 136 I. C. 282 : 33 Cr. L. J. 259, Babu Guru Charan Prasad v. 'Aj' Newspaper, Benares City.
3. ('35) 57 All. 573 : 22 A. I. R. 1935 All. 117 : 159 I. C. 193, Rajender Singh v. Uma Prasad.
4. ('38) 25 A. I. R. 1938 Cal. 772 : I. L. R. (1938) 2 Cal. 447 : 178 I. C. 744, Suresh Chandra v. Biswa Nath.
5. ('39) 43 C. W. N. 333 : 26 A. I. R. 1939 Cal. 672 : I. L. R. (1939) 1 Cal. 399 : 185 I. C. 286 : 41 Cr. L. J. 148 (S.B.), In the matter of Nagendra Nath.
6. (1889) 58 L. J. Q. B. 490 : 61 L. T. 343 : 37 W. R. 724, Hunt v. Clarke.
7. ('31) 58 Cal. 884 : 18 A. I. R. 1931 Cal. 257 : 131 I. C. 267 : 32 Cr. L. J. 675, Anantalal Singha v. Alfred Henry Watson.
8. ('14) 41 Cal. 173 : 1 A. I. R. 1914 Cal. 69 : 20 I. C. 81 : 14 Cr. L. J. 321 (S.B.), Legal Remembrancer v. Matilal Ghose.

R. D. Srivastava—for Applicant.

R. F. Bahadurji and P. N. Asthana—for Opposite Party 1 and 2.

Order. — This application under S. 3, Contempt of Courts Act arises out of two notices dated 16-3-1947, and 18-3-1947, in the National Herald and the Tanweer of Lucknow respectively. The application was filed on 9-4-1947, against Thakur Bhopal Singh, superintendent of the Balrampur estate and Mr. P. N. Asthana, an advocate of Lucknow.

[2] The application was made by one Mohammad Ibrahim, who is defendant in two suits (Nos. 219 and 339 of 1946) instituted by Maharaja Sir Pateshwari Prasad Singh taluqdar of the Balrampur estate, against him in the Court of the Munsif, North Lucknow, where they are pending.

[3] Suit No. 219 of 1946 was filed on 5-7-1946, for possession of land measuring eight biswansis comprised in kishtwar plots Nos. 38 and 45 in village Dogawan Purwa Doem, now a part of Lucknow, by demolition of certain unauthorised

constructions made by Mohammad Ibrahim. In para. 1 of the plaint the plaintiff alleged that he was the owner of village Dogawan and was the owner in possession of the land encroached upon. The suit was decreed *ex parte* on 21-10-1946. An application under O. 9, R. 13, Civil P. C., for setting aside the *ex parte* decree was made on 28-10-1946, but this was dismissed on 30-11-1946. An appeal against the order refusing to set aside the *ex parte* decree was filed in January 1947. The appeal was allowed on 14-5-1947, with the result that the *ex parte* decree was set aside and the case was sent back for trial on the merits.

[4] Suit No. 339 of 1946 was filed on 19-9-1946, upon similar allegations. The land which was the subject-matter of dispute was 12 biswansis and seven kachwansis comprised in kishtwar plots Nos. 38 and 45. The relief sought was a declaration that the Balrampur estate is the owner of the land in suit and that possession should be given to it by demolition of the encroachments and a relief for injunction. An *ad interim* order for injunction was issued against Mohammad Ibrahim and it was made absolute on 18-11-1946, upon his counsel raising no objection to it. Issues were then framed in the case. The case was fixed for evidence on 31-7-1947.

[5] While the aforementioned two suits were pending, the two offending notices under date 16th March and 18-3-1947, appeared in the papers. The notices are identical in terms and the one appearing in the National Herald may be reproduced verbatim:

"Public is informed that the land bounded as below and lying in village Dogawan Purwa Doem belongs to the Balrampur estate Attempts are being made by one Mohammad Ibrahim, son of Haji Amir Khan to lease, and sell and mortgage portions on the said area near Chemartolia. Anybody who enters into any transaction in respect of that land will do so at his risk.

East:—Canning Street and Naka Hindola.
West —Arazi Mazrua mouza Birhana.
North:—Canning Street wa Rasta Abadi Chamartolia.
South:—Aishbagh Road.

Th. Bhopal Singh,
Superintendent,
P. N. Asthana, Advocate,
Counsel for Balrampur estate."

[6] In paras. 6 and 8 of the application it is alleged that the notices published in the papers are calculated to interfere with the course of administration of justice and have a tendency to prejudice the public against Mohammad Ibrahim with a belief that he is a trespasser and an invader. It is also stated that the object of publishing the notices was to cast a cloud over his title and to prejudice the public against him. The application is supported by an affidavit of Mohammad Ibrahim.

[7] In reply the publication of the notices during the pendency of the suits is admitted. It is also admitted that the Balrampur estate had instituted proceedings under S. 145, Criminal P. C., on 8th February 1947 but the application was dismissed on 15th March 1947, by the Magistrate. It is alleged that Mohammad Ibrahim made several transfers of the property in dispute by way of mortgages, sales and leases from May 1946 to May 1947, that enquiries were made from the Balrampur estate by certain persons as to whether the estate had any claim to the land in dispute and that in order to avoid future complications and to protect the interests of the Maharaja of Balrampur as well as the third parties they published the notices. It is also pointed out that the publication of the notices referred to open land situated near Chamartolia in Dogawan which had no concern with the land involved in the civil suits over which the applicant Mohammad Ibrahim had already made constructions and it referred to all that open land about which enquiries were made from the estate. It is further alleged that the publications were made in good faith and were not in any way calculated to interfere with the course of administration of justice nor had they a tendency to prejudice the public against Mohammad Ibrahim.

[8] According to the applicant the offending passage in the notice is the first portion in which the assertion is made for the information of the public that the land with the boundaries given therein in village Dogawan Purwa Doem belongs to the Balrampur estate It is no longer disputed that the boundaries given are comprehensive and would include the lands in dispute in the two suits mentioned above. There can, therefore, be no doubt that the assertion of title contained in the offending passage embraces all lands in village Dogawan Purwa Doem which admittedly comprised the land in dispute as well. The title to the lands in dispute which is only a very small portion of plots Nos. 38 and 45 was *sub judice* in the two suits and it is obvious that a claim of title in respect thereof in a public newspaper would tend to prejudice the defence of the defendant. It is contended on behalf of the opposite parties that the estate could not have mentioned in express terms the exclusion of the land in dispute from the notice as they were referring to the applicant's attempt to transfer lands other than the land in dispute to outsiders, but we do not think that there was any obligation upon the opposite parties to issue any notice in the press. So far as the transfer of the land in dispute in the two cases is concerned, there was no point in issuing a notice as S. 52, T. P. Act, forbade the transfer of property *pendente lite* and if a transfer was made in contravention of the provisions of that section, it had no effect on the rights of the Balrampur estate. So far as

S. 41 of the same Act is co.. rned, even if the applicant assumed the ro'e of ostensible owner of property which did no. belong to him and purported to transfer it, it would be open to the Balrampur estate to sue for injunction to prevent him from alienating property and sue him and his transferee for possession if he persisted in his attitude.

[9] We are far from suggesting that it was not open to the Balrampur estate to issue in the press warning to prospective purchasers against negotiating with Mohammad Ibrahim for transfer of lands belonging to the estate, but the gravamen of the charge which is brought against the opposite parties is that they asserted title for the information of the public to lands which were the subject-matter of adjudication in a Court of law and which upon criminal proceedings having proved infructuous had led to the filing of the suits by the estate. Upon the own showing of the opposite parties there was an apprehension of a breach of the peace regarding the title to the lands in suit and the fact that the estate had to file civil suits against the applicant must be a fact of common notoriety in the locality. The question of title and possession to the lands in suit will, in all probability, depend not only on the documentary evidence but on the oral evidence as well. Witnesses will have to be produced to prove acts of possession or ownership over the land in suit and it may well be, as counsel for the applicant contends, that he will be hampered in procuring evidence or persuading witnesses to come forward and give evidence in his favour. Indeed counsel went the length of saying that he has already been handicapped in the matter as witnesses are not easily forthcoming. The question whether the publications have resulted in any prejudice to the applicant's defence is immaterial. What is essential under the law is that the publication should be calculated to create an atmosphere of prejudice against a party or such prejudice as may interfere with the course of a fair trial.

[10] We may mention in passing that four more suits were filed by the estate for possession in May 1947 in respect of other lands which were alleged to have been transferred by Mohammad Ibrahim to various persons on different dates in January 1947. These transfers were evidenced by registered documents. We do not think that we should extend the scope of the application beyond the two suits to these four suits on the ground that they were in contemplation at the time when the publication of the notices took place but we do think that it would be reasonable to assume that if property belonging to the estate is transferred by a person having no title thereto, the estate is bound to take legal proceedings for vindicating its title. The fact that the applicant was transferring portions of the property from time to time is a circumstance in favour of the exercise of extreme caution and circumspection on the part of the estate to issue any notice in a newspaper publicizing its title. Mr. Bahadurji contended in the course of his arguments that the four suits could not be used as items of complaint by the applicant but they could be considered collaterally. Mr. Bahadurji also contended that the notice was drawn up carelessly but in good faith and the contempt, if any, is a technical contempt and this Court should exercise great caution in using its powers to punish such a contempt. Learned counsel conceded that the motive of the publishers is immaterial so long as the act done amounts to contempt.

[11] In 41 Cr. L. J. 584[1] a Bench of this Court held that the question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere with the due course of justice, and on the same principle it is a contempt of Court to make a speech tending to influence the result of a pending trial whether civil or criminal, or to deliver a speech at a meeting.

[12] In A. I. R. 1931 ALL. 420[2] a Bench of the Allahabad High Court held the publication of a will which was contested in a pending suit as amounting to contempt of Court. It was remarked that the whole object of publishing the will in the advertisement column was to make the public believe in the genuineness of the will and to act upon it. It was observed :

"It is obvious that this was likely to prejudice the mind of the public against the party to the suit who was impugning the genuineness of the document. The publication undoubtedly helped to create an atmosphere in favour of the party relying upon it and adverse to them who were contesting it. If before the disposal of a pending suit in which a will is disputed newspapers are allowed to interfere in this way with a fair administration of justice there would be a serious harm done."

[13] In 57 ALL. 573[3] the defence to the mortgage suit by the plaintiff was that his father had colluded with some unscrupulous money-lenders in taking advantage of the loose habits of the defendant's father and getting fictitious recitals made in the deed regarding payment of earlier debts. During the pendency of the suit a notice was sent by the plaintiff's advocate threatening the defendant that unless he withdrew the plea and paid damages, he would be prosecuted for defamation of the plaintiff's deceased father. A notice for contempt of Court was issued against the plaintiff and his advocate. It was held that the notice amounted to a direct interference with the administration of justice in preventing or attempting to prevent the defendant from pressing the plea, which might prove to be a very

substantial and legitimate defence; and in that way an indirect attempt was made to exclude the plea from the consideration of the Court. The advocate, who drafted and sent the notice on behalf of the plaintiff, was also held responsible for contempt, it being remarked that he could not take shelter behind the act of his client who acted entirely under his legal advice and direction.

[14] In A. I. R. 1938 Cal. 772[4] it was held that the essence of the offence of contempt of Court is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which proceedings must go on. The publication of anything which tends to excite prejudice against the parties or their litigation while it is pending amounts to contempt of Court. In that case a suit was filed on behalf of the public for a declaration that certain land claimed by the defendant was a public pathway. The plaintiffs published a notice calling a meeting and stating that the disputed land which had been used for general public from time immemorial was under risk of being closed. The resolution in the meeting and an article in a newspaper also asserted that the land was being used by the public and protested against the act of the defendant to close it. It was held that these acts amounted to contempt. Khundkar J. in the course of his judgment observed:

"Now the defence of the petitioner in the title suit is that the land is his own and that no person and far less the public have ever enjoyed any right of way over it. What would be the effect and tendency of the resolution quoted above upon the petitioner's ability to establish his defence in the title suit? In my opinion it will be to hamper and circumscribe. Such a resolution passed at a public meeting would predispose people to a belief, right or wrong, that the petitioner was an invader of the public's right. It undoubtedly conveys the impression of a public denunciation of the petitioner's conduct and such a denunciation might well deter inhabitants of the locality from bearing testimony in support of the petitioner's case."

[15] It was observed by a Special Bench of the Calcutta High Court in 43 C. W. N. 333[5] that attacks on the conduct of parties to pending legal proceedings constitute contempt of Court by reason of the very fact that they are such attacks and are to be sternly punished, even though they can have no possible influence on the proceedings or the Court's decision therein.

[16] Learned counsel for the opposite parties relied upon certain passages in the Law of Contempt of Court by Tek Chand (1938 Edn.) at pp. 189 to 191 and (1889) 58 L. J. Q. B. 490=61 L. T. 343[6] and 58 Cal. 884.[7] Some of the passages relied upon are taken from (1889) 58 L. J. Q. B. 490.[6] The result of these cases is summarised at p. 191 as follows:

"The statement of law as contained in the decisions reviewed above has been accepted and followed by the High Courts in this country. The High Courts are chary of using this weapon except where they are forced to do so in order to maintain the dignity of the Courts and to preserve the Majesty of Law, whenever it is threatened to such an extent that failure to take summary action would lead to obstruction to the course of justice. Jenkins C. J. in 41 Cal. 173[8] at p. 221, alluded to the circumstances justifying recourse to the summary process of contempt in the following words:

'It is not enough that there should be a technical contempt of Court: it must be shown that it was probable that the publication would substantially interfere with the due administration of justice'."

We agree with this statement of law, but we cannot help observing that the difficulty often arises when these principles have to be applied to the facts of a particular case.

[17] (1889) 58 L. J. Q. B. 490[6] requires to be carefully examined. Hunt filed an action against Clarke claiming certain moneys for alleged misrepresentations in connection with certain companies. Pending the trial of this action the Star newspaper published a paragraph, which was alleged to offend against the law of contempt. It was addressed to the Investors and others and stated that the case was to be tried by the Queen's Bench Division by special juries and concluded by saying:

"Mourners over the Moldacot fiasco are likely to hear a little inside history of the business."

Clarke instituted proceedings for contempt against the publisher of the Star. He made an affidavit in which he stated that he was not before aware of the paragraph, that the paragraph was inserted in the paper in the ordinary course of business as an item of general news, that he had no interest in the action, and had not inserted the paragraph with any idea of prejudicing the trial and submitted that he had not been guilty of a contempt of Court. Two learned Judges, before whom this matter came up, held that it was not calculated to prejudice the trial of the action and did not amount to a contempt of Court as likely to influence the Judges or the jury. Clarke's appeal against the dismissal of his application was dismissed. Cotton L. J., in the course of his judgment, observed:

"Now these are two distinct questions, and I cannot quite express my concurrence with the view taken by the Divisional Court in saying that by no possibility could what has been done be considered as a contempt, because I think the rule is laid down by Lord Hardwicke, and which has often since been acted upon, that there may be contempt of Court of this kind in abusing the parties or 'in prejudicing mankind against persons before a cause is heard' and, in my opinion, it does technically become a contempt if pending a cause, or before a cause even has begun, any observations are made or published to the world which tend in any way to prejudice the parties in the case, and it may be that in such a case whoever is guilty of such an act would be liable to be committed."

The learned Lord Justice went on to observe:

"My view was in substance this, that where the offence complained of is of a slight and trifling nature, and not likely to cause any substantial prejudice to the party in the conduct of the action or to the due administration of justice, the party ought not to apply, and it is mere waste of time to do so, and that it is not really a proceeding in order to have the case properly conducted and justice properly administered, but that it is a mere waste of time to attempt to throw costs on the person who has done the act, where it is obvious there could not be any case calling upon the Court for committing, which is a most serious matter to be done, and only to be done when the administration of justice really requires it."

Fry L. J. and Lopes L. J. both expressed a dissent from the view of the Divisional Bench and held that it was technically a contempt of Court but one of a slight and trivial character.

[18] This case was followed by Rankin C. J. in 58 Cal. 884[7] where the editor, and the printer and the publisher of the Statesman were charged with contempt for publishing certain articles in the newspaper relating to the trial of certain accused persons charged with throwing bombs and other acts of violence. The Statesman appears to have suggested that the Congress Party could not be acquitted of complicity in or connivance at the acts of violence and the other newspaper "The Advance" had criticised the Statesman upon these suggestions. Mr. Sarat Chandra Bose, who was a prominent member of the Congress Party, appeared for the accused. The Statesman appears to have criticised the action of Mr. Sarat Chandra Bose in appearing for such accused. The accused were referred to as the Chittagong raiders. Mr. Sarat Chandra Bose objected before the tribunal trying those accused to these criticisms and to the use of the word "raiders." The Statesman published another article in which it was made clear that there was no intention to affect in any way the mind of the tribunal trying those men, although the word "raiders" was used without the adjective "alleged." It concluded thus:

"Where juries are not concerned, the Courts in England have been quick in refusing to admit that the mind of the bench can be influenced by an accidental slip in a newspaper. We regret the slip nevertheless."

In the third article the regret was repeated but the criticism against Mr. Sarat Chandra Bose was resumed for his having given up practice at the Bar to devote himself wholly to Congress activities and now defending prisoners charged with complicity in a terrorist outrage. The learned Chief Justice held that prejudice of a fair trial was not part of the editor's purpose, but if one looked at what the tendency of the words which he wrote was, it was technically a contempt of Court. Having regard to the circumstances he observed:

"In my opinion, much as I regret that these references should have been made, I cannot say that I think it even possible to hold that the prejudice in this case arising out of these articles is of a substantial character. It is theoretical and it is at the highest slight, and I do not think it is necessary for the protection of the tribunal which is engaged upon hearing the case at Chittagong that this Court's power to commit should be invoked."

[19] The circumstances of the present case in our opinion leave no manner of doubt that the action of the opposite parties in publicizing the assertion of title while the matter is *sub judice* amounts to contempt of Court. The only other question is whether the action of the opposite parties is such that there is real prejudice caused by the assertion of that title and it amounts to a substantial interference with due course of justice. We think that it does. In coming to this conclusion we have also taken into consideration the fact that the Balrampur estate contemplated a challenge to the applicant's action in transferring properties by suits which they subsequently filed.

[20] Thakur Bhopal Singh, we are informed, is an educated man being a M. A, LL. B., and holds the responsible position of Superintendent equivalent to an assistant manager in the estate. Mr. P. N. Asthana is an advocate who has been practising in Lucknow since 1926. He is described in para. 7 of his application as the standing counsel of the Balrampur estate. We should have thought that a man of his education and knowledge of law should have refrained from making an assertion of title on behalf of his client in newspapers while the question of title was *sub judice*. The suits were filed apparently under his advice as the plaints are signed by him. He also admits that he has been appearing as a counsel for the estate in those cases. Under these circumstances we are not prepared to exonerate either of them from the responsibility for publications. We accordingly hold that Thakur Bhopal Singh and Mr. B. N. Asthana are both guilty of contempt.

[21] Mr. Bahadurji, on behalf of his clients, has offered a verbal apology. In view of these circumstances while convicting the opposite parties of contempt, we think that the ends of justice will be served by giving both of them a warning to desist from such acts in the future. We make no order as to costs of this application.

D.R.R. *Order accordingly.*

A. I. R. (35) 1948 Oudh 135 *[C. N. 49.]*

GHULAM HASAN C. J.

Lalta—Defendant — Appellant v. *Asharfi Lal — Plaintiff — Respondent.*

Second Appeal No. 430 of 1943, Decided on 17-9-1947, against order of Civil Judge, Lucknow, D/-21-10 1942.

Tort — Wrongful arrest and detention — Proof of malice and want of reasonable and probable cause — Onus.

In order to succeed in a suit for damages for wrongful arrest and detention it is not necessary for the plaintiff to prove malice and want of reasonable and probable cause on the part of the defendant in causing his wrongful arrest and detention. [Para 10]

Cases referred:—

1. ('26) 3 O. W. N. 499 : 13 A. I. R. 1926 P. C. 46 : 1 Luck. 215 : 29 O. C. 165 : 95 I. C. 329 (P.C.), Balbhaddar Singh v. Budri Sah.
2. (1870) 5 C. P. 534 : 39 L. J. C. P. 260 : 22 L. T. 721 : 18 W. R. 1003, Austin v. Dowling.
3. ('33) 60 Cal. 955 : 20 A. I. R. 1933 Cal. 708 : 148 I. C. 262, Grinam v. Henry Gidney.
4. ('25) 52 Cal. 615 : 12 A. I. R. 1925 Cal. 884 : 89 I. C. 642, Gouri Prasad Dey v. Chartered Bank of India, Australia and China.
5. (1936) 1 All E. R. 69, Clubb v. Wimpey & Co. Ltd.

Hyder Husain and E. R. Kidwai — for Appellant.
M. M. Gaur and D. N. Mathur — for Respondent.

Judgment.—This appeal arises out of a suit for damages for wrongful arrest. The facts are as follows. One Gur Charan, the brother of Lalta defendant, was murdered in village Jiamau near Lucknow some time in the night of 31st May/1st June 1941. The murder was not traced. Asharfi Lal, the plaintiff, was arrested by the police in connection with this murder on 26-7-1941. He was in the jail lock-up up to the 1st September and then released on bail. Asharfi Lal filed the suit for recovery of Rs. 500 on account of damages for his wrongful arrest and detention. The heading of the plaint mentioned malicious prosecution also but it was scored out. His case was that Lalta, who is his cousin, made false allegations to the police authorities against him and caused him to be arrested on 26-7-1941, on the charge of murdering Gur Charan. He remained in the jail lock-up till he was released on bail. He also alleged that Lalta filed an application before the City Magistrate on 30-8-1941, maliciously and without any reasonable and probable cause falsely alleging that he (Asharfi Lal) had committed the murder of Gur Charan, that he should not be enlarged on bail and that on account of this wrongful act of Lalta the plaintiff suffered loss which he calculated at Rs. 500 on various counts. It may be mentioned that there being no evidence in the case the police submitted a final report on 12-9-1941, and the case was dropped.

[2] The defence was that Lalta made no false allegations before the police, nor did he ask them to arrest Asharfi Lal. He, however, admitted that he made the application before the City Magistrate alleging that if the plaintiff was enlarged on bail, his (defendant's) life will be in danger. According to him, he made the application in good faith after he had ascertained from reliable source that Asharfi Lal had become hostile to him.

[3] The two material issues framed in the case are:

(1) Did the defendant wrongfully cause the plaintiff to be arrested by making an accusation against him of the murder of Gur Charan deceased to the police authorities as alleged?

(2) Did the defendant cause the plaintiff to be detained in custody after the arrest? If so, did the defendant do so maliciously and without any reasonable and probable cause? If so, its effect?

[4] Upon the first issue, the trial Court found that the plaintiff had failed to establish that the defendant caused his arrest and on the second that the defendant's application proved infructuous as the plaintiff was released on bail and, therefore, the defendant did not cause the plaintiff to be detained in custody after his arrest. As a result of these findings, the suit was dismissed.

[5] The lower appellate Court reversed the decision. That Court found that the defendant was instrumental in getting the plaintiff arrested and locked up in jail. The learned Judge further found that the plaintiff remained in the lock-up for one month and four days and this detention was caused by the defendant. The learned Civil Judge further held that the defendant did not plead lawful justification for his action and he was, therefore, liable for damages to the plaintiff. The suit was decreed for Rs. 290 as damages for wrongful arrest. Rupees 100 were awarded for physical discomfort and mental worry and Rs. 190 as fees of counsel.

[6] It has been contended before me that the two essential ingredients necessary to establish the plaintiff's claim were not proved in the case; in other words, it was not proved that the defendant had, without any reasonable and probable cause, brought about the arrest of the plaintiff and that he was guilty of malice. The case in 3 O. W. N. 499[1] is relied upon. That was, however, a case for malicious prosecution and has no bearing on the present case. The present case is one for damages for wrongful arrest and not for malicious prosecution as the pleadings, the issues and the judgments of both the Courts below make it amply clear.

[7] In Halsbury's Laws of England, Vol. 33, part 4, the subject is dealt with under the heading "Trespass to the Person." Paragraph 58 lays down:

"Trespass to the person is a wrong committed against the personal security or personal liberty of one man by another. There are three varieties of trespass to the person, namely, 'assault, assault and battery, and wrongful imprisonment.' The act complained of must be either intentional or negligent and must be done against the will of the person who sues for the wrong."

Paragraph 67 lays down:

"An action of false imprisonment lies at the suit of a person unlawfully imprisoned against the person who causes the imprisonment... The gist of the action of false

imprisonment is the mere imprisonment; the plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification."

Paragraph 80 runs thus :

"The defendant in an action of false imprisonment is entitled to succeed if he pleads and proves that the imprisonment was legally justifiable, or that the cause of action in respect of the imprisonment accrued more than four years before the commencement of the action."

[8] The distinction between malicious prosecution and false imprisonment is brought out in (1870) 5 C. P. 534[2] at p. 540, by Willes J. in the following words :

"The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a Magistrate, one makes a charge against another, whereupon the Magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer."

[9] Thus the question is, does the defendant set a ministerial or a judicial officer in motion? If the former, he may be liable for false imprisonment, if the latter, for malicious prosecution. The reason for this distinction lies in the fact that a man cannot be sued for false imprisonment unless he himself has acted wrongfully. A Court of justice acts in the exercise of its own discretion and its acts cannot render a person who seeks its protection liable for false imprisonment. He is liable for malicious prosecution if he maliciously and without reasonable and probable cause sets a Court of Justice in motion:

"In false imprisonment the onus lies on the defendant to plead and prove affirmatively the existence of reasonable and probable cause as his justification, whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence. The reason for this distinction is that any interference with a man's personal liberty is *prima facie* wrongful, and therefore has to be justified; but any one is *prima facie* entitled to set the criminal law in motion. Imprisonment is a tort : prosecution is not so in itself.

In an action for false imprisonment it is not necessary for the plaintiff to prove that the defendant was actuated by malice": *vide* Ratanlal's Law of Torts, Edn. 13, pp. 203 and 204; Fraser's Law of Torts, Edn. 11, 1927, pp. 195 and 196.

[10] The distinction between an action for malicious prosecution and an action for trespass is clearly brought out in the following passage by S. Ramaswamy Iyer in the Law of Torts, Edn. 3, 1944, at p. 330 :

"There are substantial points of distinction between an action for malicious prosecution and one for trespass to person like false imprisonment or trespass to property like seizure of goods. In an action for malicious prosecution, the plaintiff has to prove absence of reasonable cause. In an action for trespass he has only to prove a trespass and it is for the defendant to prove a good cause or excuse. In the former the plaintiff must prove malice. In the latter he need not, and it is no defence that the dedendant had no malice but made a *bona fide* mistake. Damage is the gist of the former but not of the latter form of action."

I hold, therefore, that in order to succeed it was not necessary for the plaintiff to prove malice and want of reasonable and probable cause on the part of the defendant in causing his wrongful arrest and detention.

[11] It has also been contended that the finding that the defendant caused the arrest and detention of the plaintiff is erroneous in law. Reliance is placed on a decision of Ameer Ali J. in an original suit in 60 Cal. 955.[3] The facts of that case are by no means identical with the facts of the present case. Indeed it appears that the letter which the defendant in that case wrote to the police was for his personal protection and he had no intention whatever to cause the arrest of the plaintiff. After reviewing a large number of authorities including 52 Cal. 615,[4] the learned Judge observed :

"It will be seen that, in each case where the Court has held a private individual responsible for an arrest by the police, the individual has either 'given the plaintiff into custody', "directed the constable to arrest," or "signed the charge sheet" with the knowledge that the plaintiff would not otherwise be detained."

On the facts of that case he held that the defendant's letter contained no direction to arrest and the police officer who arrested him was not a mere "machine", "instrument" or "engine" of the defendant.

[12] In 52 Cal. 615[4] the police officer arrested the plaintiff, an employee of the defendant Bank, after the authorised agent of the Bank had signed a letter charging the plaintiff with a criminal offence. The arrest was effected as a direct consequence of the letter having been signed. The plaintiff was unanimously acquitted of the offence at the High Court Sessions. It was held that the defendant Bank was liable for damages for false imprisonment.

[13] In (1936) 1 ALL. E. R. 69[5] an agent of the defendants, thinking the plaintiff guilty of larceny, gave him into custody and signed the charge sheet. He stated in evidence : "I did give him in charge." This was held in law to amount to false imprisonment and the plaintiff was allowed damages.

[14] Coming to the facts of the case, the simple issue in the case was whether the defendant caused the arrest of the plaintiff. Two documents on this point furnish a conclusive answer. The former is the application made by the defendant to the Deputy Superintendent of Police. The very first paragraph states that at the request of the applicant the police officer had arrested

Asharfi Lal after great efforts and para. 2 of the letter made to the City Magistrate repeats the admission. A considerable emphasis is laid on the necessity of detaining Asharfi Lal in the lock-up and not releasing him on bail as he and his associates were dangerous people and his life would be in great danger if they were enlarged on bail. Another ground for not releasing them on bail was that they will tamper with evidence. The application wound up with the prayer that Asharfi Lal and his companions should not be released so that he may be able to produce ample evidence to obtain their conviction. In view of these admissions of the defendant and the contents of the two applications there is not the slightest doubt that Lalta caused the police to arrest Asharfi Lal. It is also clear that Lalta had not succeeded in getting Asharfi Lal arrested so long as Hamid Ali, the former officer in charge of the police station, was in Lucknow, but he continued his efforts and eventually succeeded in persuading his successor to arrest him. Balbhaddar Singh, Sub. Inspector who arrested him, could not have made the arrest in his discretion. He knew that his predecessor had not agreed to arrest Asharfi Lal and it is only when Lalta persisted in repeating the charge of murder against Asharfi Lal that he persuaded him to arrest him. Balbhadar Singh was not produced. In view of the admissions contained in Exs. 3 and 4, the burden for proving that the arrest was not caused at the instance of Lalta shifted on to him and it was his duty to produce Balbhaddar Singh, if he was anxious to show that the arrest was not brought about by his action but at the own discretion of the police officer. There is also the evidence of Behari (P. W. 6), which was accepted by the lower appellate Court, to the effect that Lalta told the Deputy Superintendent of Police in his presence that a clue to the mystery of murder could be found if Asharfi Lal and his associates were arrested. In view of this clear evidence it cannot be said that Balbhaddar Singh did not act as the agent or the instrument of the defendant. I agree with the finding of the lower appellate Court that the defendant caused the arrest of the plaintiff, that he had no justification for doing so and that the plaintiff is entitled to recover damages for wrongful arrest.

[15] It was also contended that the counsel's fees allowed by the lower appellate Court are excessive. I see no force in this contention. One senior counsel was paid his consulting fee which is only Rs. 75. The other counsel represented him before the police and the City Magistrate and was paid Rs. 110 for his fees. I do not think that the fees are excessive.

[16] The appeal fails and is dismissed with costs. As the appeal has been dismissed, stay order dated 5-2-1943, passed on Civil Miscellaneous Application No. 1020 of 1942 is hereby vacated.

D.R.R. *Appeal dismissed.*

A. I. R. (35 1948 Oudh 138 *[C. N. 50.]*

KIDWAI J.

Gargi Din—Plaintiff—Appellant v. *Bilas—Defendant—Respondent.*

Second Appeal No. 181 of 1942, Decided on 15-9-1947, against decree of Civil Judge, Bahraich, D/ 3 2-1942.

(a) Interpretation of statutes—Procedural laws.

Laws introducing a change in procedure (e. g. U. P. Tenancy Act, 1939) have immediate effect. [Para 6]

Annotation:—('44-Com.) C. P. C., Pre. N. 3 Pt. 7.

(b) U. P. Tenancy Act (17 [XVII] of 1939), Ss. 183 and 242 — Suit under S. 183 — Jurisdiction of civil Court.

A suit for possession by a tenant against a person allowed by the landlord to occupy a plot comes within S. 183, U. P. Tenancy Act, and the Civil Court has no jurisdiction to entertain it. [Para 6]

(c) Civil P. C. (1908), S. 9—Objection to jurisdiction—Court is bound to enquire.

Jurisdiction is *prima facie* determined according to the averments in the plaint. But if facts are brought to Court's notice indicating that a different Court has jurisdiction, it is bound to enquire into them : 16 A. I. R. 1929 Oudh 91, *Ref.* [Para 7]

Annotation:—('44-Com.) C. P. C., S. 9 N. 3, Pt. 10.

Case referred:—

1. ('28) 5 O. W. N. 1117 : 16 A. I. R. 1929 Oudh 91 : 4 Luck. 347 : 114 I. C. 507, Manohar Lal v. Mohre Lal.

R. B. Lal and S. B. Chaudhari— for Appellant.
Mahabir Pd. Srivastava — for Respondent.

Judgment. — Gargi Din, plaintiff-appellant, holds a considerable area of tenancy land at a rental of Rs. 436-11-0 per annum from the Kapurthala estate in village Bakaina, district Bahraich. Included in this land is plot No. 1309/1. It appears that, following floods in the year 1938, when the whole abadi of village Pachdeori was destroyed, the defendant, who was a resident of Pachdeori, was allowed by the Kapurthala estate to build a house on a part of plot No. 1309/1, which appears to have been lying vacant. The defendant built his house and moved into it and began living in it sometime in 1938 to 1939.

[2] On 25-1-1941, Gargi Din instituted the suit out of which this appeal has arisen against Bilas, alleging that :

(1) he was the tenant of the plot in suit;

(2) Bilas had, without any right, constructed a house on a portion of plot No. 1309/1 and had thus dispossessed the plaintiff; and

(3) damage amounting to Rs. 20 had been caused by this action to the plaintiff.

He accordingly claimed :—

(a) a decree for possession over the land in suit;

(b) a permanent injunction directing the defendant to remove the coustructions and not to interfere with the plaintiff's possession; and

(c) damages amounting to Rs. 20 as well as costs of the suit.

[3] The Kapurthala estate was no party to this suit and Bilas, the sole defendant, denied the plaintiff's tenancy and pleaded :

(a) That he had obtained the land from the landlord for construction of his house and had built his house more than 2½ years before the filing of the suit.

(b) That, even if the plaintiff was ever a tenant of the land in suit, he had lost his tenancy rights.

(c) That, if the plaintiff had any remedy it was against the Kapurthala estate which was a necessary party, and

(d) That the civil Court had no jurisdiction.

[4] The Munsif framed an issue on tenancy right and, under the provisions of S. 288, U. P, Tenancy Act, he referred it to the revenue Court for a finding. The revenue Court found that, though the plaintiff had been a tenant of the land in suit, he had lost his tenancy by reason of the fact that he had been dispossessed more than one year before the suit and consequently his claim for restoration of possession was barred by S. 129, Oudh Rent Act, which was in force at the time of his dispossession. On receipt of this finding, the Munsif framed two more issues, one as to damages and the other as to relief. It was agreed between the parties that the damages should be taken to be Rs. 10, but as a result of the finding of the revenue Court, the suit was dismissed.

[5] The plaintiff appealed and the Civil Judge of Bahraich upheld the decree of the trial Court. The trial Court had failed to frame an issue on the question of jurisdiction is spite of the plea having been taken by the defendant. The appellate Court felt it necessary to decide this point and held that the civil Court had jurisdiction. This finding as to jurisdiction is challenged by the defendant-respondent.

[6] The suit was instituted at a time when the U. P. Tenancy Act (17 [XVII] of 1939) was in force. The jurisdiction of rent Courts and the procedure to be followed must, therefore, be determined in accordance with the provisions of that Act since laws introducing a change in procedure have immediate effect : whatever may have been the position under the Oudh Rent Act we are no longer concerned with it because S. 242, U. P. Tenancy Act, clearly provides that "no Court other than a revenue Court shall .... take cognizance of any" suit of the nature specified in Sch. 4 to the Act. Among the suits so specified are suits under S. 183: *vide* Group B, item 19. Thus, if the present suit comes within the scope of S. 183, Tenancy Act, the civil Court will have no jurisdiction to entertain the suit. That section covers the case of a suit not only against the landlord but also against "any person admitted to or allowed to retain possession of the holding by such land-holder, or person whether as tenant or otherwise."

[7] In the present case the defendant expressly pleaded, and the evidence clearly establishes that the defendant had been allowed to take possession of the land by the landholder. Thus the case was exclusively triable by the revenue Court and the civil Court had no jurisdiction. One of the grounds given by the learned Civil Judge for rejecting the plea of want of jurisdiction is that jurisdiction is determined according to averments in the plaint. This is, however, only *prima facie* and, if facts are brought to Court's notice which would indicate that a different Court has jurisdiction, it is bound to enquire into them : *vide* 5 O. W. N. 1117[1] and also Chitaley's Commentary on the Code of Civil Procedure, Vol. I, p. 95, Edn. 4, wherein the law is collected. In the present case it has been found by both the Courts below that the defendant had been allowed by the landlord to obtain possession. Thus the civil Court had no jurisdiction and the plaint should have been returned for presentation to the proper Court.

[8] The result is that the appeal is allowed and the judgment and decrees of both the Courts below are set aside. The case is sent back to the Court of the Munsif, Kaisarganj, Bahraich, with directions that he shall return the plaint under the provisions of O. 7, R. 10, Civil P. C., for presentation to the proper Court. In the circumstances the order of the lower appellate Court as to costs shall stand and the parties shall bear their own costs of this appeal.

D.R.R. *Appeal allowed*

A. I. R. (35) 1948 Oudh 139 *[C. N. 51.]*

KAUL J.

Lachmi Narain — Plaintiff — Appellant
v. *Lachmi Narain and another—Defendants —Respondents.*

Second Rent Appeal No. 33 of 1942, Decided on 24th September 1947, against order of Addl. Civil Judge, Sitapur, D/- 21st March 1942.

(a) Evidence Act (1872), S. 101 — Ejectment suit —Question of title—Burden of proof—Weakness in defendant's case cannot be taken advantage of.

In a suit for ejectment, it is upon the plaintiff to make out his title by definite evidence which is not open to any reasonable doubt. He cannot succeed merely by showing a semblance of title or by adducing evidence which would support the case only so far as to establish it to some slight degree of probability. He

cannot rely on the weakness of the defendant's title, but must succeed on the strength of his own. [Para 8]

(b) Evidence Act (1872), S. 83 — Settlement maps are not documents of title.

The settlement maps, however important they may be, and whatever be their evidentiary value, cannot take the place of documents of title. [Para 8]

(c) Civil P. C. (1908), S. 100 — Inferences drawn from documents not being documents of title, in deciding question whether particular area falls within certain village — Interference in second appeal.

Even though the settlement maps which are not documents of title, prepared at the subsequent settlement supersede those prepared at the previous settlement, it is open to the Court to take them all into consideration as historical material in considering whether a particular field falls within a particular village. It is further entitled to draw inferences from all these documents and to form its conclusion on the basis of such inferences. Even if the lower Courts commit an error in drawing such inferences, that would not justify interference with the conclusion arrived at by them in second appeal. Whether a certain field is included within the boundaries of one village or another village is a question of fact. High Court has no jurisdiction to reverse the finding of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law. Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundation of rights, but were really historical material, have to be construed for the purpose of deciding the question : 17 A. I. R. 1930 P. C. 91; 10 A. I. R. 1923 P. C. 187 and 19 W. R. 222 (P. C.), *Rel. on.* [Para 10]

Annotation : ('44-Com.) Civil P. C., Ss. 100-101, Note 29 and Note 51 Pt. 5.

Cases referred :—

1. ('30) 57 I. A. 86 : 17 A. I. R. 1930 P. C. 91 : 11 Lah. 199 : 122 I. C. 316, Wali Mahomed v. Mahomed Bakhsh.
2. ('23) 10 A. I. R. 1923 P. C. 187 : 74 I. C. 482 (P.C.), Midnapur Zamindari Co. v. Umacharan Mandal.
3. ('73) 19 W. R. 222 (P.C.), Nowbut Singh v. Chutter Dharee Singh.

Niamat Ullah and M. P. Srivastava — for Appellant.

Nasirullah Beg, Government Advocate — for Respondent 2.

Judgment.—This rent appeal arises out of a suit brought by the present appellant under S. 127, Oudh Rent Act, for possession of plot of land in village Dulamau, which defendant-respondent 1 was cultivating without the plaintiff's consent and rent. The suit was dismissed by both the Courts below, hence this appeal.

[2] The material facts lie within a short compass : Villages Dulamau and Bhagat Sikror in tahsil Biswan of Sitapur District, lie adjacent to each other. The suit in the trial Court was brought on the allegation that the defendant had taken possession of Plot No. 479 (1·2 acres) two years before the institution of the suit and was cultivating the same without the plaintiff's consent. The plaintiffs prayed for rent for the period in suit and for the defendant's ejectment. The defendant pleaded that the land in suit did not belong to Dulamau but was part of village Bhagat Sikror, that it had been let out to him by Mallanpur estate to which Bhagat Sikror appertained and that he had been paying rent to the said estate. As the management of the Mallanpur estate had been assumed by the Court of Wards, it was also impleaded as a defendant. The Court of Wards supported the defence put forward on behalf of defendant 1.

[3] After the passing of the U. P. Tenancy Act the suit was treated as one under S. 180 of that Act. As a question of proprietary title was raised, an issue was framed on that point and referred to the civil Court.

[4] The learned Munsif of Biswan, before whom the matter came up for consideration, appointed a commissioner to survey the locality, prepare a plan and report whether the land in dispute lay in Dulamau or Bhagat Sikror. The commissioner prepared a plan and filed his report. Having considered the same and the oral evidence which was led before him, the Munsif came to the conclusion that the land in suit was not proved to belong to Dulamau but appertained to village Bhagat Sikror. On receipt of this finding the revenue Court dismissed the suit. An appeal preferred to the District Judge of Sitapur, which was disposed of by the Additional Civil Judge in that district, was unsuccessful. The present appeal is preferred against that decision.

[5] It was contended by the learned counsel for the respondent that the appeal was concluded by a finding of fact with which this Court had no jurisdiction to interfere in second appeal. Having given the matter my careful consideration, I am of opinion that this objection must prevail. The suit was decided by both the Courts below mainly on a consideration of the report submitted by the commissioner, to which no objection was taken by either party, and the documents produced before them. The commissioner had before him the maps prepared at all the four settlements, which had taken place from time to time in tahsil Biswan, wherein Dulamau and Bhagat Sikror lie. It appears from his report that the commissioner experienced considerable difficulty in ascertaining any fixed point in these villages from which he could start his survey. He took the boundary pillars (*sihadda*) between these two villages and the boundary pillar of Bahraich district as one fixed point, and the *sihadda* between villages Dulamau, Bhagat Sikror and Hariharpur as the second fixed point. He prepared three plans locating the position of the land in dispute on the basis of the maps of the last three settlements. The sketches numbered 1, 2 and 3 on the plan accompanying the report show the situation of the

disputed land with reference to the three said maps: (1) that of 1936-37; (2) that of 1928-29; and (3) the third which is general known as the *darmiani* settlement. According to all these sketches part of the land lies in village Dulamau and the rest in village Bhagat Sikror. When the commissioner attempted to locate the position of this land with reference to the map of the first regular settlement, he was faced with another difficulty. He noticed that the present *sihaddas* between villages Dulamau, Bhagat Sikror and Hariharpur did not occupy the same position as appeared from the map of the first regular settlement. He could not ascertain definitely which of the *sihaddas* had changed their positions. He drew another figure, which is marked No. 4 on the plan accompanying his report, on the assumption that the west boundary pillar was in its old place and that the second boundary pillar did not occupy its old position. The sketch drawn on this assumption showed that no portion of the disputed land lay in village Dulamau. The commissioner, however, as is clear from his report, was very doubtful as to the accuracy of the figure drawn by him on the material furnished by the map of the first settlement.

[6] The plaintiff did not produce any document of title, nor did he produce the khasra of the entire village Dulamau which could have shown the area that was settled with him at the last settlement, and enabled the Court to infer, after a survey of the locality, that the land in dispute formed part of that area. Though settlement maps are official records entitled to weight, they are, it was frankly conceded by Mr. Niamatullah, learned counsel for the appellant, not documents of title. Copies of certain *fards-mutabiqat* which gave the numbers of different plots at one settlement, as also the corresponding numbers of those plots in the previous settlement, were produced; but it was seen that they were not at all helpful as they were obviously wrong. Accordingly there was no material before the Courts below, except the report of the commissioner, and the plan prepared by him, giving his conclusions as arrived at by reference to the map prepared at the four settlements. It was impossible to reconcile them. The Courts below had taken the view that though it would appear according to the maps of the last three settlements that part of the land in dispute lay within the boundary of village Dulamau as found by the commissioner, it was not clear that this was so according to the map of the first settlement. On the other hand, it appeared that probably the whole of this land belonged to village Bhagat Sikror at the time of the first regular settlement.

[7] In fairness to the commissioner, it must be conceded that he was doubtful if this conclusion was definitely borne out by the evidence furnished by the map of the first settlement. The Courts below, it would thus appear, were left in doubt. In fact they attached considerable importance to the map of the first regular settlement and were inclined to be of opinion that the disputed land really belonged to village Bhagat Sikror. This being a suit in ejectment, the plaintiff having failed to satisfy the Court as to the truth of his claim, the suit was dismissed.

[8] It was strenuously argued by the learned counsel for the appellant that though the settlement maps were not documents of title, they were very important documents and formed the basis of the record of rights which were documents of title, and accordingly considerable weight should be attached to them. The proposition as stated in this bald form is unexceptionable, but we cannot lose sight of the fact that the settlement maps, however important they may be, and whatever be their evidentiary value, cannot take the place of documents of title. In a suit for ejectment, it is upon the plaintiff to make out his title by definite evidence which is not open to any reasonable doubt. He cannot succeed merely by showing a semblance of title or by adducing evidence which would support the case only so far as to establish it to some slight degree of probability. He cannot rely on the weakness of the defendant's title, but must succeed on the strength of his own.

[9] Looking at the question from this point of view, the Courts below, when they were not satisfied with the proof adduced by the plaintiff, were justified in throwing out his claim.

[10] It was argued by the learned counsel that the Courts below had committed an error of law in so far that they attached undue importance to the map of the first settlement. Under S. 52, Land Revenue Act, when any local area is under record operations, the Record Officer is required to prepare for each village therein a map and field-book which shall thereafter be maintained by the Collector (as provided by S. 28), instead of the map and field-book previously existing. The learned counsel contended that the map prepared at each succeeding settlement superseded the map of the previous settlement and accordingly the Courts below should not have allowed themselves to be influenced by the map prepared at the first regular settlement. This argument is not without force, but herein lies the difficulty arising out of the distinction between a document of title and other documents. Settlement maps not being documents of title, even though maps prepared at the subsequent settlement supersede those prepared at the previous settlement, it was open to the

Courts below to take all these documents into consideration. They were further entitled to draw inferences from all these documents and to form their conclusion on the basis of such inferences. Even if they committed an error in drawing such inferences, that would not justify interference with the conclusion arrived at by them in second appeal. Whether a certain field is included within the boundaries of one village or another village is a question of fact. Under S. 100, Civil P. C., a High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law. It was held in 57 I. A. 86[1] at p. 92 that where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundation of rights, but were really historical material, have to be construed for the purpose of deciding the question. In A. I. R. 1923 P. C. 187[2] the question which the Judicial Committee had to decide was the date of the origin of an under-tenure. The first appellate Court fixed the date from the contents of some documents. It was held that the question being one of fact, could not be interfered with in appeal. In 19 W. R. 222,[3] it was held by the Privy Council that a second appeal would not lie because some portion of the evidence might be contained in a document or documents and the first appellate Court had made a mistake as to its meaning. In the case before me the lower Courts have considered the entire material placed before them, and the commissioner's report which was based on the maps prepared at the four settlements in Biswan tahsil. Both the Courts below have concurrently come to the finding that the land in dispute is not proved to belong to village Dulamau. Even if they drew any inferences from these settlement maps and the *fards-mutabiqat* produced before them with which I am not prepared to agree, sitting in second appeal I have no jurisdiction to interfere with their finding based on such inferences. The result, therefore, is that the appeal fails and is dismissed with costs.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 142 *[C. N. 52.]*

GHULAM HASAN C. J.

Mohd. Amir Ahmad Khan — Plaintiff— Appellant v. *Bachchoo Singh — Defendant-Respondent.*

Second Appeal No. 334 of 1942, Decided on 3-9-1947, against order of Addl. Civil Judge, Sitapur, D/- 30-5-1942.

(a) Landlord and tenant—Abadi—Conversion of kachcha well into pacca by riyaya without permission of landlord—Effect.

A riyaya is competent to sink a well without the permission of his landlord on such portion of the abadi land as has been used by him as an appurtenance to his dwelling house. The conversion of a kachcha well into a pucca well without the permission of the landlord furnishes no cause of action to the latter to sue for demolition of the well : 4 A. I. R. 1917 Oudh 79; 6 A. I. R. 1919 Oudh 215 and 12 A. I. R. 1925 All. 341, *Rel on.* **[Para 8]**

(b) Civil P C. (1908), S. 100 — Questions of fact and law—Finding that certain plot was used as sahan darwaza or appurtenant to a person's house.

The findings that a person had been using a certain plot as his sahan darwaza or as appurtenant to his house for a long time are findings of fact which cannot be challenged in second appeal. When, however, the first finding depends upon the interpretation of the settlement khasra which involves a question of law it can be challenged in second appeal : 23 A. I. R. 1936 P. C. 83, *Rel. on.* **[Para 7]**

Annotation—('44-Com.) C. P. C., S. 100, Notes 29, 52 and 53.

Cases referred :—

1. ('38) 1938 O.W.N. 285, Hanuman Pershad v. Indra Bikram Singh.
2. ('42) 1942 O.W.N. 113 : 29 A. I. R. 1942 Oudh 306: 17 Luck. 610 : 199 I. C. 12, Birendra Bikram Singh v. Hanoman Prasad.
3. ('36) 1936 O. W. N. 153 : 23 A. I. R. 1936 P.C. 83 : 160 I. C. 579 (P. C.), Ballabh Das v. Nur Mahomed.
4. ('40) 1940 O. W. N. 990 : 28 A. I. R. 1941 Oudh 45: 16 Luck. 223 : 191 I. C. 157, Mahomed Mehdi v. Jagat Singh.
5. ('17) 4 O. L. J. 454 : 4 A. I R. 1917 Oudh 79 : 42 I. C. 51, Mahabal Kurmi v. Sarju.
6. ('19) 6 O. L. J. 281 : 6 A. I. R. 1919 Oudh 215 : 51 I. C. 1006, Sheo Sahai Singh v. Rajeshwar Bali.
7. ('25) 47 All. 541 : 12 A. I. R. 1925 All. 341 : 85 I. C. 1, Mahadeo Rai v. Jan Muhammad.

Akhtar Husain—for Appellant.

S. C. Das—for Respondent.

Judgment.—This is a plaintiff's appeal. The plaintiff came to Court on the allegation that he is the owner of village Lalpur included in village Shankarpur, pargana Mahmudabad and the defendant is a riyaya in the village. According to him, the defendant had made a pucca well on the disputed land in February 1939 without his permission and despite the opposition by the plaintiff's servants. He sued for the recovery of possession by demolition of the pucca well and Rs. 25 as damages.

[2] The defence was that the defendant and his ancestors had been in possession of the land in suit as sahan darwaza, that there was a chabutra used for worshipping Mahadeoji and a nim tree and that formerly the well was kachcha and was made pucca without any objection from the plaintiff. An application for amendment of the pleadings was made on behalf of the defendant whereby he further pleaded that the land was appurtenant to the defendant's house. He explained it to mean that the land is very necessary for the defendant's use.

[3] A commissioner appointed by the Court prepared a plan of the disputed land with

reference to the khasra abadi of the first settlement. This shows that Plot No. 43 contained the house of Bakhtawar Singh, the great grandfather of the defendant; that Plot No. 69, which is to the east of it, was his sahan darwaza; that Plot No. 70 to the east of 69 was a chabutra with a nim tree and to the east of this plot is Plot No. 60, upon which admittedly the pucca well stands.

[4] The issue framed was :

"Does the well in suit stand on the sahan darwaza or the appurtenant land of the defendant's house? If so, its effect?"

[5] Upon this issue the trial Court held that the well in suit does not stand on the sahan darwaza or the appurtenant land of the defendant's house. The trial Court relying upon a decision in 1938 O. W. N. 285[1] which was reversed in 1942 O. W. N. 113,[2] did not decree the demolition of the well but awarded Rs. 30 to the plaintiff as compensation.

[6] The lower appellate Court has reversed the decree. That Court recorded the finding that Plot No. 60 was in the possession of the defendant as sahan darwaza. He further held that the defendant had been in possession of the plot in question as appurtenant to his house for a long time. Lastly he held that the well in suit had been built at the site of an old kachcha well and was made pucca by the defendant because it used to get chocked in every rainy season. According to the lower appellate Court, the construction of the pucca well was not a new encroachment and could not give any right of action to the plaintiff. The suit was dismissed as a result of these findings.

[7] The findings that the defendant had been using the plot as his sahan darwaza or as appurtenant to his house for a long time are findings of fact which cannot be challenged in second appeal. The first finding, however, depends upon the interpretation of the settlement khasra which does involve a question of law : *see* 1936 O.W.N. 153.[3] That finding depends upon the construction of certain entries in Ex. A-2, the khasra of the first settlement. It shows that No. 43 is the house of Bakhtawar Singh, No. 60 is shown as *uftada main darakht nim qabza* Bakhtawar Singh, No. 69 is shown as sahan darwaza of Bakhtawar Singh, No. 70 chabutra Bakhtawar Singh and a nim tree and 71 is shown as rasta. Now a careful examination of the map prepared by the Commissioner, in accordance with these entries, shows that the present position of these plots is that not only Plot No. 43 but Plot No. 69 which was the original sahan darwaza of Bakhtawar Singh has been built upon. This is obviously an unauthorised use of the sahan darwaza, which was acquiesced in by the plaintiff and no suit for demolition was brought in respect thereof. Plot No. 70, which was the chabutra, is also partly built upon so that the defendant has been from time to time extending his possession to the east of his house to land on the pretext of using it as sahan darwaza so much so that Plot No. 60, open parti land, came to be used by the defendant either as sahan darwaza or as land appurtenant to his house. The entry against Plot No. 60, in my opinion, was rightly interpreted by the trial Court as meaning that the words "qabza Bakhtawar Singh" relate to the nim tree only and not the entire Plot No. 60, the reason being that Bakhtawar Singh was already in possession of Plots Nos. 67, 68, 69 and 70 as his sahan darwaza and appurtenances and if Plot No. 60 was intended to be sahan darwaza of Bakhtawar Singh, it would have been shown as such and not as uftada land. I am, therefore, not prepared to hold upon the khasra entry that Plot No. 60 was used as sahan darwaza by the defendant. The first finding of the lower appellate Court must, therefore, be set aside as being vitiated by an erroneous interpretation of the khasra entry.

[8] The reversal of this finding, however, has no effect upon the plaintiff's case, as the second finding must stand undisturbed. The only thing that has been urged on behalf of the appellant is that the defendant's pleader in his pleadings before the Court merely introduced the amendment that the plot was appurtenant or necessary to his house but he nowhere stated that he had been in possession of the plot for the requisite period of 12 years, nor gave any evidence to show his possession for over 12 years. The plaintiff's possession, it is argued, must be presumed to exist over all parti land in view of 1940 O. W. N. 990.[4] This contention, however, is not tenable in view of the clear finding of the lower appellate Court based as it is on admissible evidence that the defendant has been in possession of Plot No. 60 as appurtenant to his house for a very long time. The finding, in my opinion, is not open to a reconsideration in second appeal. Such being the case, the only other question which remains to be decided is whether the conversion of a kachcha well into a pucca well furnishes any cause of action to the plaintiff to sue for demolition of the well. It was held as long ago as 1917 by Lindsay J. C. in 4 O. L. J. 454[5] that a riyaya is competent to sink a well without the permission of his landlord on such portion of the abadi land as has been used by him as an appurtenance to his dwelling house. The well constructed in this case was a pucca well without the permission of the zamindar. This view was followed by Kanhaiya Lal J. C. in 6 O.L.J. 281.[6] Both these cases were followed

by a Bench of the Allahabad High Court in 47 ALL. 511.

[9] I hold, therefore, that the decree of the lower appellate Court is correct. The appeal is dismissed with costs.

D. H. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 144 *[C. N. 53.]*

GHULAM HASAN C. J. AND KAUL J.

Bajrang Bahadur Singh — Decree-holder — Applicant v. *Birendra Bikram Singh — Judgment-debtor — Opposite Party*

Civil Misc. Appln. No. 1105 of 1946 filed in Exn of Decree Appeal No. 16 of 1943, Decided on 12th August 1947.

(a) Civil P. C. (1908), O. 41, R 19 — Sufficient cause.

The appellant had engaged two counsel one of whom was in charge of the appeal and its file but on his appointment as Judge returned the file to the appellant. Notice of hearing was sent to the other counsel who intimated it by letter addressed to the agent of the appellant. The counsel for the appellant who had not been paid his fees, had left for Agra for some other engagement without making any arrangement for the representation of the appellant on the date of hearing. The appellant himself did not even care to pay his fees or to send the file of the appeal to the counsel to enable him to prepare the case and appear at the hearing. Nor did he take any steps for prosecution of his appeal. The appeal was consequently dismissed for default. On application for restoration of the appeal:

Held, that there was no sufficient cause within the meaning of O. 41, R. 19 as the non-appearance of the appellant at the hearing was due to his own negligence. [Para 4]

Annotation: ('44-Com.) C. P. C., O 41, R. 19, N. 3.

(b) Civil P. C (1908), O. 19, R. 3 — Averment in an affidavit to the effect that a particular letter did not probably reach the addressee being merely a guess cannot carry any weight merely because it is contained in counsel's affidavit. [Para 4]

(c) Legal practitioner — Duties of.

Apart from the duty which a counsel owes to his client, he owes an obligation to the Court also A counsel who has accepted the *vakalatnama* and signed the memorandum of appeal and upon whom a notice of hearing of the appeal has been issued should approach the Court and explain the circumstances which would prevent him from being present on the date of hearing of the appeal. The fact that he has neither received his fees nor the file of the case from his client would not affect this obligation A failure of the counsel to discharge the obligation is open to criticism. [Para 5]

B. K. Dhaon and Mohd. Yaqub Siddiqi — for Applicant.

Hyder Husain, Karta Krishna and Jagdish Chandra — for Opposite Party

Order. — This is an application under O. 41, R. 19, Civil P. C., for restoration of an appeal which was dismissed for default.

[2] The material facts lie within a short compass: In the appeal to which this application relates, the appellant Raja Bajrang Bahadur Singh, taluqdar of Gangwal estate, was represented by two counsel, Mr. M. H. Kidwai, Bar-at-law and Mr. Mohammad Yaqub Siddiqi, Advocate. Both counsel had signed the memorandum of the grounds of appeal. The appeal was fixed for hearing on 22nd August 1946. As no one appeared on behalf of the appellant when the case was called, the appeal was dismissed. The present application was made on 11th September 1946 for setting aside the order of dismissal for default and restoration of the appeal.

[3] It appears from the averments made in the application that before the date of hearing of the appeal, one of the appellant's counsel, Mr. M. H. Kidwai, was appointed a Judge of this Court. Accordingly, as he was in charge of the case, on his elevation to the Bench, he returned the file to the appellant because he could no longer appear as counsel. Notice of the date of hearing was in the circumstances issued by the office to the other counsel for the appellant Mr. Mohammad Yaqub Siddiqi. It is stated in the application that Mr. Siddiqi "was paid no fee." On receipt of notice of the date of hearing Mr. Siddiqi, as appears from an affidavit filed by him along with the application, sent by post a letter addressed to Sri Ram, the general agent of Raja Bajrang Bahadur Singh, appellant, informing him of the date of the appeal. We know, however, from an affidavit filed by Bharat Singh, another general agent of the appellant, that Sri Ram was dead long before the date fixed for the hearing of the appeal. Paragraph 6 of the affidavit filed by Mr. Siddiqi reads thus: "That due to postal strike, 'probably' the letter did not reach Sri Ram's house" We know further from this affidavit that no one on behalf of the appellant went to Mr. Siddiqi in connection with the appeal, and the latter left for Agra on 19th August 1946, where he had to attend to another engagement, and that he did not return to Lucknow till 22nd August 1946 the date fixed for hearing, and accordingly as no one appeared when the appeal was called, it was dismissed for default

[4] On the facts above stated, we are clearly of opinion that no sufficient cause, which prevented the appellant from appearing when the appeal was called, has been made out. Raja Bajrang Bahadur Singh had, as appears from the *vakalatnama* executed by him, engaged two counsel, Mr. M. H Kidwai and Mr. Mohammad Yaqub Siddiqi. He had paid no fee, as we gather from Mr. Siddiqi's affidavit, to the second counsel. It was the first counsel who was in charge of the appeal. When Mr. Kidwai accepted the appointment as a Judge of this Court, he naturally returned the file to the client. Raja Bajrang Bahadur Singh apparently did not take any steps for the prosecution of the appeal after that. He must be taken to have known that the notice of the date of hearing of the appeal would

in the normal course be sent to Mr. Siddiqi. Mr. Kidwai had returned the file of the case to the Raja. The Raja had not paid any fee to Mr. Siddiqi. He did not even care to send the file to Mr. Siddiqi to enable him to prepare the case and appear at the hearing. Mr. Siddiqi, as stated in his affidavit, sent a letter addressed to the Raja's general agent, Sri Ram who was in charge of the appeal. We do not know what happened to this letter. It is stated, however, that Sri Ram was dead long before the date fixed for hearing of the appeal. The affidavit filed by Mr. Siddiqi only makes a guess that "probably the letter did not reach Sri Ram's house." The Raja had got back the file from Mr. Kidwai. The mukhtiar who was in charge of the appeal was dead. We do not know if any steps were taken to entrust the prosecution of the appeal to another mukhtiar. It will thus be seen that the non-appearance of the appellant at the hearing was due to his own negligence in taking no steps for the prosecution of his case. His counsel Mr. Siddiqi, though he had received notice of the appeal left for Agra on 19th August 1946 without making any arrangement for the representation of the appellant on the date of hearing. He did not return till 22nd August, with the result that the appeal was dismissed. He contended himself with merely posting a letter addressed to the Raja's general agent, Sri Ram who, as we know from Bharat Singh's affidavit, was dead long ago. There is nothing before us to show that this letter was not delivered either at Sri Ram's house or at the Raja's office as it was addressed to his mukhtiar. We find no justification for the guess made by Mr. Siddiqi that "probably the letter did not reach Sri Ram's house." Averments like these carry no weight merely because they are contained in counsel's affidavit. The application is accordingly dismissed with costs.

[5] Before taking leave of this case we should like to say a few words about Mr. Siddiqi's conduct in this matter. Apart from the duty which a counsel owes to his client, he owes an obligation to the Court also. This is well recognised, and happily counsel in general show by their conduct that they are alive to this duty. We are not oblivious of the fact that in this case Mr. Siddiqi had received no fee from the appellant. The client had not given him the file which was returned by Mr. Kidwai on his elevation to the Bench. Nothing was heard by him from his client in reply to the letter which he had posted to the address of the Raja's general agent, Sri Ram. Still as he accepted the *vakalatnama* and signed the memorandum of the grounds of appeal it was in our opinion up to him that before leaving for Agra he ought to have approached this Court and explained the circumstances which would prevent him from being present at the hearing. His failure to do so has made his conduct in this matter open to criticism.

K.S. *Application dismissed.*

A. I. R. (35) 1948 Oudh 145 *[C. N. 54.]*

KAUL J.

Baldeo Sah — Mortgagor — Applicant v. *Mt. Ram Dulari and others — Mortgagees— Opposite Party.*

Civil Revn. No. 90 of 1943, Decided on 25th August 1947, from order of Civil Judge, Hardoi, D/- 11th February 1943.

U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), Ss. 2 (10) (a) and 12—U. P. Debt Redemption Act (13 of 1940), Ss. 2 and 9 (4) — Fourth part of mortgage debt transferred—Unity of debt, if broken up — On accounting, three-fourth of debt found to be wiped off — Balance found in hands of mortgagee, if can be applied towards satisfaction of one-fourth part transferred.

Where the liability for payment of a fourth share of a mortgage debt constituting a "loan" was under a contract transferred to another person, that portion of the debt ceases to be a loan within the meaning of the Agriculturists' Relief Act. This would not, however, break up the essential unity of the debt as between the mortgagor and the mortgagees If any portion of the mortgage money is not paid, the entire property is still liable to be sold for satisfaction thereof. In these circumstances though the benefit of the U. P. Debt Redemption Act cannot be claimed with respect of a portion of the debt, the accounting in a suit for redemption should be done as in ordinary mortgage cases. The transfer of a part of debt constitutes a notional splitting up of the debt, but it cannot be said that for the purposes of accounting between the mortgagees, the debt should be treated as two debts, distinct and independent of each other. If the debt be treated as one, there is no reason why the surplus, which was left over in the hands of the mortgagees after three-fourths of the loan was found, on accounting to have been satisfied, should not be applied towards the satisfaction of the remaining one-fourth. It is not a case in which the mortgagor having paid something to the mortgagee wants a refund of an amount paid in excess of what was due within the meaning of S. 9 (4), Debt Redemption Act. [Para 5]

K. N. Tandon — for Applicant.
M. D. Srivastava — for Opposite Party 1 to 3.

Order.—This application under S. 115, Civil P. C., arises out of an application for redemption made under S. 12, U. P. Agriculturists' Relief Act.

[2] In order to bring into clear relief the points in controversy, it is necessary to state a few facts. A 7 biswansis zamindari share in thok Ram Singh, village Amrauli, Pergana Sarah Shumali, Hardoi district, was owned by three persons. Two of them, Kunwar Sah and his brother Gaya Dut, owned one half of this property. The remaining half belonged to Gajodhar Sah. On 5th September 1900, Kunwar Sah and Gajodhar Sah mortgaged this property with three persons, Bishambhar Nath, Bisheshwar

Nath and Parganni Lal for a consideration of Rs. 700. It may be mentioned that the zamindari share, which formed the security for this mortgage, was already subject to a previous mortgage in favour of one Raghubar Dayal. By the mortgage of 1900, Kunwar Sah and Gajodhar Sah stipulated that the mortgagee should advance them Rs. 400 in cash which was to carry interest at 18 per cent. per annum. It was further stipulated that in 1907, when the mortgage in favour of Raghubar Dayal could be redeemed, the mortgagee should pay Rs. 300 to him, redeem the mortgage, take possession of the property and remain in possession for 40 years. From 1907 the transaction was to be in the nature of a usufructuary mortgage. The mortgagee advanced Rs. 400 on 5th September 1900, and in July 1907, redeemed Raghubar Dayal's mortgage and obtained possession of the mortgaged property. On 15th May 1919, Kunwar Sah and Gaya Dut made a gift of their half share in the mortgaged property to the present applicant Baldeo Sah. On 9th October 1919, Baldeo Sah acquired by purchase from one of the two sons of Gajodhar Sah (who was dead and was succeeded by his sons Babu Ram and Gulzari Lal) a transfer of his interest in this zamindari share. The sale deed executed by Gulzari Lal, son of Gajodhar Sah, in favour of Baldeo Sah stipulated that his liability for the mortgage debt which was specified in the deed to be Rs. 300 should be discharged by the purchaser. It will thus be seen that Baldeo Sah had under the deed of gift of 15th May 1919, and the deed of sale of 9th October 1919, become the owner of three-fourths share in the mortgaged property. The remaining one-fourth share was owned by Babu Ram, one of the two sons of Gajodhar. On 17th December 1941, Baldeo Sah and Babu Ram jointly applied for redemption of the mortgage under S. 12, U. P. Agriculturists' Relief Act. They claimed the benefit of the Agriculturists' Relief Act as well as the Debt Redemption Act.

[3] It was among other pleas urged in defence that Baldeo Sah being a transferee only of three-fourths share in the property was not entitled to the benefit of the Debt Redemption Act.

[4] The trial Court held that inasmuch as one half-share of the property was transferred to Baldeo Sah by a deed of gift, it did not debar him from claiming the benefit of that Act. Babu Ram, being the son of one of the original mortgagors, was of course entitled to claim the benefit of the Debt Redemption Act. It further held that the benefit of that Act could not be claimed in respect of a fourth share of the loan corresponding to that share of the property which was acquired by Baldeo Sah under the deed of sale from Gulzari Lal. The Court went into accounts and after considering all the material before it came to the conclusion that three-fourths of the debt was paid off by 31st July 1934 and out of the usufruct of three-fourths share of the property a sum of Rs. 400 remained in the hands of the mortgagees as surplus. This sum was applied towards the liquidation of the balance of the debt, that is, the remaining one-fourth. As a result the entire debt was held to have been satisfied, and redemption was allowed by the trial Court without payment of any money to the mortgagees. Dissatisfied with this decision, the mortgagees preferred an appeal which was disposed of by the learned Civil Judge of Hardoi. It was contended before him that the sum of Rs. 400 which was left over in the hands of the mortgagees after satisfaction of three-fourths of the debt in respect of which the benefit of the U. P. Debt Redemption Act could be claimed, could not be applied to wipe off the remaining one-fourth of the mortgage debt. This contention was accepted by the learned Civil Judge, and he made out a fresh account of the money payable to the mortgagees. He gave the debtor the benefit of the Agriculturists' Relief Act as regards this portion of the debt, and found, that a sum of Rs. 289 was still due to the mortgagees on 11th February 1943. He allowed redemption on payment of this sum to the mortgagees within three months. The decree of the trial Court was varied accordingly. Dissatisfied with this decision the present revision application was filed.

[5] Having heard the learned counsel for the parties I am of opinion that the decision of the learned Civil Judge of Hardoi cannot be upheld. He disposed of the contention that was put before him in two sentences. He observed:

"It was, however, contended that this sum (Rs. 400) could not be taken to wipe out the remaining one-fourth share of the mortgage money because so far as the share of Gulzari was concerned, the provisions of Debt Redemption Act did not apply. The argument is most plausible and I have no doubt that the trial Court erred in setting off the excess sum in liquidating the amount that was due in respect of the one-fourth share of the mortgage money."

This was a case for redemption initiated by an application under S. 12, U. P. Agriculturists' Relief Act. Under the provisions of that Act, an account was to be taken between mortgagor and the mortgagees. With respect to three-fourths of the debt the mortgagor was held entitled to the benefit of the U. P. Debt Redemption Act, but not with regard to the remaining one-fourth of the debt. This necessitated a notional splitting up of the debt, but it cannot be said with any good reason that for the purposes of accounting between the mortgagor and the mortgagees, the debt should be treated as two debts, distinct and independent of each other. If the debt be treated

as one, there is no reason why the surplus, which was left over in the hands of the mortgagees after three-fourths of the loan was satisfied, should not be applied towards the satisfaction of the remaining one-fourth. I am not oblivious of the provisions of S. 9 (4), U. P. Debt Redemption Act, which lays down that nothing in that section shall entitle a debtor to a refund of any sum already paid by him. This, however, does not touch the case before us. This was a case in which there was an advance constituting a "loan" within the meaning of that expression as used in the U. P. Agriculturists' Relief Act as well as in the Debt Redemption Act at its inception. Subsequently, however, as the liability for payment of a fourth share of the debt was under a contract transferred to another person, that portion of the debt ceased to be a loan within the meaning of the Agriculturists' Relief Act. This would not, however, break up the essential unity of the debt as between the mortgagor and the mortgagees. It is clear that if any portion of the mortgage money was not paid, the entire property was still liable to be sold for satisfaction thereof. In these circumstances, I am clear that even though the benefit of the U. P. Debt Redemption Act could not be claimed with respect of a portion of the debt, the accounting in a suit for redemption should be done as in ordinary mortgage cases. It is not a case in which the mortgagor having paid something to the mortgagee wants a refund of an amount paid in excess of what was due.

[6] The result therefore is that the revision application is allowed. The decree of the lower appellate Court is set aside and that of the trial Court restored. The applicant shall get his costs in this Court and in the lower appellate Court, from respondents 1 to 3.

R.G.D. *Revision allowed.*

A. I. R. (35) 1948 Oudh 147 *[C. N. 55.]*

CHANDIRAMANI AND MISRA JJ.

Raghubar Dayal and others — Appellants v. *Husain Mirza and others — Respondents.*

Appeal No. 10 of 1946 and S. A. Nos. 90 and 91 of 1944, Decided on 13-8-1947, against judgment of Kidwai J., *Reported in* 34 A. I. R. 1947 Oudh 122.

(a) Transfer of Property Act (1882), S. 100—Two properties burdened with charge—One relieved of liability of paying charge by owner's action — Whole charge can be recovered from the other.

Considerations of equity do not arise where a matter is specifically provided for by statute : 5 A. I. R. 1918 Mad. 1030 (F. B.), *Foll.* [Para 7]

When two properties are burdened with a charge and one of the properties is relieved of the liability of paying the charge as a result of its transfer by the owner to a person for consideration but without notice of charge, the charge-holder can recover the entire charge from the remaining property, and not only a proportionate share of the charge : 29 A. I. R. 1942 P. C. 50 ; 19 A. I. R. 1932 Oudh 336 and 23 A. I. R. 1936 Oudh 52, *Rel. on.* [Paras 6 & 9]

Annotation. — ('45-Com.) T. P. Act, S. 100, N. 17 ; S. 67 N. 28

(b) Civil P. C. (1908), S. 11, Expln. 4 — Defence which ought to have been taken in previous suit not taken—Suit for arrears of maintenance charged on property—Partial liability denied—Res judicata.

Under a will, two villages *A* and *G* were charged with maintenance in favour of *M* and others at Rs. 15 per month. *M* sued the transferees of the villages in the Court of Munsif, the claim being below Rs. 2000, for the recovery of the arrears of maintenance from both the villages. In that suit it was decided finally that village *G* was not liable for the charge as it was transferred without notice of charge and the entire claim was decreed against village *A*. Subsequently, *M* brought another suit to recover arrears of maintenance in the Court of the Civil Judge, as the amount claimed was over Rs. 2000, claiming the entire amount from the village *A*. The defendants contended that since in the previous suit village *G* was held not liable for the charge, village *A* was liable only to a proportionate share of the charge. The question was whether the defendants were barred by *res judicata* from denying their liability for the whole claim :

Held, that the defence raised in the subsequent suit ought to have been raised in the previous suit as it would have made it necessary to determine the extent of the rights of the plaintiff to claim maintenance from the defendants. It was a defence which ought, in the circumstances of the case, to have been taken and as it was not taken, it should be deemed to have been taken and decided against the defendants The defence in the subsequent suit therefore was barred by S. 11, Expln. 4: 32 A. I. R. 1945 P. C. 132, *Rel. on.* [Para 13]

The mere fact that the previous suit was filed before the Munsif and the subsequent one before the Civil Judge was not material and S. 11 applied to such a case : 30 A. I. R 1943 Oudh 338 (F. B.), *Foll.* [Para 14]

Annotation. — ('44-Com.) C. P. C., S. 11, Notes 35, 37, 39.

Cases referred :—

1. ('40) 1940 O. A. 1210 : 28 A. I. R. 1941 Oudh 203 : 192 I. C 327, Mt. Asia Begam v. Raghubar Dayal.
2. ('42) 69 I. A. 98 : 29 A.I.R. 1942 P. C. 50 : I. L. R. (1942) All. 608 : I. L. R. (1942) Kar. P. C. 99 : 202 I. C. 265 (P. C.), Shah Ram Chand v. Parbhu Dayal.
3. ('17) 40 Mad. 968 : 5 A. I. R. 1918 Mad. 1030 : 42 I. C. 352 (F. B.). Perumal Pillai v. R. M. M. R. M. Raman Chettiar.
4. ('32) 9 O. W. N. 900 : 19 A. I. R. 1932 Oudh 336 : 8 Luck. 168 : 143 I. C. 692, H. Hunter v. Abdul Ali.
5. ('36) 23 A. I. R. 1936 Oudh 52 : 11 Luck. 575 : 159 I. C. 117, Parshadi Lal v. Brij Mohan Lal.
6. ('26) 13 A.I.R. 1926 Cal. 650 : 94 I. C. 837, Gnanda Govinda v. Nalini Bala Debi.
7. ('41) 1941 O. W. N. 22 : 28 A.I.R. 1941 Oudh 259 : 192 I. C. 75, Mahabir Singh v. Tirbhawan Bahadur Singh.
8. ('44) 1944 O. W. N. 245 : 31 A.I.R. 1944 Oudh 281 : 215 I. C. 40, Bajrang Bahadur Singh v. Mt. Hubraj Kuer.
9. ('33) 20 A. I. R. 1933 Cal. 794 : 146 I. C. 821 : Upendra Nath Das v. Dakshayani Debya.
10. ('45) 32 A. I. R. 1945 P. C. 132 : I. L. R. (1945) Kar. P. C. 299 : 221 I. C. 531 (P. C.), Sobhagsingh v. Ranjit Singh.
11. ('43) 1943 O.W.N. 280 : 30 A.I.R. 1943 Oudh 338 : 18 Luck 683 : 210 I. C. 163 (F. B.), Maqsood Ali v. H. Hunter.

M. M. Lal, Nasiruddin and R. B. Lal (for No. 2) — for Appellants.

Niamat Ullah, Inayat Ullah and Mohammad Hajeez (for No. 1) — for Respondents.

Judgment. — In these three appeals the material facts are practically the same and by the order of the Court they have been connected and are being disposed of together.

[2] *Appeal No. 10 of 1946.* — This is an appeal under S. 12 (2), Oudh Courts Act against the judgment and decree of a learned Single Judge (Kidwai J.) of this Court, dated 24-9-1946, in a suit, instituted by Mt. Masuda Begam for recovery of Rs. 1635 as principal and Rs. 443-3-6 as interest as arrears of maintenance at Rs. 15 per month for the period from 1-8-1929 to 31-8-1938 from village Aumau on which the said maintenance was alleged to be a charge. Full facts of the case are given in the judgment of the learned Single Judge of this Court but the relevant facts are briefly as follows:—Muhammad Ahmad Khan was taluqdar of Kasmandi Khurd in the Lucknow District. He executed a will in 1898 and several codicils to that will by virtue of which he transferred eight annas share in village Gahdeo and the full sixteen annas share in village Aumau to his three sons, Khwaja Ahmad Khan, Muhammad Zaman Khan and Muhammad Saeed Khan, from his fourth wife, Mt. Imtiazi Begam. It was also provided in the will that their three full sisters, Mt. Masuda Begam (plaintiff in the present suit), Mt. Ahmad Jahan Begam (appellant in Second Civil Appeals Nos. 90 and 91 of 1944) and Mt. Asia Begam shall get Rs. 15 per month each from the profits of these two villages. The brothers by various transactions transferred their eight annas share in village Gahdeo to Majlis Rai and Lala Reghubar Dayal and by other transfers and court-sales the entire property in village Aumau passed to Lal Raghubar Dayal and later to his sons, B. Brij Gopal etc., defendants-appellants in the present appeal. The transfer of village Gahdeo took place without notice of charge to the transferees but that of village Aumau took place with notice of charge.

[3] In 1925, Mt. Masuda Begam filed a suit in the Court of Munsif, South Lucknow (Suit No. 111/26 of 1925) for recovery of arrears of maintenance at Rs. 15 per month from both the villages. All her brothers and their transferees were parties to the litigation. It was finally decided in that suit that village Gahdeo was not liable at all for the charge of maintenance but village Aumau was, and the entire claim for arrears of maintenance was decreed against village Aumau. Mt. Masuda Begam filed another suit for recovery of arrears in 1929 and that suit was also decreed and finally in 1938 she filed a third suit in the Court of the Civil Judge from which the present appeal arises. The plaintiff, Mt. Masuda Begam, claimed the entire amount from village Aumau only against the appellants, Raghubar Dayal and his three sons. The plaint also recited the fact that in the previous suit of 1925 the entire claim had been decreed against village Aumau. The defence set up was that as in the previous suit between the parties it had been decided that village Gahdeo was not liable for the charge and the property had escaped from the liability by laches of the charge-holder, village Aumau was liable only to a proportionate share of the charge and this they valued at Rs. 5 per month. The right to claim interest was denied. In the oral pleadings of the parties the plaintiff's pleader admitted that owing to the decision in the previous suit, he was not entitled to claim anything from village Gahdeo but the defendants were also barred by the rule of *res judicata* from denying their liability as owners of village Aumau for the whole allowance. The defendants denied that the previous decision operated as *res judicata* so far as village Aumau was concerned. Several issues were framed out of which Issues 2 and 6 are material for this appeal. They are:

"2. Is the plaintiff's maintenance liable to any reduction as alleged ? If so, by how much ?

6. Is the question that the maintenance is not liable to any reduction on account of Gahdeo having been freed from its charge *res judicata* between the parties?"

Thereafter the counsel for the parties admitted that if there was no reduction on account of Gahdeo having been released from the charge, then the defendants would not be entitled to any reduction as the income of village Aumau had not gone down and that if any reduction was made on account of Gahdeo having been freed from all liabilities, the amount of maintenance payable to the plaintiff would be Rs. 6 per month. The trial Court held that as it was admitted by the plaintiff's counsel that both the previous suits were fought out in the Munsif's Court, the decisions in those suits would not operate as *res judicata* and that it was the duty of the plaintiff as charge-holder to give notice of her charge to the purchasers of village Gahdeo and, on account of the plaintiff's own default, the security had been reduced and so the maintenance charge would be proportionately reduced. Accordingly a decree at the rate of Rs. 6 per month was given, the interest was reduced and the suit was decreed for Rs. 654 with future interest from the date of the decree at 3½ per cent. per annum to the date of realization.

[4] The plaintiff appealed to the District Judge, Lucknow and claimed the entire amount of the maintenance allowance from village Aumau only and denied that she had been

guilty of any laches or that any case had been made out for reducing her claim for the maintenance allowance and urged:

"That the judgment of the highest Court of appeal for the province was entitled to the greatest weight even though the matter was technically not *res judicata*."

The learned District Judge relied upon a decision of this Court in 1940 O. A. 1210.[1] This was a suit of Mt. Asia Begam, a sister of the present plaintiff and the right, she claimed, was identical with the right, claimed in the present suit. There also the present defendants claimed a reduction in the amount of the charge on the ground of release of village Gahdeo from the charge. This plea found favour with the learned Single Judge of this Court. The District Judge relying on this decision, holding that the previous decision in suit of 1925 did not operate as *res judicata* dismissed the appeal.

[5] The plaintiff came up in appeal to this Court against the decision of the learned District Judge. As she died during the pendency of the appeal, her sons were substituted and the points, raised before the Court were whether the whole of the maintenance allowance could be recovered from village Aumau only and whether the decision in the previous case operated as *res judicata*. The learned Single Judge of this Court (Kidwai J.) has held that the authorities, relied upon by Yorke J., in 1940 O. A. 1210[1] were of doubtful validity in view of a decision of their Lordships of the Privy Council in 69 I. A. 98,[2] that every bit of the property, charged with maintenance, was liable for the whole of the charge, that the question of contribution as between the owners of the various properties subject to the charge was irrelevant for the purpose of this case and that the previous decision in 1925 suit operated as *res judicata*. The learned Single Judge of this Court has certified that this is a fit case for appeal to a Bench of this Court and granted permission accordingly.

[6] Now two questions arise for consideration in this appeal. They are:—(1) When two properties are burdened with the charge of a charge-holder and one of the properties is relieved of the liability of paying the charge as a result of its transfer by the owner to a person for consideration but without notice of charge, can the charge-holder recover the entire charge from the remaining property, or can he realise from it only a proportionate share of the charge? (2) Does the decision in the previous suit of 1925 between the parties operate as *res judicata*?

[7] As regards the first question, the learned counsel for the appellants urges that as one of the properties has been relieved of the burden, its effect is to wipe off or extinguish a proportionate share of the charge. No authority is cited for the proposition and the learned counsel contends that although the authority of 1940 O. A. 1210[1] has been shaken by the decision of their Lordships of the Privy Council in 69 I. A. 98,[2] the principle, laid down in 1940 O. A. 1210.[1] is the correct principle. Now it is settled law that considerations of equity do not arise where a matter is specifically provided for by statute If any authority is needed for this proposition, it will be found in the Full Bench decision of the Madras High Court in 40 Mad. 968[3] which has been approved by their Lordships of the Privy Council in 69 I. A. 98.[2]

[7a] The law on the subject of charges will be found in S. 100, T. P. Act, which reads as follows:

"100. Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

This shows that a charge is not a transfer of interest in the property. Section 58, T. P. Act, defines a mortgage and, according to it, a mortgage is a transfer of interest in the property, Section 100, T. P. Act, provides that provisions which apply to a simple mortgage, shall apply, so far as may be, to a charge also and a charge cannot be enforced against the property subject to the charge if the property is transferred for consideration and without notice of the charge. Our question must, therefore, depend for its answer upon the existing provisions of law.

[8] Now it is clear that a charge can be created by a contract between the parties or by operation of law or by a decree of a Court while a mortgage can only be created by a contract between the parties. It is for this reason that in S. 100, T. P. Act, the expression "so far as may be" has been used when defining the extent of applicability of the provisions, relating to simple mortgages, to a charge. Section 100 itself lays down one important difference between a mortgage and a charge namely, that a charge cannot be enforced against the property subject to a charge if the transferee thereof takes it from the owner for consideration and without notice of the charge. In the case of a mortgage a transferee whether he has or has not any notice of the mortgage takes it subject to the mortgage because the mortgage is a transfer of interest in an immovable property. Now it is true that a trans-

feree without notice of the charge takes the property free from the charge but this does not mean that the proportionate share of the charge is thereby wiped out. The learned counsel for the appellants says that the proportionate share of the charge is extinguished because the transferee of the property takes it free from the charge and he cannot be made to contribute towards the charge payable by the owner or transferee of the rest of the property with notice of the charge. This argument recognises the principles; (1) that where two properties or more are subject to a charge, the charge-holder is entitled to recover his charge from the entire charged property or from any portion thereof, and, (2) that the owners of the property subject to the charge can claim contribution from one another. These, in fact, are the principles applicable to mortgages under Ss. 60 and 82, T. P. Act, and these principles do apply, so far as the nature of the charge will permit, to a charge also. In the present case, the charge has been created by a will and it has been created by the act of parties and is, in all respects, to be treated like a mortgage except that due effect must be given to the provisions of law (S. 100) that a transferee without notice of the charge takes the property free from the charge. This exception clearly relates only to the contribution which the property is liable to make and has nothing to do with the right of the charge-holder to realise his entire charge. The appellants thus raise, in effect, the question of contribution between the various owners of the properties *inter se*, a question which does not concern the charge-holder at all.

[9] Now the law is well settled that, in the absence of a contract to the contrary, the integrity of a mortgage can be broken only if the mortgagee himself becomes the proprietor of either the whole or a part of the property mortgaged and the release of a portion of the mortgage property from a portion of the mortgage debt does not break the integrity of the mortgage and the remaining mortgagors or their transferees or any one of them can redeem the mortgage only on paying the whole debt then due and there can be no piecemeal redemption. The authority for this is contained in 69 I. A. 98.[2] It follows, therefore, that a charge also cannot be split up in this manner even if the charge holder were willing by her own action to release any one of the charged properties from the liablity of her charge. The position of the plaintiff is as a matter of fact, very much stronger. It is not she but the owner who has transferred the jointly charged property. There is no duty whatever cast upon her in such circumstances to inform the transferee of her charge. There can be no doubt that the whole of village Aumau is liable for her entire charge in the present case.

[10] There are two cases of this Court, 9 O. W. N. 900[4] and A. I. R. 1936 Oudh 52[5] in which it has been held that a charge is in the nature of a mortgage and the charge-holder is entitled to recover the amount due to him from whichever portion of the property that he chooses and the question how far each of the owners of the property burdened with the charge is liable is a question of contribution among the owners themselves and does not concern the charge holder. In 9 O. W. N. 900[4] a maintenance charge holder claimed the entire charge from a transferee with notice of charge as in the present case. The reason for the decisions, mentioned above, is that the charge-holder is not interested in the question of contribution between the properties subject to his charge. This is the right approach to the question like the present one.

[11] For the reasons indicated above, we hold that the view of Kidwai J is correct and village Aumau is liable for the entire claim of maintenance.

[12] The next question that arises is whether the decision in the suit of 1925 operates as *res judicata*. It is not disputed that the defendants-appellants and their predecessors-in-interest and the plaintiffs of the present suit were parties to the previous suit, and that the claim in that suit was similar to that in the present suit. It is also not disputed that the previous suit was filed before the Munsif on account of the arrears claimed being below Rs. 2000 and the present suit was filed before the Civil Judge because the claim exceeded Rs. 2000. Exhibit 5 is the plaint in the suit of 1925, Ex. 8 is the judgment of the appellate Court while Ex. 3 is the judgment of this Court. In the plaint the amount of the charge was claimed jointly and severally from both the properties, that is, villages, Gahdeo and Aumau. The relief claimed was a decree for the entire sum separately or jointly. The written statement has not been filed but from the documents, mentioned above, it is clear that no issue was directly and specifically raised by the appellants that they were liable only to the proportionate share of the charge on village Aumau.

[13] Now it is clear that this was the defence which would have made it necessary to determine the extent of the rights of the plaintiffs to claim maintenance from the appellants. This is a defence which ought, in the circumstances of the case, to have been taken and as it was not taken, it shall be deemed (to have been taken?) and decided against the defendants. It was contended that in cases where, as in the present case, there are recurring causes of action, it is not necessary to raise a plea, regarding the extent of

liability and the rule of *res judicata* would not apply. Some authorities, A. I. R. 1926 Cal. 650,[6] 1941 O. W. N. 22,[7] 1944 O. W. N. 245,[8] and A. I. R. 1933 Cal. 794[9] were cited. These cases were decided on the peculiar facts of those cases and on the pleadings, raised therein. It is not necessary to comment further on them because of the authority in A. I. R. 1945 P. C. 132.[10] In that case the plaintiff in the previous suit between the same parties claimed that he was entitled to one half of the entire income from the offerings made by pilgrims to the idol of Shree Onkarjit at the time of certain annual fairs. The plaintiff's title to one half of the entire income was upheld. In the subsequent suit, the plaintiff claimed a half share in the income from entire offerings made at subsequent annual fairs. Their Lordships of the Privy Council held that the defence in the subsequent suit that the plaintiff was entitled to a half share in the income of only one portion of offerings, namely, the shamlat khut or joint account, was a matter which might and ought to have been made a ground of defence in the previous suit and was therefore to be deemed to have been a matter directly and substantially in issue in the previous suit within the meaning of explanation 4 to S. 11, Civil P. C. The defence in the subsequent suit therefore was barred by S. 11, Expl. 4 It is clear that the decision in the previous suit will operate as *res judicata* in the present case, provided the other requirements of S. 11, Civil P. C., are satisfied.

[14] In the present case, it was urged that the decision in the previous suit did not operate as *res judicata* because the first suit was filed before the Munsif and the the present suit was filed before the Civil Judge. This contention has no force. Section 11. Civil P. C., applies to such a case as held by a Full Bench of this Court in 1943 O. W. N. 280.[11]

[15] It was also urged that the plea of *res judicata* was abandoned at least in the first appellate Court and it could not be agitated in second appeal. The plea was, in fact, not abandoned. Ground No. 8 in the memorandum of appeal before the District Judge reads as follows:

"9 That the judgment of the Highest Court of appeal for the Province was entitled to the greatest weight even though the matter was technically not *res judicata*."

This sort of plea was taken because till then it seemed to be more or less the view that a suit or any issue, decided by a Munsif would not be *res judicata* in a subsequent suit before a superior Court. We are accordingly satisfied that the decision in the previous suit does operate as *res judicata* in the present suit. The result, therefore, is that Appeal No. 10 of 1946 is hereby dismissed. Plaintiffs' suit is decreed for Rs. 1635 with interest at 3¼ per cent. per annum from the date of trial Court's decree till realization. If the amount is not paid within six months, the plaintiffs shall be entitled to apply for a final decree for sale of village Aumau. Plaintiffs are entitled to costs here and hitherto.

Second Civil Appeals Nos. 90 and 91 of 1944.

[16] It has been seen above that Mt. Masuda Begam claimed her maintenance from villages Aumau and Gahdeo, but in her first suit she was eventually given her claim from village Aumau only. Her sister, Mt. Ahmad Jahan Begam also filed a similar suit for maintenance in 1925 from 1918 to December 1924 in the Court of Munsif. Her brothers and their transferees were impleaded in this suit. It was finally decided that the entire charge was recoverable from village Aumau. On 3-6-1942, she filed her second suit No. 54/95 of 1912 in the Court of Munsif for the period from 1-7-1930 to 31-5-1942. Although her claim amounted to Rs. 2145 at Rs. 15 per month, she gave up Rs. 145 and filed a suit to recover Rs. 2000 only from village Aumau. The defendants in the suit were the sons of Lala Raghubar Dayal who had obtained by then the whole of village Aumau. Several grounds were taken in defence but those which are relevant for our purpose are that the previous suit of 1925 did not operate as *res judicata*, and that only a proportionate share of the charge could be realised from village Aumau as village Gahdeo had become free from the charge due to the laches of the plaintiff. While the above suit of Mt. Ahmad Jahan Begam was pending, the defendants, sons of Lala Raghubar Dayal, filed suit No. 16/42 of 1942 in the Court of the Civil Judge for a declaration that as Gahdeo had become free from the charge, the plaintiff could realise from village Aumau only a proportionate share of the charge. Mt Ahmad Jahan Begam's defence to that suit was that the previous decision in the suit of 1925 operated as *res judicata* and according to that decision she was entitled to recover the whole charge from village Aumau itself. On an application being made that the two suits should be tried by the same Court Mt. Ahmad Jahan Begam's suit, filed before the Munsif, was also transferred to the Civil Judge and both the suits were disposed of by one judgment. It was held that the previous suit did not operate as *res judicata* as it was filed in the Court of Munsif and the second suit was filed in the Court of Civil Judge and that the defendants, sons of Lala Raghubar Dayal, were entitled to a reduction in the charge on account of release of village Gahdeo from the charge. The claim was accordingly reduced to Rs. 6 per month and the plaintiff's suit was decreed for Rs. 929/8/0 and the defendants were granted the declaration sought

for. Dissatisfied with this decision, the plaintiff, Mt. Ahmad Jahan Begam appealed to the District Judge. It was held that the previous suit did not operate as *res judicata* and, in view of the ruling in 1940 O. A. 1210,[1] the plaintiff-appellant could claim only a proportionate share of the charge on village Aumau. The appeals were accordingly dismissed. Second Civil Appeal No. 90 of 1944 arises from the plaintiff's suit, No. 54/95 of 1942 for recovery of maintenance and second Civil Appeal No. 91 of 1944 arises from the declaratory decree, granted by the Courts in suit No. 16/42 of 1942. Both these appeals are being disposed of together as they involve the same questions.

[17] It has been urged for the plaintiff-appellant who is now represented by her sons that the decision in 1940 O. A. 1210[1] is not correct in view of the Privy Council decision in 69 I. A. 98[2] and that the previous decision clearly operated as *res judicata*.

[18] For reasons, already given in detail in Civil Appeal No. 10 of 1946 under S. 12 (2), Oudh Courts Act, we hold that the appellants are entitled to claim the whole maintenance from village Aumau.

[19] Now comes the question of *res judicata*. It is not disputed that the previous suit of 1925 for recovery of maintenance was filed in the Court of Munsif. It is also clear that the second suit of the appellants (Suit No. 54/95 of 1942) was filed in the Court of Munsif though later on it was transferred to the Court of Civil Judge because the declaratory suit was pending in that Court. There can be little doubt that the decision in the first suit does operate as *res judicata* in the second suit for arrears. The question is whether the fact that the declaratory suit was actually tried by the Civil Judge a higher Court affects the principle of *res judicata* or not. According to a Full Bench decision of this Court in 1943 O. W. N. 280,[11] the previous suit will operate as *res judicata* notwithstanding that the subsequent suit, in which the same issue arose, was tried by the Civil Judge and could not have been tried by Court, deciding the first suit. There can be little doubt, therefore, that the decision in the 1925 suit does operate as *res judicata* in the subsequent suits that were tried by the Civil Judge In view of this decision, it is clear that the decrees, passed by the Courts below, cannot stand. We accordingly allow Second Appeals Nos. 90 and 91 of 1944 with costs in all the Courts and set aside the decrees of the two lower Courts. Suit No. 54/95 of 1942 is decreed with costs for Rs. 2000 with interest at $3\frac{1}{4}$ per cent from the date of the suit till the date of realisation. Should the money due be not paid within six months from today the appellants shall be entitled to apply for a final decree for sale of village Aumau on which the decretal amount is a charge.

[20] Suit No. 16/42 of 1942 is dismissed with costs,

S.C. *Order accordingly.*

A. I. R. (35) 1948 Oudh 152 *[C. N. 56.]*

KAUL AND WALFORD JJ.

Rudra Pratap Singh and another — Defendants—Appellants v. *Ballabh Das and another — Plaintiffs — Respondents.*

First Appeal No. 44 of 1942, Decided on 27-2-1947, against decree of Addl. Civil Judge, Bara Banki, D/-8-1-1942.

(a) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 30—Mortgage—Rate of interest reduced under Act — Agreement to further reduce rate—Registration—Registration Act (1908), S. 49 (c).

Section 30, U. P. Agriculturists' Relief Act does not put an end to any contract entered into between the parties to a loan. All that it says is that the contract shall be enforced subject to the limitation that interest allowed by the Court shall not exceed the rates specified in the Act. Hence, notwithstanding the fact that the rate of interest mentioned in the mortgage deed has been already abrogated by the provisions of the Act, an agreement by which the parties agree to further reduce the rate of interest provided by that Act requries registration and cannot be received in evidence if not registered : 18 A. I. R. 1931 Oudh 288, *Rel. on.* [Para 8]

Annotation ('45-Com.) Registration Act, S. 49 N. 23

(b) Contract Act (1872), S. 2 (d)—Promise of performance of existing duty.

Where the mortgagors are under their contract of mortgage under an obligation to pay interest regularly every six months, this cannot form a consideration for a fresh agreement to reduce the rate of interest provided in the mortgage deed : 2 Bom. 362. *Rel. on.* [Para 8]

Annotation:—('46-Man.) Contract Act, S. 2 (d) N. 6.

Cases referred : —

1. ('31) 8 O. W. N. 279 : 18 A.I.R. 1931 Oudh 288 : 7 Luck. 16 : 132 I. C. 66, Afsar Jehan Begam v. Bechey Lal.
2. ('78) 2 Bom. 362, Ram Chandra Chintaman v. Kalu Raju.

S. C. Dass, B. S. Srivastava and S. P. Avasthi — for Appellants.

R. K. Srivastava — for Respondents 1 and 2.

Judgment. — This appeal arises of a suit brought to enforce a mortgage. On 1-12-1932, a simple mortgage was executed by the present appellant Rudra Partap Singh and his son Turambuk Sah in favour of Ballabh Das and Madan Murari for a consideration of Rs. 25,000. The mortgage was for a period of ten years. The deed carried interest at 10 per cent. p. m. compoundable with half yearly rests. The mortgaged property comprised shares in three villages Sonikpur, Qazipur and Chilauli. The deed further stipulated that the mortgagee would be entitled to sue for his mortgage money without waiting for the expiry of the stipulated period of ten years, if the interest for two six months (one year) fell in arrears. The suit was brought on

16-2-1941 for a sum of Rs. 33,228-6-0 with future interest and costs by sale of the property mortgaged. As the defendants were agriculturists the interest claimed by the plaintiffs was limited to the rate specified for such a loan in the U. P. Agriculturist's Relief Act.

[2] A number of pleas were raised in defence. They were, however, rejected and the plaintiffs were granted a decree for Rs. 33,228-6-0 together with costs of the suit and interest in Rs. 33,065-11-4 from 18-2-1941 upto the date of the decree at $4\frac{1}{4}$ per cent. per annum. The entire amount decreed was to carry future interest till realisation at 2 per cent. per annum. It was made payable in thirty equal six monthly instalments. In case of default of three instalments by the judgment-debtors the mortgagee decree-holders were under the decree entitled to take out execution of the entire decretal amount. The present appeal has been preferred against this decree.

[3] Of the various defences urged in the trial Court only three now survive.

1. That the mortgagors were entitled to the benefit of the U. P. Debt Redemption Act;

2. That there was an agreement arrived at between the parties under which the plaintiffs were, in spite of the Agriculturists' Relief Act having allowed a higher rate of interest, entitled to charge interest only at $3\frac{1}{2}$ per cent. per annum; and

3. That by an arrangement arrived at between the mortgagors and the mortgagees the latter were put in possession of the mortgaged property and out of the income a sum of Rs. 7000 was paid towards the mortgage debt.

[4] It was frankly conceded by Mr. Das, learned counsel for the appellants, that he could not in view of the evidence on record press the first point with any hope of success. It was admitted by appellant 2 in the witness box that the legal rate payable by the family of the mortgagors was more than Rs. 100 per year. Thus it is clear that ten times of this figure will exceed Rs. 1000 and accordingly under S. 3 (e) (ii), Debt Redemption Act no member of that family can be said to be agriculturist for the purpose of the said Act. The first point therefore must be found against the appellants.

[5] A suit under S. 33, U. P. Agriculturists' Relief Act was brought by the present appellants to get a declaration in respect of the amount of money due under the deed of mortgage. On 6-4-1936, a decree was passed in the suit and it was declared that Rs. 28,600-10-3 was due to the mortgagee under their deed of that date. There was again a second settlement of accounts between the parties on 22-12-1936. On that date the mortgagee received a sum of Rs. 373-12-3 and granted a receipt (Ex. A49) for the same. After acknowledging the receipt of the above sum the document proceeds to recite as follows :

"In the principal amount under the said mortgage deed which is for Rs. 25,000 the outstanding interest to the extent of Rs. 4000 has already been included in accordance with the decision of the case under S. 33, Agriculturists' Relief Act. Now the entire sum of money due under the said mortgage deed is Rs. 29,000 whereon interest shall be charged at 3/8/- from 1-12-1936 in accordance with the mutual settlement."

[6] Reliance is placed on the last sentence in the above quoted paragraph and it was contended that in view of the settlement referred to therein the mortgagees could not charge interest at a rate higher than Rs. 3-8-0 per cent. per annum. On behalf of the mortgagees it was contended in reply that they were prepared to make a concession to the mortgagors in the matter of interest provided that they made prompt and regular payments as stipulated by the deed. The concession was conditional upon regular payment and as this condition was not complied with, the mortgagors were not entitled to claim the benefit of this concession. Apart from this contention it was pleaded that the agreement relied on by the mortgagors could not be enforced as it varied the terms of a document which was compulsorily registrable and was without consideration. Both these contentions were accepted by the trial Court and the issue was found against the appellants. The same contentions were repeated before us.

[7] It was pointed out on behalf of the respondents that this point was not raised in the grounds of appeal and accordingly could not be permitted to be argued. Even if the appellants were permitted to raise the point the finding arrived at by the lower Court could not be successfully challenged. We have examined the appellants' memorandum of the grounds of appeal with care and find that none of the grounds mentioned therein covers the points sought to be argued before us. The memorandum of the grounds of appeal contains five grounds. The first of these is directed to the contention raised as regards the U. P. Debt Redemption Act. Grounds Nos. 2 and 3 deal with the payment of Rs. 7000 towards mortgage debt. This is the third point mentioned above. By ground No. 4 the appellants wanted reduction of future interest and ground No. 5 prays for grant of yearly instalments. It is, therefore, clear that the appellants are not entitled to raise this contention. Apart from this technical ground on which the appellants' contention must be ruled out, we are of opinion that the finding of the lower Court that Ex. A49 being an unregistered document "cannot be received as evidence of any transaction affecting the mortgaged property covered by the deed of mortgage and the

agreement to reduce interest being without consideration, could not be enforced in a Court of law."

[8] The question as to Ss. 17 and 49, Registration Act is covered by the Bench decision of this Court in S O. W N. 279.[1] It was held in that case that if a document is required to be registered its terms cannot be varied by an unregistered agreement. In the case before their Lordships, one Sadiq Ali executed a deed of simple mortgage in favour of three persons Baldi Ram, Pohkar Mal and Kanhai Lal for Rs. 8000 bearing interest at Rs. 1/2 per cent. per mensem. compoundable six monthly. When the deed was sought to be enforced it was pleaded among other defences that the mortgagees had agreed to reduce the rate of interest to -/14/6 only. It was found that by an unregistered document the mortgagees had agreed to reduce the interest from 1/2 per cent. per mensem to -/14/6 p. m. with effect from a certain date. Reference was made in the course of their Lordships' judgment to a number of decided cases, and it was held that such an agreement fell under S. 17 (1) (b), Registration Act and the document could not be received under S. 49, Registration Act as evidence of any transaction affecting the mortgaged property in suit. It was contended by Mr. Das that in the present case the rate mentioned in the deed was already abrogated by the provisions of the U. P. Agriculturists' Relief Act and that there was nothing in law which required registration of an agreement by which the parties agreed to further reduce the rate of interest provided by that Act. We have no hesitation in holding that the argument is without substance. Section 30, U. P. Agriculturists' Relief Act does not put an end to any contract entered into between the parties to a loan. It lays down that in spite of any contract to the contrary that may be entered into between the debtor and a creditor interest allowed by the Court shall not exceed the rates specified in the Act. It does not put an end to the contract between the parties. All that it says is that the contract shall be enforced subject to this limitation. What Ex. A 49 did was to vary the terms of the mortgage deed as regards interest and this the parties could not do except by a registered document. But apart from this ground, it is clear that it was an agreement for which there was no consideration. The appellants' counsel contended that the mortgagors had failed to pay interest every six months as was agreed to, the mortgagees were anxious that regular payments should be made, so on 22nd December 1936, the mortgagors undertook to do so. In consideration thereof the mortgagees agreed to reduce the rate of interset. We are clear that the mortgagors were under their contract of mortgage under an obligation to pay the interest regularly every 6 months and if they were already under a legal obligation to do so, this could not form a consideration for a fresh agreement. The law on the subject is thus laid down in Pollock's Principles of Contract, p. 181:

"Promise of performance of existing duty—Similarly, neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do either by the general law or by a subsisting contract with the other party."

Reference in support of this proposition is made to Leake 436.

[9] In 2 Bom. 362[2] an agreement was executed by a client in favour of his vakil after the latter had accepted a *vakalatnama* to act for him in a certain suit whereby the client bound himself to pay to the vakil in the event of his conducting the suit to a successful termination a certain sum in addition to the vakil's full fees. A suit was brought by the vakil to enforce the agreement. It was held by Westropp C. J., that the plaintiff had accepted *vakalatnama* from the defendant previous to the execution of the agreement to render his best services as a pleader to him in the suit. There was no fresh consideration proceeding from the plaintiff for the agreement that he obtained. He could not be bound by it to render to the defendant his professional service. This he was bound to do by the existence of the *vakalatnama*. The agreement was accordingly held unenforceable. We are clear that the conclusion arrived at by the lower Court on this contention is simply supported by principle as well as authority.

[10] The third point need not detain us long. [Their Lordships agreed with the Court below that the mortgagees were never put in possession of the mortgaged property and further held after discussing the evidence, that the sum of Rs 7000 was not paid towards the mortgage debt.]

[11] We see no sufficient grounds to interfere with the lower Court's order making the decretal amount payable in instalments.

[12] No other question was raised before us. The result therefore is that the appeal fails and is dismissed with costs.

V.R. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 154 *[C. N. 57.]*

GHULAM HASAN C. J.

Mata Badal Singh and others—*Defendants*—*Appellants* v. *Mathura Singh and another*—*Defendants*—*Respondents.*

Second Civil Appeal No. 169 of 1942, Decided on 20-8-1947, against order of Civil Judge, Partabgarh, D/- 14-11-1941.

Landlord and tenant—Grove lands — Abandonment — Custom prohibiting sale — Sale in execution of decree against grove-holder—Effect.

Where there is a custom prohibiting the sale of groves a sale of the grove lands in execution of a decree against the grove-holder amounts to an abandonment and the proprietor of the village in which the groves are situated, thereupon becomes entitled to possession of the grove land, although right of re-entry has not been specifically reserved to the proprietor. The sale being invalid as being in contravention of the custom the position of the auction-purchaser and persons holding the land on his behalf is that of a trespasser : 15 O. C. 91; 17 A. I. R. 1930 Oudh 235 and 25 A. I. R. 1938 Oudh 91, *Rel. on.* [Para 8]

Cases referred :—

1. ('12) 15 O. C. 91 : 15 I. C. 385, Ali Mahomed Khan v. Chhedan.
2. ('30) 7 O.W.N. 271 : 17 A.I.R. 1930 Oudh 235 : 122 I. C. 774, Kanhaiya Lal v. Hamid Ali.
3. ('38) 1938 O. W. N. 176 : 25 A.I.R. 1938 Oudh 91 : 173 I. C. 289, Iqbal Hussain v. Kesho Dayal.

B. K. Dhaon — for Appellants.
S. C. Das — for Respondent 1.

Judgment. — This is the defendants' appeal. One Sital Singh had two sons, Ganesh and Lal Bahadur. Ganesh had a son Arjun. Arjun owned a half share as groveholder in ten grove plots. His half share devolved on Sheo Ratan. Mata Badal is the son of Sheo Ratan and Bindeshwari is the brother of Sheo Ratan. All the three are defendants to the suit. The other half share in the grove plots devolved upon the descendants of Lal Bahadur. In execution of a decree obtained against Arjun, half share in the grove plots was sold and purchased by Mata Badal. The plaintiff, who is admittedly the proprietor of the village in which the groves are situate, sued for possession of the grove plots on the ground that Arjun had no transferable rights in the groves, nor could those rights be sold in execution of the decree. Mata Badal, who had purchased the grove-holders' rights at the auction in 1928 and had taken possession of the grove plots, acquired no rights thereunder and whatever rights existed in the groves had been extinguished. According to the plaintiff, two more plots which were other than the grove plots had been encroached upon by the defendants, hence he asked for possession of all the 12 plots.

[2] The defence was that under the custom recorded in the wajib-ul-arz, there was no clause for re-entry in the case of sale of the groves and consequently the plaintiff had no right of possession. The sale in favour of Mata Badal was characterised as fictitious. As regards the two plots, it was pleaded that a certain portion of these plots belonged to the plaintiff and the other portion to the defendants. No controversy any longer survives respecting these two plots.

[3] The trial Court held that the sale was not fictitious, that the custom applied to voluntary as well as involuntary sales, that it was not rebutted by the instances produced by the defendants, that although the custom prohibiting the transfer of groves existed, yet no right of re-entry being reserved in favour of the landlord, the plaintiff was not entitled to eject the defendants from the grove plots. The suit was, therefore, dismissed in respect of these plots.

[4] The lower appellate Court reversed the decision of the trial Court. According to the view taken by that Court the wajib-ul-arz of the village clearly recorded a custom prohibiting sale or mortgage of groves by tenants. The sale in question being in contravention of the terms of the wajib-ul-arz amounted to an abandonment which gave a right to the zamindar to re-enter.

[5] The sole question that has been argued before me is that the sale in execution of the decree did not amount to an abandonment in law as abandonment connotes change in possession and as there was nothing to show that Mata Badal as a result of the auction sale obtained possession, no abandonment should be held to have been established. Reliance is placed on 15 O. C. 91.[1] The terms of the wajib-ul-arz were, more or less, identical with the terms of the wajib-ul-arz before me The grove-holder had no right to sell or mortgage the groves without the permission of the proprietor. There was no express provision as to the proprietor's right in the event of the grove-holder selling or mortgaging the grove in contravention of the terms of the wajib-ul-arz. The learned Judicial Commissioners differentiated the case of a mortgage from that of a sale. They held that in the case of a mortgage the grove-holder cannot be said to have entirely parted with or abandoned his own rights and he has still something left which he can plead against the landlord so as to protect the mortgagee. whose right of possession is subject to the right of redemption of the mortgagor. They observed :

"At any rate, in the case of a transfer by way of sale it may be said that there has been on the part of the transferor an entire abandonment of his rights in favour of another person, so that if a grove-holder in a case like the present purports to sell outright whatever rights he may possess in respect of his grove, he clearly has no rights left which he can set up against another person, and the transferee who is left in actual possession cannot plead that there exists as between himself and the landlord any contract of license in respect of the trees in the grove, or the land on which they stand, which can secure him against ejectment or prevent the landlord from treating him as a mere trespasser."

This case, therefore, far from helping the appellants helps the respondents.

[6] In the well-known *Pihani case*, 7 O. W. N. 271[2] a person who was merely a riyaya had made a waqf of the land and it was held that the riyaya had no right of occupation left in the

land after the execution of the waqf. The learned Judges held that he had abandoned that right and had become a trespasser liable to ejectment at the instance of the superior proprietor.

[7] In 1938 O. W. N. 176[3] it was held that where a grove-holder sells trees which he is forbidden to do under the custom recorded in the wajib-ul-arz the sale amounts to an abandonment and as the purchaser gets nothing by the invalid purchase, the taluqdar is entitled to get possession of the grove so sold.

[8] The point that Mata Badal was not in possession was not raised in the lower Courts. All that was urged there was that the transfer was fictitious but that case was negatived. Mata Badal, therefore, was a real transferee since the date of the purchase. If the purchase in his favour was invalid, he acquired no rights under it and became a trespasser. Assuming that the other defendants are in possession of the groves with the acquiescence of Mata Badal, their position is no better than that of a trespasser. I hold, therefore, that the decision of the lower appellate Court cannot be disturbed.

[9] The only cross-objection that has been pressed is with regard to costs. It is urged that full costs should have been allowed and not proportionate costs. This is agreed to by the appellants. Apart from this, I am of opinion that the order as regards costs was not correct. The lower appellate Court had allowed the appeal and there was no reason why full costs should not have been allowed. I dismiss the appeal with costs and allow the cross-objection with costs.

N.S. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 156 *[C. N. 58.]*

KIDWAI J.

Rameshwar—Judgment-debtor— Appellant v. *Gajodhar Prasad — Decree-holder — Respondent.*

Ex. of Decree Appeal No. 43 of 1945, Decided on 15th September 1947, against order of Civil Judge, Unao, D/- 23rd March 1945.

Civil P. C. (1908), O. 21, R. 15 — Joint decree-holders applying for execution in favour of one only — Non-mention of O. 21, R. 15 — Application whether in accordance with law — Limitation Act, Art. 182.

Under a decree for foreclosure passed jointly in favour of *A* and *B*, *A* applied for execution by delivery of possession of entire property. On the same date *B* filed a separate application praying that property be delivered to *A* only as he had transferred his interest to *A*. Subsequently, *A*'s application was amended by including the prayer in *B*'s application. Order 21, R. 15, Civil P. C., was not mentioned in the application nor was it stated that it was for the benefit of both the decree-holders. In an objection that it was not in accordance with law so as to save limitation :

Held, that provided there was substantial compliance with the provisions of O. 21, R. 15, it was not necessary that the rule should be mentioned in the application ; that its non-mention was not a defect and even if it were, it was removed by the simultaneous application by *B*; that there was nothing in law to prevent the joint decree-holders from applying that actual possession may be delivered to one of them alone ; that considering both the applications together, it was an application in accordance with law and the amendment by addition of a prayer which could not be granted did not affect its validity. [Paras 4, 5 and 6]

Annotation : ('44-Com.) C. P. C., O. 21, R. 15, N. 4.

Cases referred :—

1. ('27) 2 Luck. 259 : 13 A. I. R. 1926 Oudh 605 : 97 I. C. 896, Gauri Shankar v. Kunwar Jang Bahadur.
2. ('19) 6 A. I. R. 1919 Pat. 286 : 4 Pat. L. J. 575 : 53 I. C. 803, A. J. Meik v. Midnapur Zamindary Co. Ltd.
3. ('33) 20 A. I. R. 1933 Lah. 655 : 14 Lah. 212 : 139 I. C. 151, Nasir-ud-Din v. Dost Mahomed.
4. ('30) 17 A. I. R. 1930 Lah. 603, Madho Parshad v. Ghanaya Lal.

R. N. Shukla— for Appellant.
M. L. Tewari — for Respondent.
Gajodhar Prasad in person.

Judgment. — Mani Ram and Gajodhar Prasad obtained a final decree for foreclosure against Sheodayal and others on 9th September 1939. On 6th July 1943, Gajodhar alone applied for execution of this decree by the delivery of possession of the entire property. At the same time Mani Ram filed a separate application praying that the decree be executed in favour of Gajodhar alone because he had transferred his interests to him. Thereafter, on 7th July 1943, the advocate for Gajodhar stated before the Court that on that very date Mani Ram had executed a deed of transfer in favour of his client and that this matter should be mentioned in the application for execution. He asked for time to amend his application in order to mention this fact. Time having been granted to him, he applied on 8th July 1943, adding to his original application the following words :

"Since decree-holder 1 has transferred his share by means of a sale deed, dated 7th July 1943, in favour of decree-holder 2, therefore notices may be issued under O. 21, R. 16, Civil P. C., to the judgment-debtor and the vendor and, after making substitution, proprietary possession be delivered to decree-holder 2 alone. The sale deed is attached to this application."

[2] Notices were issued accordingly, and the judgment-debtor filed an objection on three lines : — (1) That Mani Ram was minor and could not make a valid transfer ; (2) That the assignment was not registered and could not be considered by the Court ; and (3) That possession could not be delivered as the property was "protected land." While these objections were pending, Sheodayal died and the decree-holder had his execution application consigned to the records. On 3rd December 1943, another application for execution was made by Gajodhar alone in which he set out the transfer to him and prayed for execution of the decree in his favour alone. He also prayed for substitution of his

own name in the place of that of Mani Ram and for the heirs of Sheodayal in his place. After the necessary substitution had been effected the heirs of the judgment-debtor took the same pleas which the original judgment-debtor had taken. The Court executing the decree dismissed the objections but, on appeal, the objection that the deed of transfer not having been registered, could not be considered by the Court was allowed. Accordingly, the prayer for delivery of possession to Gajodhar alone was rejected.

[3] Gajodhar, thereafter, obtained a fresh registered sale deed and then applied on 29th May 1944, for execution on the basis of the transfer. To this an objection was taken that it was barred by time. The contention was that, although the two prior applications were presented in time, having regard to the provisions of the U. P. Temporary Postponement of Execution of Decrees Act, they were not applications in accordance with law and so could not save limitation. The argument was that one of several joint decree-holders can only present an application for execution in accordance with and under the provisions of O. 21, R. 15, Civil P. C., and that, if the application is not in accordance with that rule, no action can be taken upon it and it is not an application in accordance with law. The learned counsel relies on 2 Luck. 259[1] and A. I. R. 1919 Pat. 286[2] in support of this proposition. The first decision does not cover this case because in that case, the application was by one of the decree-holders to execute the decree in so far as his share was concerned. Such an application is warranted by law and it was held that it could not be acted on. In the present case one of the joint holders—apart from the transfer of the decree, to Mani Ram Gajodhar was also a joint decree-holder—applied for execution of the whole decree. Thus, the application was in accordance with the provisions of O. 21, R. 15, Civil P. C., though the rule was not mentioned. The second decision no doubt supports the appellant's contention but a contrary view has been taken by other High Courts.

[4] It has been laid down in a large number of decisions that, provided the application is substantially in compliance with the provisions of O. 21, R. 15, Civil P. C. it is not necessary that that rule should be mentioned in the application. Indeed the Lahore High Court has gone to the extent of holding that the procedure provided in O. 21, R. 15, Civil P. C., is for the benefit of the joint decree-holders and the judgment-debtor cannot object to execution by one of the joint decree-holders: *vide* A. I. R. 1933 Lah. 655.[3]

[5] In the present case one of the two joint decree-holders applied for execution of the whole decree. He did not ask for delivery of possession of the property to himself alone but he asked for action under Rr 22 and 35 of O. 21, Civil P. C. If this application is considered by itself, there is no defect in it except that O. 21, R. 15, Civil P. C. is not mentioned and it is not mentioned that execution is sought for the benefit of all the decree-holders. That is not a defect at all—*vide* A. I. R. 1930 Lah. 603[4] but, even if it is, in the present case the defect was removed because at the same time as the execution application was presented, the other joint decree-holder also applied, praying that the decree may be executed by delivery of possession of the property to Gajodhar alone. There is nothing in law to prevent two joint decree-holders applying that actual possession should be delivered to one of them alone. Thus, if the two applications are read and considered together, as they were by the trial Court, they evidenced an application by both the decree-holders for execution of the decree. The mere fact that one of the two applications does not mention all the details required to be mentioned in an application for execution is immaterial because it was only a part of the execution application proper which did give all the particulars. The mere fact that a reason is given for the prayer for delivery of possession to one of the decree-holders, which the Court could not consider, does not make the application itself defective. Thus the application presented on 6th July 1943, was in accordance with law and can be relied upon to save limitation.

[6] The next question that arises is whether the amendment made subsequently by reason of something that had happened later, can have the effect of making the original application itself invalid. The amendment was the addition of another relief, leaving the two original reliefs unaffected. The new prayer could not be granted but there was nothing to prevent the grant of the original prayers' execution. Thus, the amendment cannot affect the validity of the original application.

[7] The result, therefore, is that the application for execution presented on 29th May 1944, is not barred by time. The order of the lower appellate Court is maintained and this appeal is dismissed with costs. The stay order dated 8th November 1945, is vacated.

D.R.R. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 157 *[C. N. 59.]*

GHULAM HASAN C. J. AND MISRA J.

Kr. Tej Dat Singh — Applicant v. *Dat Singh and others — Opposite Party.*

Civil Revn. Applns. Nos. 57 and 141 of 1946, Decided on 20-8-1947, from order of Civil Judge, Lucknow, D/- 22-12-1945.

(a) Civil P. C. (1908), O. 33, Rr. 1 and 5 (b)—Applicants having assets and funds sufficient to raise money for court-fee but mentally incapacitated —Whether can be allowed to sue in forma pauperis.

Rules 5 and 7 of O. 33 imperatively enjoin that if the applicant for permission to sue in *forma pauperis* has sufficient funds or property from which he can pay court-fee or on which the requisite money can be raised for that purpose permission to sue in *forma pauperis* must be refused. According to the explanation attached to O. 33, R. 1 a person can be held to be a pauper only when he is not possessed of sufficient 'means.' The latter expression covers all realisable assets within the applicant's reach. The fact that he is mentally incapacitated from contracting or transferring the property is hardly material, since the law provides proper methods by the adoption of which the property of a person of unsound mind can be converted into money. [Para 7]

Annotation : ('44-Com.) Civil P. C., O. 33 R. 1, Note 3, Pt. 11; R. 5 Note 4.

(b) Civil P. C. (1908), O. 33, R. 7 and S. 149—Application for leave to sue on behalf of lunatic — Plaint of proposed suit filed on last date of limitation — Application rejected — Payment of court-fee, if can be allowed at late stage of revision against rejection of pauper application.

Where in an application to sue in *forma pauperis* by next friend on behalf of a lunatic, the plaint of the proposed suit is filed on the last date of limitation and the application is refused on the ground that the lunatic plaintiff had sufficient means to pay the court-fee, assuming that the suit is founded on a title which deserves to be investigated refusal to permit the plaintiff to pay the necessary court-fee is likely to entail the extinction of the plaintiff's claim. The conduct of the next friend in minimising the extent of the plaintiff's properties should not be allowed to prejudice the plaintiff's interests. The provisions of S. 149, Civil P. C., are sufficiently wide and should be applied for granting time for filing the requisite court-fee even at the stage of revision against the rejection of the application for leave to sue in *forma pauperis*. [Para 8]

Annotation : ('44-Com.) Civil P. C., O. 33 R 7, Note 5 and S. 149 Note 10.

(c) Civil P. C. (1908), O. 33, Rr. 5 (b) and 7 — Rejection of application to sue in forma pauperis —Costs—Pleader's fees—Computation—Civil P. C. S. 35—Oudh Civil Rules, R. 289.

It is not possible to ascertain the value of a claim in an application to sue as a *forma pauperis*. The plaintiff merely seeks immunity from payment of court-fee, but since that immunity is not absolute, it is difficult to regard the sum payable as its true value. Sub-rule (11) of R. 289, Oudh Civil Rules prescribes that in cases in which the subject-matter of a claim does not admit of valuation the fee must be calculated according to the rules framed under the Suits Valuation Act if they are applicable and in other cases reasonable fee must be fixed in view of the time occupied in the trial of the case and the nature of the question involved. Under sub-r. (9) the fee payable to the Government pleader for opposing an application to sue as a pauper is 10 per cent. on the amount of the court-fee leviable on the plaint subject to a maximum of Rs. 75. The fee payable to defendants' pleader obviously should not be larger. Computation of pleaders' fees, on the valuation of the suit, made in application for leave to sue as pauper is not warranted by R. 289. [Para 9]

Annotation : ('44-Com.) Civil P. C., S. 35, Note 26, Pt. 9.

Siraj Husain, Girja Shankar and Ali Nazar — for Applicant.

R. B. Saraswati Prasad, S. B. Chaudhry, Karta Krishna and Lakshmi Narain (for No. 1) and R. K. Nigam (for Nos. 2-6)—for Opposite Party.

Order.—These connected revisions are directed against two orders passed by the learned civil Judge, Lucknow. The first order rejected the applicant's prayer for grant of leave to sue as a pauper and the second refused to amend the memo of costs in the formal order.

[2] Kr. Tej Singh applicant is alleged to be a person of unsound mind. Whether or not he is in fact mentally afflicted as alleged has yet to be determined.

[3] The plaint of the proposed suit was filed by one Thakur Ganga Singh purporting to act as the next friend of Kr. Tej Singh. It prayed for delivery of possession of the taluqa of Oel as well as diverse other properties from the present holder of the estate, namely Raja Yuvraj Dutt Singh and Guzaredars of the estate. The claim was founded on the allegation that the plaintiff was the nearest heir of the previous taluqdar, namely, Raja Krishna Dutt Singh who died on 15th December 1932. The suit was valued at Rs. 1,10,00,000. The court-fee payable on the aforesaid sum amounted to Rs. 12,500. The value of the plaintiff's total assets was shown in a schedule attached to the plaint as Rs. 1275 only, and in its para. 18 Thakur Ganga Singh who signed as the next friend for the plaintiff averred that Kr. Tej Singh was a pauper and did not possess sufficient means to enable him to pay the fee prescribed by law. He prayed, therefore, for leave to sue in *forma pauperis*. Notice was issued to the Government pleader and to the defendants in due course. Both denied Thakur Ganga Singh's averments regarding the plaintiff's means. In a written statement filed by the Raja it was mentioned that Kr. Tej Singh possessed properties which were worth at least Rs. 94,000. Their details were given in eight lists. The allegations as to plaintiff's infirmity of mind were denied. The interests of Thakur Ganga Singh were said to be adverse to those of the plaintiff. The Raja maintained that the so-called next friend was actuated by self-interest in instituting the suit, and he characterised the action as vexatious and calculated to defeat the ends of justice.

[4] As stated above, the controversy regarding Kr. Tej Singh's mental condition was not entered into. It was left for disposal after the question of pauperism was decided. The parties agreed to the adoption of this course.

[5] The inquiry under O. 33, Civil P. C., revealed that the plaintiff's assets were worth more than Rs. 70,000, that the schedule containing the list of assets attached to the plaint

omitted to disclose the existence of many valuable properties of Kr. Tej Singh and that this was done in a deliberate attempt on the part of the next friend to conceal them in order to avoid the payment of the court-fee. The learned Civil Judge, therefore, holding that the plaintiff was possessed of sufficient means to enable him to pay the requisite fee refused to give leave to sue as pauper. It transpired from the evidence that previously Thakur Ganga Singh's brother Madho Singh had instituted a title suit for possession of the taluqa and other properties left by Raja Krishna Dutt Singh and claimed that he was the nearest heir of the late Raja. In it Tej Singh who is his junior son was alleged to be a congenital lunatic and therefore excluded from inheritance. The right of succession of Raja Yuvraj Dutt Singh, who is a son of a predeceased son of Raja Krishna Dutt Singh was disputed on various grounds which do not concern us. All that we need state is that the suit was not pressed for decision. It was withdrawn apparently because Madho Singh who had simultaneously started proceedings under the Lunacy Act in order to obtain a declaration regarding Kr. Tej Singh's mental infirmity, miserably failed to substantiate his allegations. Soon afterwards another suit instituted in this Court on behalf of the present plaintiff by one Raja Jai Indra Bahadur Singh of Mahewa who purported to act as his next friend was also withdrawn presumably for the same reason. In view of the aforesaid litigation, the learned Civil Judge, it would seem, considered that Thakur Ganga Singh's attempt to set up the title of Kr. Tej Singh and to fight out his battle by characterising him as a lunatic was a part of the design conceived by his brother in 1933 to harass, and, if possible, to dislodge the present holder of the Oel estate. The learned lower Court, therefore, awarded three sets of costs against Thakur Ganga Singh personally. It also allowed special costs to the Raja under S. 35-A, Civil P. C. The costs of opposite party No. 1, Raja Yuvraj Dutt Singh, were taxed at rupees 5281-1-0. This amount included Rs 5000 in respect of pleader's fee on the valuation of the suit, namely Rs. 1,10,00,000. A further sum of Rs. 500 was shown as the Raja's special costs. The costs of the other defendants were taxed at Rs. 1506-9-0 including Rs. 1500 for pleader's fee as per certificate. The Government pleader's fee was shown as Rs. 75. Thakur Ganga Singh was dissatisfied with the taxation of pleader's fee. According to him, the valuation of the suit should not have been regarded as the valuation of the prayer for leave to sue as a pauper. He, therefore, applied under S. 152, Civil P. C., for reduction of the legal fee but remained unsuccessful. Revision Application No. 57 of 1946 is directed against the order refusing leave. Revision Application No. 141 of 1946 challenges the order whereby the plaintiff's application for correction of the memorandum of costs was rejected.

[6] The elaborate arguments which were addressed to us on behalf of the applicant resolve themselves into three main contentions :

(1) that in view of the mental condition of the applicant he must be deemed to be incapable of actually possessing the property of which he has been found to be the owner,

(2) that in the circumstances of the case the Court below ought to have permitted the plaintiff to make good the deficiency in court-fee within a reasonable time,

(3) that the pleader's fee ought not to have been taxed on the valuation of the suit.

[7] The first of the aforementioned contentions rests upon the assumption that Kr. Tej Singh is a person of unsound mind. It is pointed out that though the applicant has been found to have cash and silver of considerable value they are kept with the treasurer of the estate and are out of reach of the next friend. In our opinion the circumstances indicate that the plaintiff has full control over his assets. He keeps a safe in the Raja's treasury. The value of its contents would seem to be more than what is necessary for payment of the court-fee. The safe has two keys. One of them is kept by the plaintiff himself, while the other is kept by the estate treasurer who makes disbursements on plaintiff's orders and gets from him a separate allowance for the services which he is called upon to render. There is also reliable evidence to show that apart from what is contained in the safe there are other properties such as groves, a motor car and a number of milch cattle which are in the sole control of the plaintiff. The value of these properties also exceed the amount necessary for meeting the court-fee. Besides, Kr. Tej Singh who lives with the Raja gets a maintenance allowance of Rs. 700 per month. We are satisfied, therefore, that the plaintiff is in a position to pay Rs. 12,500 as court-fee. Rules 5 and 7 of O. 33 imperatively enjoin that if the applicant has sufficient funds or property from which he can pay court-fee or on which the requisite money can be raised for that purpose permission to sue in *forma pauperis* must be refused. According to the explanation attached to O. 33, R. 1 a person can be held to be a pauper only when he is not possessed of sufficient 'means.' The latter expression covers all realisable assets within the applicant's reach. The fact that he is mentally incapacitated from contracting or transferring the property is

hardly material, since the law provides proper methods by the adoption of which the property of a person of unsound mind can be converted into money. There is no evidence to show that Ganga Singh ever made any efforts to secure the necessary funds from the plaintiff's safe or from any other property. The learned Civil Judge was, we think, justified in refusing leave to Kr. Tej Singh to sue as a pauper. There is, in our judgment, no illegality or material irregularity in the exercise of the lower Court's jurisdiction, and there is no reason, therefore, to interfere with the order refusing to grant the leave sought.

[8] As regards the applicant's request to permit him to make good the deficiency in court-fee we have come to the conclusion that reasonable opportunity should be given to him The plaint of the proposed suit was filed on the last day of limitation, and assuming as we must assume at this stage that the suit is founded on a title which deserves to be investigated refusal to permit the plaintiff to pay the necessary court-fee is likely to entail the extinction of Kr. Tej Singh's claim. The conduct of the next friend in minimising the extent of the plaintiff's properties should not be allowed to prejudice the plaintiff's interests. The provisions of S. 149, Civil P. C., are sufficiently wide and should be applied for granting time even at this stage for filing the requisite court-fee. In the circumstances of the case, we think we should grant the indulgence which the plaintiffs seeks.

[9] As regards the third contention our conclusion is that the computation of pleader's fee on the valuation of the suit was not warranted by R. 289, Oudh Civil Rules. The defendants' costs have been apparently taxed by the lower Court under sub-r. (8) read with sub-r. (5). The applicant's prayer for leave to sue as a pauper has been treated as a miscellaneous case and has been valued at Rs. 1,10,00,000. It seems to us hardly possible to ascertain the value of a claim in an application to sue as a *forma pauperis*. The plaintiff merely seeks immunity from payment of court-fee, but since that immunity is not absolute, it is difficult to regard the sum payable as its true value. Sub-rule (11) of R. 289 prescribes that in cases in which the subject-matter of a claim does not admit of valuation the fee must be calculated according to the rules framed under the Suits Valuation Act if they are applicable and in other cases reasonable fee must be fixed in view of the time occupied in the trial of the case and the nature of the question involved. Under sub-rule (9), the fee payable to the Government pleader for opposing an application to sue as a pauper is 10 per cent. on the amount of the court-fee leviable on the plaint subject to a maximum of Rs. 75. The fee payable to defendants' pleader obviously should not be larger. In our judgment, therefore, first defendant's pleader's fee should be taxed at Rs. 75, and the same amount should be taxed as the pleader's fee of the other defendants.

[10] We accordingly uphold the order of the learned Civil Judge, Lucknow, so far as it refuses leave to the plaintiff to sue in *forma pauperis*. We, however, modify the formal order to this extent that in the costs of defendant 1 his pleader's fee shall be taxed at Rs. 75 instead of Rs. 5000, and in the costs of the other defendants a similar sum shall be substituted for Rs. 1500. We allow three months' time to Kr. Tej Singh from the date of this order to make good the deficiency in court-fee. If the court-fee is paid, the plaint shall be registered as a suit. The applicant having substantially failed in S. 115-Application No. 57 of 1946. Thakur Ganga Singh shall personally pay the costs of this Court to the opposite parties. We fix Rs. 75 as pleader's fee. In S. 115-Application No. 141 of 1946 parties will bear their own costs.

R.G.D. *Order accordingly.*

A. I. R. (35) 1948 Oudh 160 *[C. N. 60.]*

KAUL J.

Shri Bhokhan v. *Radha Swami Satsang Sabha.*

Second Appeal No. 340 of 1943, Decided on 9-9-1947, against order of Civil Judge, Bahraich, D/- 9-9-1943.

(a) Will—Bequest—Validity—Bequest in favour of body corporate.

There is no restriction in Indian law to a corporation taking property under a will. Consequently a bequest in favour of Radha Swami Satsang Sabha, Dayal Bagh, a body corporate under Societies Registration Act, is valid. [Para 3]

(b) Succession Act (1925), S. 114 — Will taking effect immediately on death of testator.

Where the will takes effect immediately on the death of the testator and the property bequeathed vests in the legatee forthwith, no question of offending against rule of perpetuity arises. The fact that a corporate body may hold the property for ever is no infringement of the rule against perpetuity. [Para 4]

Annotation : ('44-Com.) T. P. Act, S. 14, N. 5.

(c) Texts—Construction—Stray passages.

It is always unsafe to rely on stray passages found in English Law Books and to treat them as stating either the whole of the law on the subject to which they relate or the present law applicable to cases in this country. [Para 9]

Siraj Hussain — for Appellant.

S. C. Das and Jai Shanker Trivedi — for Respondents.

Judgment. — This is a defendant's appeal against an appellate decree passed by the learned Civil Judge of Bahraich confirming the decree of the Munsif in the same district.

[2] The suit out of which this appeal arises was brought by Radha Swami Satsang Sabha

Dayalbagh, a body corporate registered under the Societies Registration Act. It appears that on 17th May 1939, one Sheo Ratan executed a will in favour of Radha Swami Satsang Sabha, Dayal Bagh (hereinafter referred to as the Sabha) plaintiff-respondent 1 in this appeal, by which he bequeathed all his property in favour of the said Sabha. On Sheo Ratan's death Shri Bhokhan, appellant, and certain others claiming to be collaterals of the deceased, took possession of his property. The Sabha accordingly brought a suit for recovery of the same. A number of points were raised in defence, but it is unnecessary to refer to them in detail. It was found by the Munsif, Bahraich, in whose Court the suit was brought, that Radha Swami Satsang Sabha was an institution in the nature of a *math* and so capable of holding property under a will. A contention put forward on behalf of the defendants that the will not being in favour of a deity but in favour of Sabha was invalid, was repelled. It was further held that the will did not offend against the rule of perpetuity. The Sabha's claim was ultimately decreed. Dissatisfied with this decision Shri Bhokhan, Indar Datt and Inder Pal, defendants in the suit, preferred an appeal before the District Judge of Gonda. The case was disposed of by the Civil Judge, Bahraich, who agreed with the trial Court and dismissed the appeal; hence the present second appeal.

[3] Only two points were raised by the learned counsel for the appellant in support of his contention that the bequest in favour of the Sabha was invalid. He contended : (1) that a body corporate like the Radha Swami Sat Sang Sabha could not take any property under a will, and (2) that the will of Sheo Ratan offended against the rule of perpetuity. I am clear that there is no force in either of these contentions. In support of the first contention, Mr. Siraj Husain relied on the following passage from Broom's Legal Maxims, Edn. 9, p. 292 :

"The latter of these statutes was explanatory of the former, and declared that every person (except as therein mentioned) having a sole estate of interest or being seised in fee-simple of and in any manors, lands, tenements, rents, or other hereditaments in possession, reversion, remainder, or of rents or services incident to any reversion or remainder, shall have full and free liberty, power and authority to give, dispose, will, or devise to any person or persons (*except bodies politic and corporate*) by his last will in writing, all his said manors, lands, tenements, rents, and hereditaments, or any of them, at his own free will and pleasure."

He emphasised the words which have been underlined (here italicized) in the above passage and contended that the law as laid down there should be applied to the present case. It is always unsafe to rely on stray passages found in English Law Books and to treat them as stating either the whole of the law on the subject to which they relate or the present law applicable to cases in this country. The passage referred to occurs in a part of the book which describes how the law relating to transfer of property developed in England in the different periods of history after the Norman Conquest. It was pointed out that it was the well-known policy of English law to favour alienations and to discountenance every attempt to tie up property unreasonably; or in other words, to create a perpetuity. The feudal system which prevailed in England for a long time was, however, directly opposed to this view. Under the heading "*Alienatio rei praefertur juri accrescendi* (Co. Litt. 185-a) alienation is favoured by the law rather than accumulation" the author discusses the different steps by which restrictions which were, in accordance with the spirit of the feudal laws, imposed upon the alienation of land by deeds, were gradually relaxed. It was further pointed out that the power of disposing of land *by will* was equally opposed to the policy of feudal law. The learned author observes (p. 291) :

"Consequently, although land was devisable until the conquest, yet shortly afterwards, it became inalienable by will and so remained until the enactment of the statutes 32 Hen. VIII, c. 1, and 34 & 35 Hen. VIII, c. 5."

Then follows the passage on which reliance was placed by Mr. Siraj Husain. But what is stated there is not the present law in force in England far less law applicable to cases in this country. As pointed out in Halsbury's Laws of England, Hailsham Edn., Vol. 8, p. 88, para. 142 :

"Apart from the provisions of the Mortmain and Charitable Uses Acts, a corporation aggregate is as much entitled to take property under testamentary disposition as an ordinary person, for the Wills Act repealed all the former statutes restricting corporations from taking under such a disposition, and itself imposed no restriction of any kind: (Wills Act 1837 (7 Will IV & 1 Vict. c. 26), S. 2 (repealed)."

There is no doubt now that even in England land may be granted to a corporation sole (by a deed) and a corporation sole may acquire land under a will (Halsbury's Laws of England, Vol. 8, para. 141). But whatever be the law in England, there can be no doubt that there is no restriction in Indian law to a corporation taking property under a will. The first of the contentions therefore fails.

[4] The second contention raised with reference to the rule of perpetuity is equally without substance. The rule of perpetuity briefly put is: No bequest is valid where the vesting of the thing bequeathed is delayed beyond the lifetime of one or more persons living at the time of the testator's decease and the minority of some person who comes into existence at the expiration of that period and to whom the thing

bequeathed is to belong if he attains full age. The fact that a corporate body may hold property for ever is no infringement of the rule of perpetuity. The will was to take effect immediately on the death of the testator, Sheo Ratan, and the property bequeathed vested in the Sabha forthwith; hence no question of the bequest offending against the rule of perpetuity arises. The appeal is without substance and is dismissed. Respondent 1 will get his costs from the appellant.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 162 *[C. N. 61.]*

FULL BENCH

MISRA, KAUL AND KIDWAI JJ.

B. Gur Charan Lal — Creditor — Appellant

v. *Shiva Narain and others — Respondents.*

Misc. Appeal No. 53 of 1945, Decided on 25-9-1947, from order of Special Judge, 1st Grade, Unao, D/- 28-5-1945.

(a) U. P. Encumbered Estates Act (25 [XXV] of 1934), S 20—Decrees under S.14 passed—Proceedings cannot be quashed under S. 20 even if claim is subsequently entertained and determined.

When once decrees under S 14 have been passed, the Special Judge cannot quash proceedings under S.20 even if a bona fide claim is subsequently entertained under S. 11 (2) proviso and determined by him : 31 A. I. R. 1944 Oudh 277; 34 A. I. R. 1947 Oudh 66 and Misc. Appeal No. 14 of 1944, *Approved.* [Para 17]

(b) Interpretation of statutes — Plain language—Effect to be given to its plain meaning even if serious anomalies may result thereby.

It is one of the cardinal principles of the interpretation of statutes that, where the language is plain and unambiguous and admits of but one meaning, the Courts must give effect to it according to its plain meaning and they are not justified in departing from it even though serious anomalies result or what the Court conceives to have been the intention of the Legislature is not carried out. [Para 6]

(c) Interpretation of statutes — Harmonious construction — Meaning of words depends on context — All parts of Act to be considered together — Words in one part to be so construed as to be consistent with other parts and intention of legislature.

The meaning of the words used in any portion of the statute must depend upon the context in which they are placed. Moreover in interpreting an enactment all its parts must be considered together as forming one whole and it is not in accordance with sound principles of construction to consider one section, or group of sections alone, divorced from the rest of the statute. Further, so far as possible, that construction must be placed upon words used in any part of the statute which makes them consistent with the remaining provisions and with the intention of the Legislature to be derived from a consideration of the whole of the enactment. The words may be given a wider or a more restricted meaning than they ordinarily bear if the context requires it: 19 A. I. R. 1932 Oudh 152, *Ref.* [Para 6]

(d) Interpretation of statutes — Amending Act —Vested rights cannot be allowed to be abrogated unless such intention is clearly expressed.

It would not be in accordance with sound principles of construction to allow vested rights to be abrogated by action under the amendment unless there was clear indication of an intention on the part of the Legislature to allow that to be done. [Para 14]

Cases referred : —

1. ('44) 1944 O. W. N. 297 : 31 A. I. R. 1944 Oudh 277, Sheo Mangal Singh v. James Own.
2. ('46) 1946 O.W.N. 258 : 34 A. I. R. 1947 Oudh 66 : 21 Luck. 522 : 224 I. C. 530, Ara Begum v. Roshan Jahan Begam.
3. Misc. Appeal No. 14 of 1944, D/- 9-4-1946, Irshad Husain v. Bakhshish Husain.
4. ('46) I. L. R. (1946) All. 588 : 33 A. I. R. 1946 All. 508 : 225 I. C. 159, Ganga Sahai v. Mt. Nafis Bano.
5. ('32) 9 O W. N. 229 : 19 A. I. R. 1932 Oudh 152 : 7 Luck. 648 : 137 I. C. 42 (F.B.), Kedar Nath v. Pearey Lal.
6. ('34) 11 O. W. N. 977 : 21 A. I. R. 1934 P. C. 188 : 9 Luck. 421 : 61 I. A. 322 : 150 I. C. 810 (P. C.), Abdul Latif Khan v. Mt. Abadi Begam.

Anand Madhava — for Appellant.

M. Wasim — for Respondents 1 to 4.

Judgment.—The respondents made an application under S. 4, Encumbered Estates Act, and notices under S. 11 of the Act were published in the Gazette on 8-1-1938. Claims were filed and were disposed of by the Special Judge on 15-12-1942 Thereafter no application having been made under S 20 of the Act, claims by creditors were taken up and decrees were passed in their favour on 5-3-1943. Gur Charan, the appellant, obtained a decree for Rs. 24,000. The Special Judge passed an order for the transmission of the decrees passed by him to the Collector but this was not in fact done since, in connexion with an appeal in this Court, the transmission of decrees had been stayed by an order dated 28-1-1943.

[2] On 3-1-1945, one Sheo Prasad filed a claim under S. 11, Encumbered Estates Act, in respect of a few bighas of "haqqiat mutafarriqua." The delay in filing this claim was excused under the proviso to S. 11 (2) of the Act and, on 15-5-1945 it was allowed. Eleven days later, the landlord-applicant prayed that, under S. 20 of the Act, proceedings be quashed, and this was done by an order passed on 28-5-1945, without notice to the other parties.

[3] Gur Charan Lal, the principal creditor, appealed and a division bench of this Court, finding that there is a conflict of opinion between this Court and the High Court at Allahabad as to the interpretation of S. 20 and as to whether an application can be made under that section in circumstances such as the present, has referred the following question for determination by a Full Bench :

"Whether when a bona fide claim has been entertained under the proviso of S. 11 (2), and has been decided by the Special Judge, an application under S. 20 can be entertained although the claims under S. 14 have been determined and the decrees have been passed?"

[4] The Encumbered Estates Act is not happily worded and the interpretation of various

provisions contained in it has caused considerable trouble to the Courts and anomalies and differences of opinion have resulted. In respect of the matter before us, three division benches of this Court have laid down the proposition that, if decrees under S. 14 of the Act have been passed, proceedings cannot be quashed under S. 20. These cases are : 1944 O. W. N. 297,[1] 1946 O W.N. 258[2] and the unreported decision in Misc. Appeal No. 14 of 1944.[3] In the judgment in the first of these decisions the question is discussed while the other two decisions follow the first case. In the last case an application was made for review of judgment on the ground that the remarks in the first case were obiter dicta and that, in any case, the decision was incorrect. This application for review was rejected and it was ruled that the remarks were not obiter dicta but were necessary for the decision of the case. It was also held that the opinion expressed in that case did not call for reconsideration.

[5] It is true that none of these cases was exactly similar to the present case. In the first two of the cases mentioned, the claim was not entertained as the conditions laid down in the proviso to S. 11 (2), Encumbered Estates Act, were not fulfilled. Thus there was no decision of the case on the merits. In the third case there was a decision of the claim on the merits but the claim was rejected, though this does not make any difference in principle, since even the rejection of a case on the merits is a "determination". This case was not available to the Counsel for the parties since it has not been reported and was not laid before the division Bench which has referred the case. On the othar hand, in (I. L. R. 1945 ALL. 588=A. I. R. 1946 ALL. 508)[4] a division Bench of the Allahabad High Court, in a case in which the circumstauces were very similar to those in the present case, held that S. 20 of the Encumbered Estates Act allowed the quashing of proceedings even after decrees under S. 14 of the Act had come into existence. The learned Judges considered that the use of the word "any" before the word "claim" in S 20 gave it a wide scope. They held that, in the absence of any exception or proviso to S. 20, they were bound, on the language of the section, to hold that when a claim under the proviso to S. 11 (2) is decided by the Special Judge, a fresh period of limitation for making an application under S. 20 commences. In view of this difference of opinion, it becomes necessary for us to examine the language of the Statute, but before we do this, it will be as well to summarise some of the well-established rules relating to the interpretation of Statutes.

[6] It is one of the cardinal principles of the interpretation of Statutes that, where the language is plain and unambiguous and admits of but one meaning, the Courts must give effect to it according to its plain meaning and they are not justified in departing from it even though serious anomalies result or what the Court conceives to have been the intention of the Legislature is not carried out. It is, however, equally well settled that the meaning of the words used in any portion of the statute must depend upon the context in which they are placed. Moreover, in interpreting an enactment all its parts must be considered together as forming one whole and it is not in accordance with sound principles of construction to consider one section, or group of sections alone, divorced from the rest of the statute Further, so far as possible, that construction must be placed upon words used in any part of the statute which makes them consistent with the remaining provisions and with the intention of the Legislature to be derived from a consideration of the whole of the enactment. The words may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. These principles are so well settled that it is not necessary for us to quote authority to support them but it would be useful to refer to a Full Bench decision of this Court in 9 O. W. N. 229.[5] In that case on a consideration of the remaining provisions of the statute, the Full Bench greatly cut down the meaning to be given to general words used in S. 14 of the Religious Endowments Act (XX of 1863).

[7] Coming then to a consideration of the policy of the Legislature as derived from the provisions enacted by it, we find that the first objective was that proceedings under the Encumbered Estates Act should be commenced and terminated as expeditiously as possible, though unfortunately, this objective has not been attained. It was a measure enacted to give relief to encumbered estates, the burden upon which had become very heavy owing to great economic depression and the consequent increase in the value of the currency. Thus immediate relief was required, and efforts were made to secure it. Section 4 limits the time, within which applications could be made, to one year, with some extension if the circumstances justified it from the date of the enforcement of the Act. Sections 9 and 11 originally fixed short periods of time for making claims to property and to money decrees Section 7 (1) results in a stay of all suits and execution proceedings by which creditors sought to enforce their rights and S. 14 gives the date of the making of the application as the point of time at which liabilities were to be determined, that is to say, a moratorium for the payment of all debts, principal as well as interest,

was granted and, for the period no provision was originally made for the protection of the interests of the creditors from destructive and wasteful acts by the debtor who continued in possession. At the same time S. 26 fixed the year of the application as the year on the basis of which the ability of the landlord to pay instalments was to be determined and it was considered that all the property available then, even movable property, would continue to be available-*vide* Ss. 24(1) and 19(2). Section 7, sub-ss. (2) and (3) forbid the execution of decrees and all dealings with property until certain stages in the proceedings under the Encumbered Estates Act have been passed, that is to say, they hold up all transactions relating not only to land but to all the property of the debtor which is the subject-matter of the proceedings. These, as well as other provisions of the Encumbered Estates Act, clearly indicate that the Legislature contemplated that proceedings under that Act would be completed very expeditiously.

[8] We next come to a consideration of the procedure to be followed in disposing of proceedings under the Act. These proceedings are divided into four stages. First there is the preliminary stage, namely the stage of presenting an application before the Collector, filing a written statement before the Special Judge and getting notices under Ss. 9 and 11 of the Act published in the Gazette. Failure to comply with the provisions of the Act, or of the rules framed under it, or a default in the prosecution of the case at this stage entails the penalty of dismissal of the application. The next stage is the stage of an enquiry into the extent of the landlord's property. Claims to property were to be made within three months of the publication of the notice in the Gazette and, originally, no extention of time was allowed. Within one month of the completion of the enquiry under S. 11, the landlord-applicant had a right, which the Court was bound to enforce, of getting the proceedings quashed under S. 20 of the Act. During this period of one month no decrees under S. 14 of the Act were to be be passed: *vide* S. 11 (3). Thereafter comes the third stage, namely the determination of claims to money and finally the fourth stage, namely proceedings to liquidate the debt, for which the case goes back to the Court of the Collector. Once the stage contemplated by S. 20 is past there is no provision for the termination of proceedings which must continue their course till liquidation of debt takes place in accordance with the provisions of the Act. Even if the landlord-applicant dies the proceedings are to be "continued as nearly as may be possible in all respects as if the landlord were living."

[9] No doubt the choice given under S. 20 is offered at the stage at which it is offered for two reasons. Firstly, on the determination of claims to property the position is crystallised and the landlord-applicant is in a position to know how much property is available for the satisfaction of his debts. He also knows the full extent of the claims for money against him because claims which have not already been made under the provisions of Ss. 9 and 10 of the Act are, by virtue of S. 13, deemed "for all purposes and on all occasions to have been duly discharged". Secondly, no rights have arisen in favour of creditors by having decrees passed in their favour. It is no doubt true that decrees will, by this time, have been passed in favour of persons having a right to property but their rights will not be adversely affected by reason of the quashing of the proceedings since there is no impediment in their way in establishing them in civil Courts. In the case of creditors, however, the position is different because if their decrees are set aside, the priority which they acquire by reason of those decrees over persons who have become creditors since the commencement of the proceedings under the Encumbered Estates Act, is lost and they are placed on the same footing as the subsequent creditors. Thus their rights under decrees will be materially affected.

[10] The scheme of the Act, as well as the considerations which we have just mentioned, lead us to the conclusion, in agreement with the three decisions of this Court to which we have referred in an earlier part of this judgment, that an order quashing proceedings can only be passed before any decrees have been passed under S. 14 of the Act. We consider that the provision of the Act, which prohibits the passing of decrees under S. 14 before the period allowed for applying to get proceedings quashed conclusively shows that the Legislature meant that the landlord-applicant was to make his choice before his creditors had obtained decrees for money against him.

[11] It is no doubt true that the general word "any" has been used before the word "claim" but this is so not because any occasion could arise for a claim to be disposed of after the passing of decrees under S. 14—we have just shown that this was not possible under the Act, as it originally stood—but because the Legislature wished to make it clear that it was not necessary for the landlord—applicant to wait till *all* the claims under S. 11 had been disposed of but that it was possible for him to apply when *any one* claim had been disposed of.

[12] We were also pressed with the argument that, on this construction, the words "notwithstanding anything contained in S. 18" in S. 43

(a) of the Act have no meaning. It is contended that these words clearly indicate that decrees under S. 14 might have been passed before the proceedings are quashed, since S. 16 relates only to the effect of decrees passed under that section. These are words which occurred in the unamended Act also.

[13] Under the Act, as it then stood, no decrees could have been passed under S. 14 before the quashing of proceeding because S. 11·(3) expressly forbade the passing of such decrees so long as the period fixed for making an application for quashing had not expired and it was certainaly not contemplated that any decrees would be passed after such an application had been made but before it was disposed of. Thus it appears that these words were inserted by the Legislature not to indicate that there could be any quashing of proceedings even after decrees under S. 14 of the Act, had been passed but, as their Lordships of the Judicial Committee said in respect of some words used in S. 3 of the Oudh Estates Act, " *ex abundanti cautela*"— *vide* 11 O. W. N. 977[6] at p. 983.

[14] Thus under the unamended Act there can be no doubt that proceeding could only be quashed so long as the stage for passing decrees under S. 14 had not arrived. Then came the amendment. It would not be in accordance with sound principles of construction to allow vested rights— the rights under decrees passed under S. 14— to be abrogated by action under the amendment unless there was clear indication of an intention on the part of the Legislature to allow that to be done.

[15] In the present case the amendment was made not for the benefit of the landlord-applicant but because it was realised that the period of three months was too short for the purpose of enabling persons, who had no connection with the landlord-applicant or with his creditors but whose property had wrongly been entered in the list of the landlord's property by the landlord himself or by his creditors, to file claims. It was felt that injustice had resulted, the consequences of which might be serious; but there is no indication that the Legislature intended that; in making provision for removing this injustice, whatever had passed, or whatever proceedings had in the meanwhile taken place, between the landlord or his creditors should in any way be affected or that proceedings should be in any way delayed.

[16] It is worthy of note that, in spite of the addition of the proviso to S. 11 (2) allowing claims to be filed even at a stage when all decrees under S. 14 had been passed and the case had been forwarded to the Collector, S. 11 (3) and S. 20 have both been left unaltered and no amendments have been made even to the Rules framed by the Government under the powers conferred by S. 54. In the absence of any such amendment there is no reason for giving to the words "any claim" in S. 20 a more extended meaning than that which they had under the unamended Act, nor can it be assumed that the Legislature intended to confer any fresh right upon the landlord-applicant to apply for the quashing of proceedings and consequently the setting aside of decrees already passed, the right originally conferred having already terminated by efflux of time.

[17] Having regard to all these considerations, we see no reason to differ from the opinion consistently held by this Court and expressed in three decisions of division Benches to which we have referred and we answer the question referred to the Full Bench as follows:

"When once decrees under S. 14 of the Encumbered Estates Act have been passed the Special Judge cannot quash proceedings under S. 20 of the Act, even if a bona fide claim is subsequently entertained and determined by him."

[18] The case will now be laid before theB ench for disposal.

S. C. *Answer accordingly.*

A. I. R. (35) 1948 Oudh 165 *[C. N. 62]*

KAUL AND KIDWAI JJ.

Baldeo Singh — Plaintiff — Appellant v. *Achal Singh and another — Defendants — Respondents.*

First Appeal No. 100 of 1942, Decided on 4-11-1947, from decree of Civil Judge, Rae Bareli, D/- 30-5-1942.

(a) Civil P. C. (1908), S. 11—Suit against Hindu widow by third person—Compromise — It operates as res judicata in subsequent suit between third party and reversioner if compromise is bona fide and for benefit of estate — This principle applies in case of talukdar's widow.

If a litigation is fought out bona fide between a Hindu female and a person who threatens the estate, the decision in that litigation operates as "res judicata" in a subsequent litigation between the third party and the reversioner. The mere fact that the person with whom the litigation was fought was not a Hindu widow but a talukdar's wldow does not make any difference because, during her lifetime the talukdar's widow, though not an heir, alone represents the estate and no one else has any interest in it. Thus the same principles as to res judicata apply to a decision to which she was a party. Neither under the Hindu law nor under the Talukdari law does the reversioner claim under the widow. Section 11, Civil P. C., has been made applicable to a decision obtained against the widow because she represents the estate but this is subject to an important condition, namely, that the "decree must be fairly and properly obtained against her in regard to the estate", and not have been obtained by fraud and otherwise. This does not mean that the widow must necessarily fight out the case. She may effect a compromise and the compromise decree will bind the estate as much as a decree after contest, provided always, that the action of the widow is for the protection of the estate. If, however, the widow looks not to the benefit

of the estate but to her advantage and after securing her own rights abandons the reversion to the assailant, it cannot be said that she has entered into the compromise bona fide for the benefit of the estate: 5 AIR 1918 P C 87; 12 AIR 1925 P C 272 and 9 A I R 1922 Oudh 236, *Rel. on.* [Paras 17, 20]

Held on facts, that the final decision, the compromise and the withdrawal of the appeal in pursuance of it in a litigation between a talukdar's widow and a third person could not be said to have been arrived at in such a way as to bind the estate and it could not operate as res judicata against the plaintiff in a subsequent suit. [Para 21]

Annotation : ('14-Com.) C. P. C., S. 11, N. 63.

(b) Succession Act (1925), S. 61 — Plea of undue influence — Such importunity as takes away the free agency of testator, must be proved — Oudh Estates Act (1 [I] of 1869), S. 11.

In the case of a will where a plea of undue influence on the testator is taken, what is required to be proved is not "undue influence" as such but "such importunity as takes away the free agency of the transferor or testator." [Para 22]

(c) Evidence Act (1872), S. 111—Will—Plaintiff pleading undue influence—Evidence not disclosing use of undue influence — Burden is on plaintiff to substantiate his plea—Court must however determine whether evidence adduced by legatee is sufficient to remove all suspicion—Evidence Act (1872), S. 10.

Where in a suit challenging the validity of a will in favour of the defendant, the plaintiff pleads exercise of undue influence by the father of the defendant on the testator on the ground that he stood in the position of active confidence to the testator, but the evidence does not establish this, the burden lies upon the plaintiff to substantiate his allegations of undue influence. [Para 24]

Of course, in spite of this, when considering whether the will has been proved to be the voluntary act of an intelligent testator the burden of which rests upon the propounder of the will, the Court must bear in mind any suspicious circumstances that exist and must determine whether the evidence adduced by the legatee is sufficient to remove all suspicion: 9 A.I.R. 1922 PC 366, *Rel. on.* [Para 25]

Annotation : ('46-Man.) Evi. Act, Ss. 101 to 103, N. 52; S. 111, N. 3.

(d) Oudh Estates Act (1 [I] of 1869), S. 13A (2) Interpretation — Remoter male agnate of testator is covered by S. 13A (2) in absence of nearer male agnate.

Section 13A cannot be read by itself but must be considered along with Ss. 14 and 15. The plain intention of Ss. 13A, 14 and 15 is that so long as the estate remains in the talukdar's family, no matter how remotely connected the legatee might be, it will continue to be governed by the Act while if it is bequeathed to a stranger, a person between whom and the testator there is no heritable blood it will cease to be governed by the Act. All that S. 13A (2) provides is that the person must be one "who might in the absence of other heirs, have succeeded." It does not provide that he must be a person coming within any particular clause of S. 22. The use of the words "in the absence of nearer heirs" indicates that the Courts are to determine the possibility of succession of the legatee to the testator in the absence of any person standing between him and the testator in the line of heirship. Such an event would presuppose the absence of male agnates nearer in degree than him to the testator and in that event he would be the nearest male agnate and entitled to succeed as such. Thus a legatee who is a remoter male agnate is covered by cl. (2) of S. 13A if there is no nearer male agnate of the testator. [Paras 39, 40, 41]

Cases referred :—

1. ('34) 11 O.W.N. 351 : 21 A.I. R. 1934 Oudh 190 : 9 Luck. 484 : 150 I.C. 495, Gaya Bakhsh Singh v. Deo Singh.
2. ('18) 45 I. A. 168 : 5 A. I. R. 1918 P.C. 87 : 40 All. 593:48 I.C. 553 (P.C.), Risal Singh v. Balwant Singh.
3. ('25) 52 I.A 398 : 12 A.I.R. 1925 P.C. 272 : 47 All. 883 : 28 O. C. 352 : 91 I. C. 370 (P. C.), Mata Prasad v. Nageshar Sahai.
4. ('22) 25 O. C. 189 : 9 A. I. R 1922 Oudh 236 : 69 I. C. 730, Nageshwar Sahai v. Mata Prasad.
5. ('83) 6 Mad. 43, Vythilinga Muppanar v. Vijayathammal.
6. ('75 77) 1 All. 293, Hingan Khan v. Ganga Prasad.
7. ('91) 15 Bom. 370, Patloji Bhiwaji v. Ganu Ramji.
8. ('35) 14 Pat. 635 : 23 A. I. R. 1936 Pat. 198 : 159 I. C. 173, Dist. Board, Darbhanga v. Suraj Narain Sinha
9. ('20) 1920 A. C. 349 : 6 A. I. R. 1919 P.C. 132 : 89 L. J. P. C. 22 (P. C.), Craig v. Lamonreux.
10. (1868) 1 P. & D. 481, Hall v. Hall.
11. (1858-67) 175 E. R. 860 : 1 F. & F. 578, Earl of Sefton v. Hopewood.
12. ('85) 11 P. D. 81, Wingrine v. Wingrine.
13. ('27) 99 I. C. 571 : 14 A.I.R. 1927 Mad. 255, Venkataramier v. Krishnammal.
14. ('11) 38 I. A. 13 : 38 Cal. 355 : 9 I. C. 33, Bur Singh v. Uttam Singh.
15. ('22) 49 I.A. 413 : 9 A.I.R. 1922 P.C. 366 : 44 All. 495 : 69 I. C. 31 (P.C.), Ram Gopal Lal v. Aipna Kunwar.
16. ('20) 47 I. A. 1 : 7 A.I.R. 1920 P.C. 65 : 43 Mad. 546 : 55 I. C. 447 (P. C.), Poosathurai v. Kannappa Chettiar.

Hyder Hussain and Jagdishchandra — for Appellant.

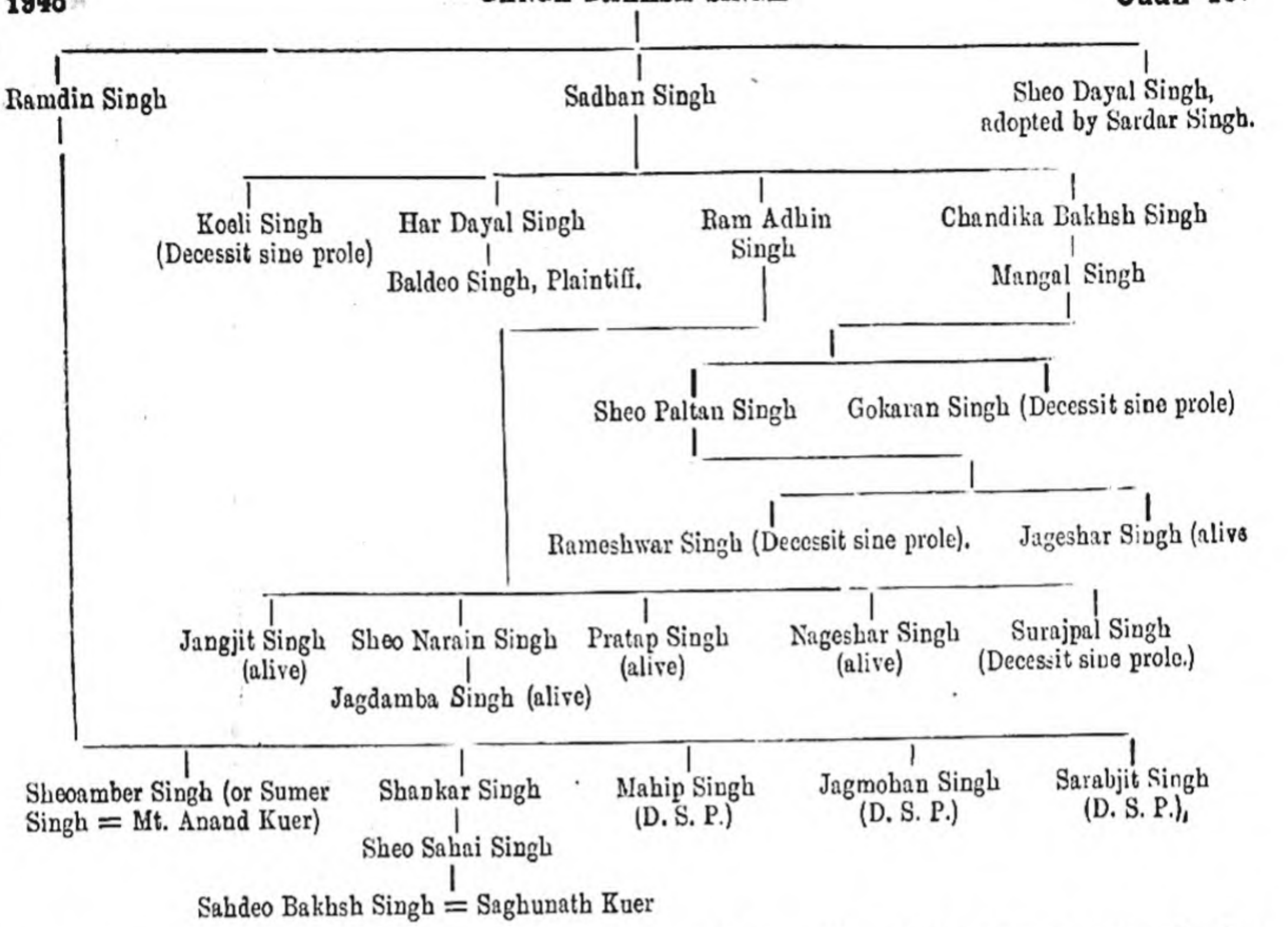
M. Wasim, Bishun Singh, Ali Hasan and Onkar Singh — for Respondent 2.

Judgment. — The following pedigree, to be found in para. 1 of the plaint will help to elucidate the facts of the case:

(See pedigree on page 167.)

[2] This pedigree is admitted except for the fact that the defendants allege that Chandika Bakhsh Singh was the eldest, and not the youngest, son of Sadhan Singh. Moreover, the defendants put forward a fuller pedigree to show the connection between defendant 1 and the last holder, Shahdeo Bakhsh Singh. This pedigree, which has been held by the learned Civil Judge to have been proved—a finding which is not challenged in appeal—shows that defendant 1 is the great-grandson of Sheo Dayal Singh who had been adopted by Sardar Singh, a descendant of Mardan Singh grand-uncle of Ganga Singh.

[3] Sheoambar Singh, mentioned in the above pedigree, was the taluqdar or Taluqua Osah, district Rae Bareli, and his name was entered at No. 203 and 93 in lists I and II prepared under S. 8 of Act I of 1869. He was thus a



taluqdar to whom the provisions of Act I of 1869 applied and it is agreed that all the property mentioned in lists A, B and C attached to the plaint was governed in his hands by the Act. He died on 1st September 1871 and his widow, Anand Kuer, entered into possession of his estate, although nearer heirs under S. 22 of Act I, his brother Mahip Singh, and his real nephew, Sheo Sahai were then alive. On 21st October 1877, Babuain Anand Kuer died and Sheo Sahai entered into possession. Sheo Sahai died in December 1903 and was succeeded by his only son Sahdeo Bakhsh Singh. About two years after he had succeeded to the property on 18th June 1910 Sahdeo Bakhsh Singh then a childless man, about 36 years of age, executed a will in favour of Achal Singh, defendant 1, and deposited it with the District Registrar under S. 43, Registration Act. Sahdeo Bakhsh Singh lived for anothor 10 years and died on 5th December 1920. He left no issue and his widow, Babuain Saghunath Kuer, took possession of the property ignoring the will.

[4] Achal Singh, the legatee, was not well off, consequently he sold a ten annas share in the property to the father of defendant 2 and the vendor and the vendee jointly instituted a suit on 30th August 1921 for recovery of possession of the estate on the basis of the will (*vide* Ex. A–52). The widow resisted the claim and challenged the genuineness of the will and alleged the absence of mental and physical capacity in the testator to execute the will (*vide* Ex. A-53). The trial Court held that Babu Sahdeo Bakhsh Singh had executed the will and that he was possessed of a sound disposing mind at the time. It, however, held that the will was not properly registered as required by S. 13A, Oudh Estates Act. It, therefore, decreed the suit with regard to non-taluqdari property but dismissed it with regard to taluqdari property (Ex. A-55). Both parties appealed against the decree of the Subordinate Judge, and the Judicial Commissioner's Court, after a difference of opinion between the two Judges composing the Bench which heard the appeal had been resolved by reference to third member of the Court, uphold the will in its application to taluqdari property also. The appeal of the widow was, therefore, dismissed and that of Achal Singh was allowed (*vide* Exs. A-68, A-33 and A-40). The widow appealed to His Majesty in Council but the appeal was compromised and it was agreed that Babuain Saghunath Kuer should remain in possession during her lifetime and after her death the plaintiffs of that suit should obtain possession.

[5] On the 23rd April 1929, Partap Singh, first cousin of the plaintiff, instituted a suit against the present defendant 1 as well as against his own brothers and the present plaintiff, for recovery of possession of the ornaments and other movable property left by Saghunath Kuer. He claimed that Babuain Saghunath Kuer was the taluqdar of Osah and he and his brothers and cousin were her heirs being the reversioners of her husband (*vide* Ex. 4). Achal Singh set up the will and claimed to be entitled to the property either as legatee of Sahdeo Bakhsh Singh or the heir of

Saghunath Kuer (EX. 16 and EX. 1). In the oral pleadings the plaintiff's counsel denied the genuineness and validity of the will. He also pleaded that the will, if held proved,

"was obtained by undue influence by defendant 1's father inasmuch as he was in a position of active confidence and he dominated the will of Sahdeo Bakhsh" (Ex. 1).

This suit was decreed and the movable property was obtained by Partap and others (EX. A-5).

[6] The suit, out of which this appeal arises was instituted on 18th February 1941. With the plaint the plaintiff put forward a pedigree which showed him as not only one of the four persons nearest in the degree but also as the seniormost in the line among the male agnates of Sahdeo Bakhsh Singh. The statement of the plaintiff's claim in the plaint is not very happily worded but the case is made quite clear in the oral pleadings of 19th February 1942, when the plaintiff's advocate stated that his first case was that Babu Sahdeo Singh was the last male-holder of the Osah estate and was governed by the Oudh Estates Act. He died on 5th December 1920. After his death, his widow Mst. Saghunath Kuer, succeeded to the estate as the widow of a Taluqdar. She died on 20th February 1919. The plaintiff is the nearest heir to the Taluqa..... His case in the alternative is that Mst. Anand Kuer widow of Sheoambar Singh, remained in possession of the estate from 1st September 1871 to 21st October 1887 adversely against the rightful heir under the Oudh Estates Act. Therefore the Taluqua went out of the Act and consequently succession to the property known as Taluqua Osah is governed by ordinary Hindu law.

[7] The will in favour of Achal Singh is noticed in the plaint in which it is said that the will

"was executed under undue influence, is not admissible and is void and ineffectual as against the plaintiff ....."

The pleas were made clearer in paragraph 15 of the replication and in the oral pleadings of 19th February 1942. Paragraph 15 stated:

"Babu Bishnath Singh who was the father of Babu Achal Singh, always remained in company of Babu Sahdeo Singh and managed all his business and whatever Babu Bishnath Singh said, Babu Sahdeo Singh used to act upon. Babu Sahdeo Bakhsh Singh was a man of weak understanding and all along remained ill."

[8] In the oral pleadings it was stated:

"Sahdeo Bakhsh Singh being physically and mentally weak and was constantly ill and consequently the estate was managed and everything was done by Bishnath Singh, father of Achal Singh. Sahdeo Bakhsh Singh did what he was asked to do by Bishnath Singh and was completely under the influence of the latter."

It was also pleaded that the will was not registered as required by law—S. 13A of the Oudh Estates Act—and that Sahdeo Bakhsh Singh was not of sound disposing mind owing to a severe attack of small pox in May 1910 which had caused a serious deterioration in his health and had left after-effects lasting till NOVEMBER 1910.

[9] The defendants pleaded that (1) the will was a genuine and valid document which was properly registered since the legatee defendant 1, was also a male agnate of the testator within the meaning of S. 22 (10) of the Act I of 1869 and (2) That the decision in the case of Achal Singh against Babuain Saghunath Kuer operated as res judicata. Other pleas were also taken with which we are no longer concerned since they are not raised in the appeal. They will, however, appear in the issues framed by the trial Court which were as follows:

"1. Was Mardan Singh a son of Nehal Sah and is the line of Mardan Singh downwards as given in para. 1 of the written statement correct? 2. Was Hardayal Singh second son of Sadhan Singh and is plaintiff the nearest heir of Sahdeo Bakhsh Singh according to the rule of lineal primogeniture? 3. (a) Did Sheoambar Singh execute a will on 14th August 1871 in favour of his wife? If so, is it invalid and its effect upon the possession of his widow? 3 (b) Whether the estate went out of the Oudh Estates Act by virtue of the possession of Mst. Anand Kuer or not? If so, its effect on the present case? 4. (a) Was Sahdeo Bux Singh the executant of the will dated 18th June 1910, not possessed of sound disposing mind? 4 (b) Was the will in question properly registered? 5. Was its execution brought about under undue influence as alleged by the plaintiff? 6. (a) Whether the property left by Sahdeo Bakhsh Singh is governed by ordinary Hindu Law? 6. (b) If so, is plaintiff his next reversioner and entitled to succeed under Hindu Law? 7. Did Mt. Saghunath Kuer die on 20th February 1929 and is the suit within time? 8. Is the suit not maintainable unless and until the decree of Mt. Saghunath Kuer is set aside? 9. Did defendants enter into a compromise with Babuain Saghunath Kuer on 8th November 1926 and is plaintiff bound by it? 10. Is the plaintiff bound by the decision of the Judicial Commissioner in re: Babu Achal Singh and another v. B. Saghunath Kuer and does the decision operate as res judicata. 11. To what relief and mesne profits, if any, is plaintiff entitled?

[10] Upon these issues the learned Civil Judge found:

1. That the pedigree set up by the defendants is proved and Achal Singh is a male agnate of Sahdeo Bakhsh Singh. This finding is not challenged in appeal except as regards seniority among the sons of Sadhan Singh. 2. That it is not proved that, among the Sons of Sadhan Singh, Har Dayal was senior to Chandika Bakhsh Singh. 3. That Sheoamber Singh did not execute a will in favour of his wife. 4. That the estate did not pass out of the Act by reason of the possession of Mt. Anand Kuer after the death of Sheoambar Singh. 5. That Sahdeo Bakhsh Singh was of sound disposing mind on 18th June 1910 when he executed the will in question (Ex. A-20). 6. That the will was properly registered by deposit with the registrar inasmuch as S. 13A (2) of Act 1 of 1869 applied to the case 7. The will was not executed under undue influence. 8. That the issue as to whether the property passed out of the Act was not argued by the plaintiff and in any case this was not so because there was no evidence that Mt. Anand Kuer prescribed anything more than a life estate. 9. That the suit is within limitation. 10. That it is not necessary to set aside the decree against Saghunath

Kuer before any relief can be granted to the plaintiff. 11. That although Babuain Saghunath Kuer and the present defendants did enter into a compromise that does not bind the plaintiff. 12. That the decree in the previous case does not operate as res judicata.

[11] As a result of these findings the plaintiff's suit was dismissed. The plaintiff has appealed to this Court and his learned counsel has raised four points in this appeal : 1. That, whether he belongs to the senior line or not, the plaintiff is one of the nearest reversioners and entitled to oust a trespasser since the property is governed not by Act 1 of 1869 but by the Hindu law. 2. That, even if the property is governed by Act 1 of 1869 the plaintiff is entitled to it under S. 22 (10) of the Act as the nearest male agnate of Sahdeo Bakhsh Singh according to the rule of male lineal primogeniture; 3. That the will was obtained by the exercise of undue influence by Bishunath Singh, father of Achal Singh, upon Sahdeo Singh and 4. That the will was inoperative because it was not registered in accordance with the provisions of S. 13A (3) of Act 1 of 1869 and sub-ss (1) and (2) of that section were inapplicable to it.

[12] Mr. Wasim in reply contended : 1. That the estate was still governed by Act 1 of 1869 and consequently the heir has to be found under S. 22 (10) and not under the Hindu law. 2. That the plaintiff has not been proved to be the nearest male agnate of Sahdeo Bakhsh Singh within the meaning of S. 22 (10). 3. That the will in favour of Achal Singh was not obtained by "undue influence." 4. That the will was validly registered; and 5. That the pleas as to the invalidity of the will be barred by the rule of res judicata.

[13] With regard to the question as to whether the property in suit is governed by the Oudh Estates Act or by the Hindu law the answer depends upon the nature of the estate acquired by Mt. Anand Kuer. It is agreed that, in the absence of any will, she could not succeed to her husband in the presence of his brother and nephew. Her possession was, therefore, adverse and she was in possession for over 12 years. If, however, her possession was adverse only to the extent of a limited extent, it came to an end on her death and the title of the real owner was relieved of the cloud which had been cast upon it. If, on the other hand, it was absolute then succession took place on her death and the property passed out of the purview of Act 1 of 1869: *vide* (1934) 11 O. W. N. 351.[1] Thus the question whether the property was governed by the Act or not depended upon proof of particular facts and those facts were agreed upon by the parties who agreed that the estate in the hands of Sahdeo Bakhsh Singh was governed by Act 1 of 1869. This could only be if Mt. Anand Kuer had prescribed for a life estate. Indeed the plaintiff clearly asserted in his plaint that she succeeded as a Hindu widow and in the oral pleadings, that she was in possession as a taluqdar's widow. This position was accepted by the defendants who agreed that the estate continued to be governed by the Act. In view of this agreement of the parties it is not possible to hold that Mt. Anand Kuer prescribed for any estate greater than a widow's estate. On her death, therefore, succession did not take place to her and the estate reverted to the real owner who accordingly obtained possession. The estate in the hands of Sahdeo Bakhsh Singh was accordingly governed by Act 1 of 1869 and the plaintiff can only succeed if he proves that he is the nearest male agnate of Sahdeo Bakhsh Singh according to the rule of male lineal primogeniture.

[14] On the question of seniority of the plaintiff's line, reliance is placed on the testimony of five witnesses P. W. 1 Jagannath, P. W. 2 Ram Swarup, P. W. 4 Jagdamba Singh, P. W. 5 Partab Singh and P. W. 7 Baldeo Singh, the plaintiff. The learned civil Judge has discussed this evidence at considerable length and we agree with him that it cannot be accepted as proving that Chandika Bakhsh Singh was not senior to Har Dayal Singh among the sons of Sadhan Singh. (After discussing the evidence of these witnesses the judgment proceeded.)

[15] Thus the evidence which the plaintiff has led to prove the seniority of Har Dayal Singh is not satisfactory and it cannot be accepted as discharging the onus which rested upon him.

[16] This finding is sufficient to dispose of the appeal since when the plaintiff has failed to establish his title it does not matter whether the defendants have any title or not. The case, has however been fully argued by the learned counsel on all the points and we think it advisable to indicate our decision on these points also.

[17] We shall first take up the question of "res judicata". It is not disputed that if a litigation is fought out bona fide between a Hindu female and a person who threatens the estate, the decision in that litigation operates as "res judicata" in a subsequent litigation between the third party and the reversioner : *vide* 45 I. A. 168[2] and 52 I. A. 398.[3] In the present case the person with whom the litigation was fought was not a Hindu widow but a taluqdar's widow. It is agreed that this does not make any difference because, during her lifetime the taluqdar's widow, though not an heir, alone represents the estate and no one else has any interest in it. Thus the same principle as to "res judicata" apply to a decision to which she was a party : *vide* 25 O. C. 189[4] at pp. 199 and 200, which was affirmed in appeal by their Lordships of the Judicial Com-

mittee in 52 I. A. 398.[3] We have, therefore, to see whether there is any such decision in the present case as may operate as "res judicata."

[18] The decision which is relied upon is the decision in the suit which Achal Singh and the then Raja of Sheogarh instituted against Babuain Saghunath Kuer to recover possession of the estate from her on the basis of the will now in suit (EX. A-52). In that suit Babuain Saghunath Kuer challenged the will and alleged that it was not genuine or valid and that the testator was not possessed of a sound disposing mind. She also pleaded that the will failed for want of registration according to law (EX. A-53). The trial Court held that the will was proved and that the testator did possess a sound disposing mind but that the will could not have effect in respect of the taluqdari property because it was not properly registered. It accordingly decreed the suit with regard to the non-taluqdari property but dismissed it with regard to the taluqdari property, (EX. A-55). Both parties appealed to the Court of the Judicial Commissioner of Oudh. The appeal of Babuain Saghunath Kuer was dismissed while the appeal of the present defendants was allowed and it was held that the will was properly registered (EXS. A-68, A-33 and A-40). Babuain Saghunath Kuer filed a further appeal to His Majesty in Council but before the hearing of the appeal, the matter was compromised and the appeal was withdrawn: (*vide*, plaint and written statement, para. 6).

[19] Mr. Wasim contends that the effect of the withdrawal of the appeal was that the decree of the Judicial Commissioner remained the final decree and continued to have binding effect. He relied upon 6 Mad. 43[5] at p. 44, 1 ALL. 293,[6] 15 Bom. 370[7] and 14 Pat. 633.[8] Of these, only the first decision is in point since only in that case was the appeal withdrawn as a result of a compromise. The Madras case too will, however, not govern this case because in that case the compromise was between a male-holder and another person. In the present case the compromise is between a person holding a widow's estate and a third person and this makes all the difference.

[20] Neither under the Hindu law nor under the Taluqdari law does the reversioner claim under widow. Section 11, Civil P. C., has been made applicable to a decision obtained against the widow because she represents the estate, but this is subject to an important condition namely that the "decree must be fairly and properly obtained against her in regard to the estate" and must not have been obtained by fraud and otherwise: *vide* 45 I. A. 168[2] at p. 178. This does not mean that the widow must necessarily fight out the case. She may effect a compromise and the compromise decree will bind the estate as much as a decree after contest provided always that the action of the widow is for the protection of the estate. If, however, the widow looks not to the benefit of the estate but to her advantage and after securing her own rights, abandons the reversion to the assailant, it cannot be said that she has entered into the compromise bona fide for the benefit of the estate.

[21] In the present case Achal Singh had won throughout and the will had been upheld. It was open to the lady not to appeal further if she was advised that no advantage could be gained by the estate and that would have been an end of the matter. She, however, did pursue the matter further and appeal to His Majesty in Council. Before that appeal could be heard, she agreed to a compromise under which she obtained possession of village Osah, shown in the plaint as having a net profit of Rs. 3107-11-6, in lieu of her "guzara" which had been fixed at Rs. 1500 in the will, and abandoned the rest of the estate and the reversion in Osah to Achal Singh, *vide*, para. 20 of the written statement. It cannot be said that action was a bona fide one for the protection of the estate though it may have been fully justified in so far as the protection of her own rights went. Thus the final decision, the compromise and the withdrawal of the appeal in pursuance of it cannot be said to have been arrived at in such a way as to bind the estate and it cannot operate as res judicata against the plaintiff. We have, therefore, to determine the pleas on the merits.

[22] We have already stated in an earlier part of this judgment the exact plea of undue influence which has been taken. We would first of all note that this being a case of a will what is required to be proved is not "undue influence" as such but 'such importunity as takes away the free agency of the transferor or testator"—*vide*, S. 11 of the Act 1 [I] of 1869 and S. 61, Succession Act.

[23] Much argument was addressed to us as to the person upon whom the burden of proof lay in such a case. Mr. Hyder Husain contended that the evidence disclosed that Bishnath Singh stood in a position of active confidence to Sahdeo Singh and that, therefore, by reason of S. 111, Evidence Act, the burden lay upon Achal Singh, the son of Bishnath Singh, to prove the good faith of the transaction. On the other hand, Mr. Wasim contended that the evidence on the record did not disclose any relation of active confidence and that in any case if a will has been proved to have been duly executed, it is for a person asserting it, to prove that it was obtained by such importunity as took away the free agency of the testator. He relied upon 1920

A. C. 349,[9] (1868) 1 P. & D. 481,[10] (1858-67) 175 E. R. 860,[11] (1885) 11 P. D. 81[12] and 99 I. C. 571[13] and contended on the basis of 38 I. A. 15[14] at p. 19 that the same principle applied to India also.

[24] It is really not necessary for us to consider this question in the present case because even if we were to accept the principle of law for which Mr. Hyder Husain contends, the evidence which has been adduced does not disclose that Bishnath Singh stood in a position of active confidence to Sahdeo Singh. This evidence consists of some letters written by Sahdeo Singh to Bishnath Singh, Exs. A-34 to A-39 and Exs. A-40 to A-43 and oral evidence. All that this evidence discloses is that Bishnath Singh managed the estate of Sahdeo Singh who consulted him off and on. It does not establish that Bishnath Singh was ever the general agent of Sahdeo Singh or that he had any very wide or unlimited powers of management. Indeed, the letters prove the reverse and show that Sahdeo himself took an intelligent interest in the work which he supervised and in respect of which he issued instructions from time to time. Sahdeo was not a weakling or a young man who had just emerged into maturity. In these circumstances it cannot be held that Bishnath Singh stood in a position of active confidence to Sahdeo Singh. The burden was, therefore, in any case upon the plaintiff to substantiate his allegations of undue influence.

[25] Of course, in spite of this, when considering whether the will has been proved to be the voluntary act of an intelligent testator, the burden of which rests upon the propounder of the will, we must bear in mind any suspicious circumstances that exist and we must determine whether the evidence adduced by the legatee is sufficient to remove all suspicion—49 I. A. 413[15] at p. 417.

[26] In the present case the learned Civil Judge has found that the testator possessed a sound disposing mind and that the will was his voluntary act. The first finding was not challenged in this appeal. It is supported not only by the oral evidence produced by the defendant but also by the letters to which reference has already been made. They show that Sahdeo Bakhsh took an intelligent interest in his affairs and there is no indication of mental weakness. All these letters were written between the date of the execution of the will and the death of Sahdeo Bakhsh a period of close on 10 years.

[27] As to the voluntary execution of the will—apart from the question of undue influence—the will was deposited by the testator himself in a sealed cover with the District Registrar under the provisions of Ss. 42 and 43, Registration Act. This was done about 10 years before the death of the testator and he made no attempt during all this time to withdraw it or alter it in any way. D. W. 6, Ganga Prasad, an attesting witness, proves the due execution of the will. Thus apart from the question whether any such importunity as would take away the free agency of the testator is proved, the due execution and attestation of the will is proved.

[28] We come then to a consideration of the question whether the requisite degree of importunity has been established. Mr. Hyder Husain contends that all that the words of S. 11 of Act 1 of 1869 require to be proved is undue influence and it is not necessary or always feasible, to give direct evidence of such influence which may be inferred from the circumstances. Before we come to consider whether any such inference can be drawn from the facts of the present case we shall briefly review the law on the point.

[29] In (1885) 11 P. D. 81[12], at p. 82, Sir James Hannen said:

"To be undue influence in the eye of the law there must be, to sum it up in a word—coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence.

"The coercion may, of course, be of different kinds it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence."

"These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator or of some one else offering them do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, 'this is not my wish, but I must do it.'"

"If, therefore, the act is shown to be the result of the will and wish of the testator at the time then, however, it has been brought about—for we are not dealing with a case of fraud—though you may condemn the testator for having such a wish, though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to adopt that view—still it is not undue influence."

[30] This exposition of the law is so clear and complete that it is not necessary for us to refer to numerous other authorities on the subject. We would, however, say that this is the law which

has been deliberately adopted by the Indian Legislature with regard to wills, *vide* S. 11 of Act 1 of 1869 and S. 61, Succession Act, both of which lay down that a will is only void if the importunity is such as to take away the free agency of the testator. If the testator is responsible for what he is doing and it is really a case of his being persuaded to do it, that does not invalidate the will. The difference between undue influence and persuasion is a real one and will be found set out in Basu's Commentary on the Indian Succession Act, Edn. 3, p. 185.

[31] In this connection it will be useful to refer to the following remarks of their Lordships of the Judicial Committee in 47 I. A. 1[16] at pp. 3 and 4:

"It is a mistake . . . to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point 'influence' alone has been made out. Such influence may be used wisely, judiciously and helpfully. But whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, 'undue'. It must be established that the person in a position of domination has used that position to obtain unfair advangage for himself, and so to cause injury to the person relying upon his authority or aid."

[32] Again in 38 I. A. 13[14] p. 22 their Lordships say :

"The onus of proving the testamentary capacity of Shib Singh of course lies on those by whom the will is propounded and in their Lordships' opinion they have discharged that obligation by the evidence indicated above. Such evidence is not displaced by mere proof of serious illness and of general intemperance, and yet that is as far as the evidence of the respondents can fairly be said to go. So far as the charge of undue influence is concerned, all that is shewn on the part of those attacking the will is that there was motive and opportunity for the exercise of such influence by the defendants, and that some of them in fact benefited by the will to the exclusion of other relatives of equal or nearer degree. Circumstances of that character may sometimes suggest suspicion, and would certainly lead the Court in the present case to scrutinise with special care the evidence of those who propound the will, but in order to set it aside there must be clear evidence that the undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property."

[33] Judged by the standards laid down in the above decisions the case of undue influence is not established. Mr. Hyder Husain relied upon the following circumstances for inferring undue influence. He contended that the testator was only 36 years of age and there was no ill-feeling between him and his wife: he had consequently no reason to despair of issue and the will should in any case, have provided for the eventuality of the birth of a son. Moreover, if he had so despaired, it would be natural for him as a Hindu, to adopt a son. Furtber there was no special attachment on the part of the testator for the legatee and the sole reason for the will in his favour seems to have been the special position occupied by Bishnath Singh vis-a-vis the testator. Moreover, the widow and the mother were both excluded from the succession—not to mention the near reversioners — in favour of a distant collateral. It is contended that in these circumstances, when taken in conjunction with the dominating position of Bishnath Singh, undue influence should be inferred since the will was executed in favour of his son, then a young boy.

[34] The first thing which was required to be proved to make out this case was that Bishnath Singh was in a position to dominate the will of the testator. Neither the oral nor the documentary evidence proves this. All that is established is that Bishnath Singh was managing the estate of the testator. It is not, as if he was an old servant of the estate who had had ample opportunities of establishing his hold on the mind of the youth as he advanced to manhood. P. W. 5 Partab Singh states that Bishnath was never in the service of Sheo Sahai father of Sahdeo Bakhsh nor had he ever done any work for him. There is no evidence against this and it is the plaintiff's own evidence. Thus Bishnath had only been in the service of the estate for about a year and a half at the most and that at a time when Sahdeo Bakhsh was a fully grown up man. Moreover, the letters which have been filed, Exs. A-34 to A-39 and A-41 to A-43, clearly established that Sahdeo Bakhsh was by no means a mere non-entity, accepting whatever Bishnath did but that he always had opinions of his own and issued directions to Bishnath to do things in a particular manner. It is no doubt true that the letters are couched in respectful terms but that was only to be expected having regard to the ordinary courtesies of Indian life because Bishnath was not merely the manager but also the uncle of Sahdeo Singh, however remote the relationship might be. The mere fact that Sahdeo entrusted the management of the estate to Bishnath cannot prove that the latter dominated the will of the former. Thus the very foundation upon which the plea of undue influence is based is not established.

[35] The circumstances too upon which reliance is placed do not make out a case of undue influence. The testator informs us in the will that he did despair of issue and as a matter of fact, although he lived another ten years, he did not have any issue. The testator might of course have adopted a boy but if desired to benefit Achal Singh, he could not in accordance with ordinary conceptions do so by adoption because Achal Singh was the only son of his father. Moreover he thought that he was attain-

ing this object by directing in the will that Achal Singh (alias Lal Madho Singh) "having remained joint with them, shall obey and be subservient to them" (EX. A-20). These words indicate that be expected the legatee to live with his mother and widow and to look up to them as his elders in the family. Further from an estate yielding a net income of about Rs. 12,000, he made a maintenance allowance of Rs. 1,500 per annum payable to each of the two ladies for their pocket expenses. This did not include other expenses such as food, conveyance etc., which the testator contemplated though he did not expressly so provide should remain a charge upon the estate. According to the conception of Sahdeo Bakhsh this provision would have been quite sufficient for the comfort of two widowed ladies neither of whom would have any issue on his death. Moreover, it may well be, as has been stated in EX. A-20, the will, that he did not consider either of the two ladies competent to manage the estate. As to the exclusion of the near reversioners, there is evidence on the record to show that he was not on good terms with this branch and the pedigree establishes that by blood relationship, Achal Singh was as closely related, though by reason of an adoption his great-grandfather had passed to a more distant branch of the family. Even so, however, Achal Singh belonged to nearest line next after that of Sadhan Singh. Thus all these circumstances do not justify any inference that the execution of the will was obtained by undue influence.

[36] This is, however, not an end of the matter. There is evidence to negative undue influence. Even if we do not attach any value to the oral evidence adduced by the defendants there is sufficient documentary evidence in this respect. The first piece of evidence is EX. A-61 which shows that on 16th December 1913 Babu Sahdeo Bakhsh Singh, on being elected a member of the Co-operative Bank, Ltd., of Rai Bareli declared that Achal Singh was his heir. Then we have the written statement filed by Babuain Saghunath Kuer (EX. A-33) in the suit by Achal Singh against her to establish the will. In this document the will is challenged on various grounds but no allegation as to undue influence is made. Obviously, if there had been any such influence the testator's wife would have been in the best position to know and her failure to take any such undue influence. [sic] Thus, we agree with the learned Civil Judge that it is not proved that the execution of the will, EX. A-20 was obtained by the exercise of undue influence.

[37] We come now to consider the last point raised, namely that the will fails for want of registration. Mr. Hyder Husain contends that EX. A-20 being the will of a Taluqdar is required to be registered "according to the law for the time being in force relating to the registration of assurances," under S. 13A (3) of ACT I of 1869, since sub-ss. (1) and (2) of that section were not applicable. He relies in support of this proposition upon the judgment of Dalal A. J. C., in the previous case relating to this estate between Achal Singh and Babuain Saghunath Kuer, EX. A-33. The learned Judicial Commissioner did not agree with this view (*vide* EX. A-33) and on the case being referred to the Second Additional Judicial Commissioner the decision went against Mr. Dalal's opinion (EX. A-40). The decision is, therefore, not relied upon as an authority but Mr. Hyder Husain contends that the reasoning of Mr. Dalal should be adopted by us in preference to the reasoning of the other two members of the Court. Neither of the learned counsel have been able to refer us to any other authority on the interpretation of S. 13A in so far as it is involved in this case.

[38] Section 13A of Act, I of 1869, reads as follows:

"13A. No taluqdar or grantee and no heir or legatee of a taluqdar or grantee and no transferee referred to in S. 14, and no heir or legatee of such transferee shall have power to bequeath his estate, or any portion thereof or any interest therein:

1 (a) to a person who would have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate at the time when the bequest took effect.

(b) to his daughter,

(c) to a son of his daughter, or

(d) to a younger son.

except by a will duly executed and attested;

2. to a person who might in the absence of other heirs have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate at the time when the bequest took effect,

Except by a will duly executed and attested not less than three months before the death of the testator and presented for registration within one month from the date of its execution and registered;

3. to any person other than a person mentioned in clauses (1) and (2),

except by a will duly executed and attested not less than three months before the death of the testator and registered according to the law for the time being in force relating to the registration of assurances but presented for such registration within one month from the date of its execution."

It is now agreed that Achal Singh is a male agnate of Sahdeo Singh but it is contended that the advantage of S. 13A (2) accrues only to the nearest male agnate and not to all male agnates so that a will to a remoter male agnate comes under S. 13A (3).

[39] According to the words of S. 13A (2) there is no difficulty in holding that the will in favour of Achal Singh comes within its purview. All that that section provides is that the person

must be one "who might, in the absence of other heirs, have succeeded." It does not provide that he must be a person coming within any particular clause of S. 22. There can be no doubt that Achal Singh would in the absence of nearer heirs have succeeded to the testator.

[40] The use of the words "in the absence of nearer heirs" indicates that we are to determine the possibility of succession of Achal Singh to the testator in the absence of any person standing between him and the testator in the line of heirship. Such an event would presuppose the absence of male agnates nearer in degree than him to the testator and in that event he would be the nearest male agnate and entitled to succeed as such. As Mr. Daniels remarked in his judgment in the case of *Saghunath Kuer* v. *Achal Singh* (Ex. A33):

"What the learned Subordinate Judge means by talking about a possibility upon a possibility I cannot pretend to say. The simple question for decision is whether the words 'in the absence of nearer heirs' include the absence of nearer heirs under Cl. (10) of S. 22, or are confined to the absence of heirs who would tak under the preceding clauses. Nor can I follow him in drawing any conclusion from the absence of the words 'and his male lineal descendants' in Cl. (10) of S. 22. He is willing to allow that a will in favour of any descendant of a brother however remote is governed by sub-s. (2) of S. 13A because the male lineal descendants of the brother are mentioned in S. 22 (5), but would exclude a will in favour of the second nearest agnate because the words 'male lineal descendants' do not occur in S. 22 (10). But on any construction of S. 13A, these words are unnecessary. When the Legislature is dealing with a single line of succession such as that of a brother of a son they are appropriate but they are quite out of place in dealing with an agnate. Inasmuch as the nearest agnate is to be found according to the rule of lineal primogeniture, as soon as the father dies the son becomes the nearest agnate in his place. As soon as that particular line is exhausted the senior representative of the next senior branch becomes the nearest agnate. In fact as soon as the nearest agnate dies the next nearest steps automatically into his place. A person who would be a remote agnate in presence of another agnatic heir becomes at once the nearest agnate in his absence."

[41] Further, it must be remembered that S. 13A cannot be read by itself but must be considered along with Ss. 14 and 15. By S. 14, if the bequest is to a person mentioned in cls. (1) and (2) of S 13A, the estate continues to be governed by the Act while if the bequest is to a person not covered by these clauses the estate ceases to be governed by the Act. If Mr. Hyder Husain's argument were accepted, an estate bequeathed to a male agnate in the presence of a nearer male agnate would cease to be governed by the Act while a bequest to a cognate, if he were the nearest amongst cognates, would keep the estate within the Act although he is a remoter heir than the remotest male agnate. This is not construction which commends itself to us. The plain intention of Ss. 13A, 14 and 15 is that so long as the estate remains in the taluqdar's family, no matter how remotely connected the legatee might be, it will continue to be governed by the Act while if it is bequeathed to a stranger, a person between whom and the testator there is no heritable blood it will cease to be governed by the Act.

[42] Mr. Dalal raised various objections to the contention which we adopt and out of deference to his opinion we think it proper to consider those objections one by one. He was of the opinion that cl. (2) "includes every kind of heir mentioned in the amended S. 22 and none else." From this he proceeds to hold that, since cl. 10 of S. 22 provides only for the nearest male agnate and as the plaintiff was not such male agnate at the time of the taluqdar's death when the bequest took effect he does not come under that clause. This reasoning entirely ignores the force of the words "in the absence of other heirs" used in Cl. (2) of S. 13A. In the absence of such heirs including nearer male agnates—Achal Singh would be the nearest male agnate and he would have succeeded under S. 22 Cl. (10).

[43] It was also urged that the words "under the provisions of the Act applicable to such estate" used in Cl. (2) of S. 13A would be redundant if the interpretation which we have adopted is accepted. This is not so. Unamended S. 13 recognised a privilege in favour of the person who would have succeeded "under the provisions of this Act or under the ordinary law. . . ." The words now used were intended to make it clear that if a person were not an heir under the provisions of this Act, even though those provisions be S. 22 (11) or S. 23, he could not be entitled to the benefit of S. 13A Cl. (2) even though he might have succeeded to an interest in the estate under the law that would have been applicable to him had the Act not been passed.

[44] We accordingly hold that Achal Singh was a person who was covered by cl. (2) of S. 13A of Act, I of 1869 and that a will in his favour could be validly registered by deposit with the District Registrar under the provisions of Ss. 42 and 43, Registration Act. Thus, this ground of attack on the will also fails. We accordingly uphold the will, in favour of Achal Singh as genuine, valid and binding.

[45] The result is that the judgment and decree of the learned Civil Judge are upheld and the appeal is dismissed with costs. This appeal was preferred in forma pauperis. The appeal having been dismissed the appellant shall pay the court-fee which would have been paid to him if he had not been remitted to sue as a pauper.

S.C. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 175 *[C. N. 63.]*

MISRA AND WALFORD JJ.

Kaniz Abid — Appellant v. *Ch. Razi-ud-din — Respondent.*

Ex. Decree Appeal Nos. 9 and 10 of 1942, Decided on 13-12-1946, from order of Addl. Civil Judge, Barabanki, D/- 1-9-1941.

Limitation Act (1908), Arts. 166 and 181 — Applicability — U. P. Temporary Postponement of Execution of Decrees Act (10 [X] of 1937), S. 3 — Facts entitling judgment-debtor to stay of execution not made out — Sale held in execution if void or voidable — Application to set aside sale — Limitation.

Where an execution sale is impeached as being void, the application questioning the sale will be governed by Art 181 and not Art. 166.

Where an execution sale is questioned as being in contravention of S. 3, U P. Temporary Postponement of Execution of Decrees Act, (1937), a distinction must be drawn between a case where there is total absence of jurisdiction and a case where the executing Court works out the decree under an impression that the legislative injunction to keep the proceedings stayed did not apply. In the former case the sale is void and can be ignored. In the latter case it is voidable and can be set aside if irregularity is established: 11 A. I. R. 1924 Mad. 137, *Rel. on.* [Para 4]

An executing Court will have jurisdiction to proceed with the execution unless and until facts entitling the judgment debtor to the benefit of S. 3, U. P. Temporary Postponement of Execution of Decrees Act 1937, are made out. Where the judgment-debtor in spite of notice of the execution fails to adduce proof of such facts, the executing Court will have jurisdiction to sell the property. If such a sale is attacked as being in contravention of S. 3. U. P. Act. the sale will not be void but only voidable and an application to set it aside would be governed by Art. 166 and not by Art. 181. [Para 4]

Annotation: ('42-Com.) Lim. Act, Art. 166, N. 2, Pts. 6 to 12.

Case referred:—

1. ('24) 47 Mad. 525 : 11 A I R 1924 Mad 137 : 77 I C 631, Paramasiva Thevar v. Phulukaruppa Thevar.

Akhlaque Husain and Kalbe Mustaja — for Appellant.

Farooq Husain — for Respondent.

Judgment.—Execution Decree Appeals Nos. 9 and 10 of 1942. In these execution of decree appeals two principal points are raised for determination: (1) Whether the judgment-debtor's applications which purported to be under Ss. 47 and 151, Civil P. C, and which gave rise to the proceedings culminating in what may be called decrees under appeal could be entertained as valid objections to the execution of the two simple money decrees which had already been satisfied. (2) If so were the aforesaid applications barred by time?

[2] The facts are these In execution of two simple money decrees of 1932 the appellant Rani Kaniz Abid purchased certain zamindari shares of her judgment debtor Zahir-ud-din in 1939. The sales were held under Sch. 3 of the Code and were confirmed by the learned Munsif, Barabanki, in whose Court the execution proceedings were initiated. Possession was delivered in due course and the decrees were satisfied and the execution cases consigned to records. At the time when the proceedings in the Court of the sale officer were going on the Temporary Postponement of Execution of Decrees Act (10 of 1937) was in force by virtue of subsequent legislation extending its operation. Section 3 of the enactment prescribed *inter alia* that all proceedings in execution of money decrees passed previously by civil Courts against agriculturists should be stayed during the currency of the Act if the judgment-debtor's land revenue or rent did not exceed Rs 250. On 29th June 1938 the decree-holder's general agent accordingly stated before the sale officer that from inquiry he was satisfied that Zahir-ud-din's land revenue exceeded Rs. 250 but as he did not know the exact figure the judgment-debtor might be summoned and inquiries might be made from him. Notice was, therefore, issued to Zahir-ud-din for 16th July 1938. He was served personally and the notice was signed for him by his son Raziuddin. The judgment-debtor, however, did not appear before the Court of the Sale Officer on 16th July 1938. He died soon afterwards, and his sons Raziuddin, Rafiuddin and Fasihuddin were substituted in place of their father on 17th December 1938. On that date a rubkar giving intimation of substitution was sent to the Sale Officer. Thereafter Fasihuddin and one of his brothers, namely Rafiuddin who also appended his signature on the petition applied for stay of execution on the ground that the judgment debtor's land revenue was less than Rs. 250, and that he was entitled to the benefits of S. 3 of Act 10 of 1937. This claim was not persisted in and the applications were dismissed for default on 28th April 1939. The property was sold and purchased by Rani Kaniz Abid on 20th June 1939. About a month later the sale was confirmed. The case was consigned to records and possession of the property was delivered to the decree-holder on 5th November 1939. About three months after that date Raziuddin preferred two applications in the Court of the Munsif, Barabanki, alleging that the sales were void as they were in contravention of s. 3, Temporary Postponement of Execution of Decrees Act He claimed that the land revenue paid by him and his brothers did not exceed the specified amount and the proceedings in the two executions, therefore, ought to have remained stayed. The claim was contested and he failed to obtain the declaration from Munsif's Court. In appeal, however, he succeeded. The Courts below differed on the two points stated above as also on the question regarding

the amount of the applicant's land revenue. Rani Kaniz Abid has appealed.

[3] On the first principal point of controversy considerable amount of case law has been cited before us in respect of the parties' respective view points, but we are of opinion that it is unnecessary to consider it in the facts and circumstances of the case. We will assume for the sake of argument that the judgment-debtor's applications, which in substance prayed for setting aside the sales, were permissible as objections under S. 47 or S. 151 of the Code as held by the Court of first appeal and we will proceed to consider the second principal point stated above, namely, whether the limitation bar operated to put Raziuddin out of Court.

[4] It has been mentioned above that the sales were made on 20th June 1939. Their confirmation took place on 25th July 1939. An application to set aside a sale in execution of decree whether by a judgment-debtor or any other person under the Civil Procedure Code must be made within 30 days of the date of the sale according to Art. 166 of Sch. 1, Limitation Act. The applications with which we are concerned were not filed till 9th February 1940. Apparently, therefore, they are time-barred. The applicant, however, alleged in para. 2 of his petitions that he came to know of the sales only 25 days previous to the date of his objections that he was in service abroad and that the decree-holder's agent acted fraudulently throughout. These allegations were not pressed before the learned Munsif or before the lower appellate Court apparently because there was no reliable evidence to support them. The Court of first instance held that Art. 166 applied and the objections were barred by time. The Court below on the contrary arrived at the conclusion that the execution sales were void and the applications were governed by three year's rule under Art. 181. If this approach to the question was correct there is no doubt that the applications were well within limitation. The question whether the sales were or were not void depended on the further question whether the Court which executed the decrees possessed the jurisdiction to sell. Obviously the Court would have jurisdiction to proceed with execution unless and until facts entitling the judgment-debtor to the benefit of S. 3 of Act 10 of 1937 were satisfactorily made out. In absence of proof which the judgment-debtor was called upon to adduce after notice served on the applicant's father it cannot be said that the executing Court had no jurisdiction to proceed to sell the property. The burden to make out a case for the application of S. 3 lay on Zahiruddin and after his death on his sons. There was no obligation on the Court to stay its hands in spite of their failure. Distinction must be drawn between a case where there is total absence of jurisdiction and a case where the executing Court works out the decree under an impression that the legislative injunction to keep the proceedings stayed did not apply. In the former case the sale is void and can be ignored. In the latter case it is voidable and can be set aside if irregularity is established. The importance of the distinction was pointed out by Spencer J. in 47 Mad. 525.[1] In the cases before us the sales were not vitiated by any inherent lack of jurisdiction because the conditions precedent to the application of S. 3 of Act 10 of 1937 were not established. The fact that the evidence now adduced by the judgment-debtor has induced the lower appellate Court to hold in his favour that the land revenue of Zahiruddin was less than Rs. 250 does not appear to have much materiality for, it may render the Court's action irregular and may entitle Raziuddin to set aside the sales but until they are avoided they must stand and cannot be ignored as void. We are clear, therefore, that Raziuddin's applications of 9th February 1940, were governed by Art. 166. As such they were belated and should have been rejected.

[5] We accordingly allow these appeals, set aside the orders of the learned Additional Civil Judge, Barabanki, and restore those passed by the learned Munsif. The appellant is entitled to her costs of this Court and of the Courts below.

K.S. *Appeals allowed.*

A. I. R. (35) 1948 Oudh 176 [C. N. 64.]

MISRA J.

Atma Ram and others—Judgment-debtors — Appellants v. *Shyama Kumar Singh and others—Respondents.*

Exn. of Decree Appeal No. 6 of 1943, Decided on 21-11-1946, against order of Civil Judge, Hardoi, D/- 2-11-1942.

(a) Limitation Act (1908), Art. 182 (5) — 'In accordance with law'—Defective application.

The expression 'in accordance with law' in Art. 182 should be taken to mean that the application though defective in some particulars, was one upon which execution could lawfully be ordered. If the execution could lawfully be ordered then the application is 'in accordance with law' and the fact that the executing Court did not issue execution on it is scarcely of any materiality. If, on the other hand, the omissions were such as to make it impossible for the Court to issue execution upon it, it should be held that such an application was not 'in accordance with law': 24 A. I. R. 1937 Oudh 233, *Foll.* [Para 2]

(b) Civil P. C. (1908), O. 21, R. 16 — Original decree-holder not barred from executing decree.

The fact that O. 21, R. 16 makes a provision for execution of the decree by the assignee does not debar the person in whose name the decree stands from taking an action for satisfaction of the decree or for keeping his decree alive. [Para 3]

Case referred :—

1. ('38) 13 Luck 162 : 24 A.I.R. 1937 Oudh 233 : 167 I. C. 34, Chandika v. Kamla Prasad.

K. N. Tandon — for Appellants.

Harish Chandra (for No. 3) and Siraj Husain (for No. 1)—for Respondents.

Judgment. — This is an execution of decree appeal. The sole point which falls for determination is whether the third application for execution of the decree, dated 14th December 1934, was barred by time. This question depends upon the view that may be taken of the second application for execution which was presented by the decree-holder, Kr. Shyama Kumar Singh on 15th December 1939, and rejected on 30th September 1940. It is conceded that if the consequence of making the second application was to keep the decree alive as contemplated by Art. 182, Limitation Act, the execution cannot be time-barred. The Court of first instance allowed the judgment-debtors' objection on the plea of limitation. It did not, therefore, decide other matters in controversy and dismissed the application as barred. The lower appellate Court on the other hand held that the previous execution application of 15th December 1939, could be availed of by the decree-holder for holding that the present execution was within limitation. Since the decree the judgment-debtor had died. His representatives were the persons against whom the decree was sought to be executed, and they have come up in appeal against the remand order of the Court below.

[2] The learned counsel for the appellants has again pressed the point which his clients took up in the Courts below, and he has urged that the order dismissing the second execution conclusively determined that the application was incompetent. He says that the matter is no longer res integra. It appears to me that the question which was before the executing Court in 1939 is not exactly the question which arises for decision now. What is to be determined in the present case is whether the second execution application was a mere nullity or whether it could operate to keep the decree alive for a further period of three years after the orders thereon were passed. Article 182, Limitation Act, provides a period of three years from the date of the final order passed on an application made "in accordance with law" to the proper Court for execution or to take some step-in-aid of execution of the decree or order. In order that the extension granted by this article may be available, it is necessary that the previous application must be one for execution or to take a step-in-aid of execution : that it must be "in accordance with law": that it was made to proper Court and that there was a final order on the application. It has been held in numerous cases that even though an application may be defective and was rejected on that ground, it could nevertheless be regarded as an application "in accordance with law," within the meaning of Art. 182. In 13 Luck. 162,[1] a Division Bench of this Court held that the expression "in accordance with law" should be taken to mean that the application, though defective in some particulars, was one upon which execution could lawfully be ordered. If on the other hand the omissions were such as to make it impossible for the Court to issue execution upon it, it should be held that such an application was not "in accordance with law." Section 51, Civil P. C., provides that

> "Subject to such conditions and limitations as may be prescribed, the Court may, *on the application of the decree-holder*, order execution of the decree."

[3] Section 146 of the Code authorises the taking of proceedings or the making of an application by or against a person claiming under the decree-holder. It follows that a decree may be executed either by the decree-holder himself or by those who claim under him namely his assignees. The fact that O. 21, R. 16, Civil P. C., makes a provision for execution of the decree by the assignees does not debar the person in whose name the decree stands from taking an action for satisfaction of the decree or for keeping his decree alive. Kr. Shyama Kumar Singh's application of 15th December 1939 must, therefore, be held to be "in accordance with law." In determining this point I need not concern myself with the reasons which actuated the executing Court in dismissing the second execution application on 30th September 1940. It is true that it took the view that decree-holder had divested himself of the power of the proprietor of the estate and was debarred from executing the decree. It is clear, however, that the disability to which the then executing Court referred cannot operate to render the application otherwise than in accordance with law for the purposes of Art. 182, Limitation Act. I have only to determine whether the defect which was pointed out in the second execution application of 1939 was or was not such as to make it impossible for the Court to issue execution upon it. The fact that the executing Court did not issue execution on it is scarcely of any materiality. I concede that if Raja Shyama Kumar Singh sought to resuscitate the second execution application or if he desired to execute it again during the subsistence of the trust, the finding given by the execution Court on 30th September 1940, might have stood in his way. The present application for execution was made by the president of the trust, and there is no doubt that he could avail himself of Art. 182 and of the application made by Kr. Shyama

Kumar Singh in 1939 for maintaining it. I hold, therefore, that the decision of the Court below was sound. This appeal must, therefore, fail and is accordingly dismissed with costs.

Appeal dismissed.

D.S.

A. I. R. (35) 1948 Oudh 178 *[C. N. 65]*

KIDWAI J.

Gaya Prasad Shukla — *Applicant* v. *Ram Abhilakh Pathak* — *Opposite Party.*

Application No. 57 of 1943, Decided on 18-12-1946, from order of Munsif, South Fyzabad, D/- 24-8-1943.

(a) U. P. Debt Redemption Act (13 [XIII] of 1940), S. 2 (9)—Goods purchased on credit—Bond executed for unpaid price — Transaction is "loan".

Where goods are purchased on credit, that does not amount to a loan nor is the transaction, in substance, a loan : 24 A. I. R. 1937 Oudh 124, *Rel. on.* [Para 3]

But if the purchaser executes a bond for the unpaid price of the goods the purchaser's liability for the unpaid price is converted into his liability to pay the consideration of the bond and the transaction is, therefore, changed into a loan : 32 A. I. R. 1945 All 144, *Rel. on*; 26 A. I. R. 1939 All. 398, *Ref.* [Para 3]

(b) U. P. Debt Redemption Act (13 [XIII] of 1940), S. 4 (3)— Proviso 3 to S. 4 (3) applies also to cases in which execution has been sought prior to commencement of the Act : 30 A. I. R. 1943 Oudh 333; 31 A. I. R, 1944 Oudh 119 and 29 A. I. R. 1942 All. 394, *Foll.* [Para 4]

Cases referred :—

1. ('36) 1936 O. W. N. 1158 : 24 A. I. R. 1937 Oudh 124 : 165 I. C. 469, Nihal Singh v. Ganesh Das Ram Gopal.
2. ('39) 1939 A. L. J. 241 : 26 A. I. R. 1939 All. 398, Mahomed Shibli Khan v. Ish Datt.
3. ('45) 32 A. I. R. 1945 All. 144 : I. L. R. (1945) All. 154 : 219 I. C. 446, Padam Singh v. Raj Saran Singh.
4. ('43) 1943 O. W. N. 133 : 30 A.I.R. 1943 Oudh 333 : 207 I. C. 127, Kaisar Mirza v. Ajodhia Prasad.
5. ('43) 1943 O. W. N. 150 : 31 A. I. R. 1944 Oudh 119 : 211 I. C. 207, Shyam Sundar Lal v. Mt. Chandan Devi.
6. ('42) 29 A.I.R. 1942 All. 394 : 203 I. C. 328 : I.L.R. (1943) All. 48 (F. B.), Mahomed Abdul Razak v. Mt. Parvati Devi.

S. C. Das — for Applicant.

M. P. Srivastava — for Opposite Party.

Order. — The applicant, Gaya Prasad, obtained a decree against Ram Abhilakh and his son for a sum of Rs. 129-9-0 on 29th September 1926. The first application for execution of the decree was made on 4th September 1938, and this was stayed under Act 10 [X] of 1937 but later it was dismissed in 1941. In that application, execution was sought by sale of the agricultural land of the judgment-debtor as well as the trees standing on various plots. On 29th July 1942, the decree-holder again applied for execution and on 9th December 1942 he filed a declaration under section 4, U. P. Debt Redemption Act. The judgment-debtor also applied for amendment of the decree. In reply the decree-holder pleaded that the decree was not based on a loan and could not be amended. He further pleaded that in view of the declaration which he had made under section 4, U. P. Debt Redemption Act, the amendment could not be allowed. It appears that the file of the original case has been weeded out. The parties therefore led oral evidence to show the nature of the transaction which resulted in the decree. The judgment-debtor came into the witness-box and stated that originally he had bought some grain from the decree-holder and as he could not pay the price he had executed a bond for Rs. 60. Later this bond was renewed for Rs. 100 which consisted of the principal and interest on the previous bond.

[2] The trial Court held that the transaction in question was a loan and that by reason of proviso 3 to S. 4, sub-s. (3), U. P. Debt Redemption Act, the declaration could not operate so as to prevent the amendment of the decree. He accordingly allowed the amendment of the decree. The decree-holder has come up in revision under S. 25, Provincial Small Cause Courts Act, and his learned counsel contends that the transaction was really one of purchase on credit and the fact that the promissory note was executed for the purpose would not bring it within the definition of loan contained in S. 2, sub-s. (9), U. P. Debt Redemption Act. He also contended that the application for execution which had been made before the enforcement of the Debt Redemption Act, did not come within the purview of proviso 3 to S. 4, sub-s. (3) of the Act.

[3] It is settled law that if goods are purchased on credit that does not amount to a loan, nor is the transaction in substance a loan. This has been laid down by a bench of this Court in 1936 O. W. N. 1158.[1] This is also the interpretation placed by the Allahabad High Court on the definition of loan contained in the Agriculturists Relief Act. The question, however, which falls to be determined in this case is whether the execution of the bond by the person who purchased the grain makes any difference in the relation between the parties. In 1939 A. L. J. 241[2] a learned Judge of the Allahabad High Court has laid down the proposition that if a mortgage deed is executed by a person who purchases some property and is unable to pay for it at the time of the purchase the transaction is still one for the price of the article sold and does not evidence a loan. The learned Judge gives no reasons for his decision. A bench of the Allahabad High Court of which the same learned Judge was a member has held in A. I. R. 1945 ALL. 144[3] that if a promissory note is executed in satisfaction of the amount due under a decree, the promissory note evidences a loan as defined in the Agriculturists Relief Act. The learned counsel for the applicant sought to distinguish this last mentioned case on

the ground that in that case the promissory note clearly mentioned the fact that the money had been received by way of a loan in exchange for the decree. In the case of every promissory note the person who executes it undertakes to repay a certain sum of money for consideration received. The exact words used cannot affect that relation which is established between him and the person in whose favour the promissory note is executed. The rights of the parties in respect of the unpaid purchase money of articles sold are quite different from the rights of the parties in a case where there has been a contract by which the liability has been converted into one evidenced by a bond or a promissory note. In the former case the person suing for recovery of the price must prove the sale and the rate at which the goods were sold. Moreover, he does not in every case get interest while in the case of a promissory note or bond it is presumed, unless the contrary is shown that consideration passed and the person in whose favour the document is executed is entitled to the interest specified in the document. In fact the parties agreed to terminate their old contract and replace it by a contract of loan. The execution of the bond is evidence of the intention of the parties to place themselves upon a new footing entirely. The result therefore of the execution of the bond was to convert the liability of the judgment-debtor for the unpaid price of the wheat supplied to him into his liability to pay the consideration of the bond. The transaction was therefore thus changed into a loan in the same way as a transanction of loan may by the execution of sale-to satisfy the loan, be changed into a sale.

[4] On the second question as to whether the declaration of the decree-holder is operative or not it has been held by this Court that proviso 3 to S. 4, sub-s. (3), Debt Redemption Act, applies also to cases in which execution has been sought prior to the enforcement of that Act : *vide* 1943 O. W. N. 133[4] and 1943 O. W. N. 150.[5] The same view has been taken by the Allahabad High Court in A. I. R. 1942 ALL. 394.[6] The lower Court therefore, acted rightly in amending the decree.

[5] This application is accordingly dismissed with costs.

N.S.D. *Application dismissed.*

A. I. R. (35) 1948 Oudh 179 *[C. N. 66.]*

WALFORD AND KIDWAI JJ.

Wazir—Accused—Appellant v. *Emperor.*

Criminal Appeal No. 116 of 1947, Decided on 3-10-1947, from order of Sessions Judge, Gonda, D/-28-3-1947.

Penal Code (1860), S. 84—Essentials—Mere abnormality not enough—Proof of insanity—Person since death of his wife showing abnormal state of mind and believed to be insane by his father and others in his village—Person killing his sons without any motive—Person held suffered from complete unsoundness of mind and acquitted of murder.

Mere abnormality of the mind is not an excuse for the commission of crimes. To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the accused person was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing or if he did know it that he did not know that he was doing what was wrong. Proof as to the state of mind with reference to cognitive faculties of a person said to be of unsound mind at the time of committing a crime is always an extremely difficult problem particularly in cases where a person has not exhibited any signs of violent insanity before the crime though he has shown some abnormality of the mind. Of necessity the Court must arrive at conclusion from surrounding circumstances such as the personal history of the accused, absence of motive particularly in multiple murders, want of preparedness or prearrangement and finally the connection or relationship of the murderer with victim. [Para 9]

A person, since the death of his wife and a child was in an abnormal state of mind and was believed to be insane by his father and others in the village and an attempt had been made to 'charm away his insanity'. There was no evidence against him of his cruelty or indifference towards his family. One day after his two sons about eight or ten years old had gone to bed, the person completely severed the heads of these two sons from the trunk and killed them without any motive.

Held that such a conduct could only be explained upon the hypothesis that he had gone completely mad and was not conscious of the terrible crime that he was committing. The frightful act was in itself to a very great extent substantial evidence of the fact that the person's cognitive faculties had been completely affected by reason of unsoundness of mind. He was therefore not guilty of murder. [Para 10]

Government Advocate—for the Crown.

Judgment.—This is a jail appeal submitted on behalf of Wazir who has been convicted under S. 302, Penal Code, for the murder of his two small sons Rojat and Raza Mohammad Khan alias Rajai and sentenced to transportation for life by the Sessions Judge of Gonda.

[2] The facts alleged by the prosecution are that sometime during the night between 12th and 13th October 1946, the appellant murdered his two sons by severing their heads with a gandasa. The murder was discovered the following morning by Sulaiman. It is said that Sulaiman who lived next door called out to his son, the appellant, about having the bullocks ready for ploughing. On not receiving a reply, he went to the house and on entering it found one of the boys lying on a cot with his head completely severed from the trunk while the other with his head also severed was lying on the floor. He then raised an alarm and ultimately went and lodged a report (Ex. 1) on 13th October 1946, at 8 A. M. at police station Colonelganj. The appellant was arrested by police constable Sheonandan Singh who was on his way from the police station

to the village in which the murder had been committed. It appears that the appellant himself was going to the police station. He was arrested and taken to the police station. Later, upon inquiry it is alleged, the appellant produced from under a heal of *katia* a gandasa which he handed over to the station officer.

[3] The appellant was ultimately sent up before a Magistrate who recorded a statement (EX. 7). Before the Magistrate he stated that his wife died of cholera in Chait since when his mind was not under his control. On the night of the occurrence, he and his children were asleep. He did not know what had come over him but during the night he cut up his two children. The children were about ten or twelve years of age. For the last six months he had been running about hither and thither since the death of his wife.

[4] In addition to the confession recorded, 11 witnesses were examined on behalf of the prosecution. Their statements are more or less of a formal character. There is absolutely no direct evidence to prove that the appellant had in fact committed the murder. His guilt is sought to be proved by circumstantial evidence and confession, EX. 7. The only circumstantial evidence is the recovery of blood-stained clothes which the appellant was wearing at the time of his arrest on his way to the police station and the alleged recovery of gandasa at his indication by the station officer said to be blood-stained.

[5] From the evidence of Sulaiman, P. W. 1 the father of the appellant, it appears that the appellant had four sons and three daughters. In Chait previous to the murder, the appellant's wife and one of his sons died of cholera. Since then the appellant's mind appears to have been unhinged. Of the remaining six children the eldest daughter is married and lives in her husband's house. The remaining two daughters live with Sulaiman himself and two boys, namely, Subrati and one of the murdered boys, namely, Raza Mohammad, normally lived with their uncle in village Kusehri ka Monja. Only one boy, namely, Rojat lived with his father, the appellant. It seems that Raza Mohammad had come only the day before the murder to see his father. It further appears that Sulaiman had taken the appellant to places for, in the words of the witness, himself, "charming away his insanity." He stated that when these fits of insanity came over the appellant he would not eat or do any thing but sit silently for long periods.

[6] The appellant was kept under observation in jail by the Civil Surgeon of Gonda who expressed the opinion that it was possible that on the day of the occurrence the appellant was incapable of knowing the nature of his acts. In cross-examination by the Government Pleader, the Civil Surgeon stated that during the time he was under observation, the appellant did not exhibit any sign of insanity but his mental condition was below normal and it was highly probable that he may have had a fit on the day of the occurrence as to have rendered him incapable of knowing the nature of his act.

[7] P. W. 6 Kali Prasad Singh inter alia stated that the appellant sometimes became insane for which he was given treatment without any effect.

[8] The learned Sessions Judge came to the conclusion that the guilt of the appellant had been established and though some evidence of the unsoundness of mind had been given there was no evidence on the record to establish that at the time of the commission of the offence, the appellant was of such unsound mind as not to know the nature of the act he was doing or that he was doing wrong. He, however, inflicted the lesser of the two punishments provided under the law, holding that "in the circumstances of the case and specially because there was no motive for the murders," the ends of justice would be met by a sentence of transportation for life.

[9] We have given this case our very anxious consideration and we do not feel satisfied with the view taken by the learned Sessions Judge as to the culpability of the appellant. Proof as to the state of mind with reference to cognitive faculties of a person said to be of unsound mind at the time of committing a crime is always an extremely difficult problem particularly in cases where a person has not exhibited any signs of violent insanity before the crime though he has shown some abnormality of the mind. As the law stands, mere abnormality of the mind has never been accepted as an excuse for the commission of crimes. The law relating to criminal responsibility of a person said to be of unsound mind was laid down in England in the celebrated Mcnaughton case over a century ago by fourteen English Judges on questions put to them by the House of Lords, since when it has not only been the law in England but also in India. The answers given by the learned Judges to the House of Lords epitomised come to this that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the person accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing or if he did know it that he did not know that he was doing what was wrong. This legal test was embodied in S. 84, Penal Code. Though a century has elapsed during which the science of psychology has made great advances the law as then laid down

has remained unmodified. Problems frequently arise as to what evidence can be considered to be sufficient to establish that at the time of the doing of an act by a person pleading insanity he did not know the nature and quality of the act he was doing or that what he was doing was not wrong. To our mind, it is absolutely impossible to give positive evidence as to the state of mind of any person about whom there is some history of abnormality of his mental condition. Of necessity, the Court must arrive at conclusion from surrounding circumstances such as the personal history of the accused, absence of motive particularly in multiple murders, want of preparedness or prearrangement and finally the connection or relationship of the murderer with the victim. Complete idiots, imbeciles and persons who are deprived of all understanding and memory can easily be shown as not responsible for the criminal offences and their cases do not present any difficulty in law Courts. The difficulty, however, arises in those cases where a person labours under a partial delusion or becomes a victim of sudden fits of insanity. A person for some undiscoverable reason may temporarily be afflicted with such a fit of insanity as to urge him to commit an atrocious act as the present without knowing the nature of the act he was committing or that what he was doing was wrong and yet ordinarily nothing can be specifically pointed to as showing unsoundness of mind. In such a case of necessity, one is forced to consider whether the act of a person who commits the murder of his own children without any motive can be explained upon any other hypothesis except an act of an insane person or at least of a person who had been temporarily afflicted with a fit of insanity which drove him to commit an act of such a terrible nature.

[10] In the present case the undisputed evidence on the record is that ever since the shock of his wife and child's death the appellant had shown some abnormality of conduct. He was believed to be insane by his father and others in the village and an attempt had been made to "charm away his insanity." There was no burden upon him in regard to taking care of his children because except for the youngest who remained with his father, all others had been living either with their grandparents or their uncle. One of the victims of this murder had come only a day before on a visit to his father. The appellant and his two children in the evening after taking their meal, had gone to bed in the normal manner. In these circumstances, the question which is pertinent to the problem before us is, why should the appellant against whom there is no evidence of cruelty or indifference to his family a man who had felt great grief on the loss of his wife and child have got up in the night and murdered his two young children who according to the medical evidence are said to be about eight and ten years of age by severing their heads completely from the trunk. Such conduct in a man like the appellant can only be explained upon the hypothesis that he had gone completely mad and was not conscious of the terrible crime that he was committing. To our mind, the frightful act was in itself to a very great extent substantial evidence of the fact that the appellant's cognitive faculties had been completely affected by reason of unsoundness of mind. Added to this, the evidence of his peculiarity of conduct since the death of his wife and child and the opinion expressed by the Civil Surgeon as to the possibility of the appellant being of such unsound mind at the time of committing the terrible murders of his two young children leaves little doubt as to the complete unsoundness of mind of the appellant at the time of committing the murders. We are, therefore, of opinion that this appeal must be allowed and the conviction and sentence set aside. We order accordingly.

[11] The next question to be considered is, what appropriate orders should be passed as to the appellant's future. We are satisfied on the evidence that the appellant had committed a terrible crime of which he was convicted, in a fit of insanity. He has, however, not since then exhibited any violent symptoms of unsoundness of mind. We are, however, required under S. 471, Criminal P. C. to direct his detention in safe custody and report the action taken to the Local Government. We are of opinion that in the present case, the appellant should be sent to a mental hospital to be kept under observation and if necessary treated for any symptoms of abnormality of mind and if it is found that he has regained normal mental balance, he may be released on such terms as the authorities then may think fit. Let a report of this be made to the Local Government.

D.S. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 181 *[C. N. 67.]*

WALFORD J.

The Municipal Board, Bahraich — Applicant v. *Ram Lal—Accused—Opposite Party.*

Criminal Revn. No. 32 of 1947, Decided on 3rd October 1947, from order of Addl. Sessions Judge, Bahraich, D/- 5th February 1947.

U. P. Municipalities Act (2 [II] of 1916), S. 153—Bye-laws under — Bye-laws 2 and 7 of Bahraich Municipality—Rules for assessment and collection of terminal toll in Bahraich Municipality, R. 2—Person or cart entering into Municipal limits but not passing toll-bar—Toll cannot be charged.

Rule 2 of the rules for assessment and collection of terminal toll in the Bahraich Municipality cannot be construed to mean that tolls become payable the moment a cart or person enters the municipal limits irrespective of whether a toll-bar is passed or not. The rule should be construed to mean that entry into such area of the municipality as was not covered by the toll barrier is to be free from the payment of toll and it is only when a toll barrier is crossed that the toll becomes payable. [Para 6]

K. P. Misra — for Applicant.
Siraj Husain — for Opposite Party.

Order. — This is an application in revision against an order of acquittal. The applicant is a cartman and was prosecuted for non-payment of toll while carrying certain goods from the Sheo Rice Mills in Bahraich to the railway station. He was convicted under bye-laws 2 and 7 made under S. 153, Municipalities Act and was sentenced to pay a fine of Rs. 10 or in default to undergo simple imprisonment for two weeks by a Bench of Second Class Magistrates. The applicant preferred an appeal to the District Magistrate who set aside the conviction and sentence and acquitted the applicant. The Municipal Board of Bahraich, who are the complainants, moved the Additional Sessions Judge in revision against the order of acquittal but he refused to interfere. The Municipal Board has now come to this Court in revision against the order of acquittal.

[2] The facts which influenced the learned District Magistrate in acquitting the accused are that the question with regard to payment of terminal tax or toll on goods going to or coming from the Sheo Rice Mills had been agitated as far back as the year 1920. It was claimed by the Sheo Rice Mills that their mill lay outside Municipal limits and that though some portion of the road which was used by them for carting their goods to and from the station lay within Municipal limits, it was partly a private road and partly a District Board road and therefore the Municipality was not justified in charging them either toll or terminal tax. By G. O, No. 863/XI-D.-D./100 dated 3rd June 1920, the Local Government agreed with the recommendation of the Commissioner of the Division that no terminal tax, etc., on goods to and from the Sheo Rice Mills should be levied by the Municipal Board, Bahraich. It also appears that the Municipal Board unsuccessfully attempted to enlarge the limits of Bahraich Municipality in order to bring the Sheo Rice Mills within its ambit. Although goods have been carried to and from the railway station never before has there been any question of exacting toll upon carts passing along the road leading to the Mills.

[3] The learned counsel for the applicant has strenuously contended that the Courts below have completely confused the two different forms of tax that could be levied by the Municipal Board. One is a terminal tax which is exacted on goods imported into Municipal limits and the other is a terminal toll levied upon vehicles, other conveyances, animals and laden coolies entering Municipal limits. It is urged that what the Government exempted was the terminal tax and not the toll which is normally levied at the toll barriers. Assuming that the learned counsel is correct that there was some confusion in the minds of the Courts below as to whether terminal tax was exempted by Government as well as toll, or whether terminal tax alone was exempted and further assuming that terminal tax alone was exempted, the question which requires determination is whether having regard to the rules, any liability has been incurred by the opposite party for not having paid the toll tax. From a plan given to me by the learned counsel for the applicant, which he says was made by the Municipal Board, it appears that there are two parallel roads, one from the railway station and the other from the goods-shed, both running southwards and joining the main road which runs east and west and ultimately leads into the City and Civil Lines. Thus two junctions are formed by the three roads. The toll barrier is shown on the main road between the two junctions and the traffic on either of the road coming from the station or the goods shed and going into the City or Civil Lines is controlled by the one toll bar.

[4] The road coming from the goods shed is dotted with red meant to show the route carts take from the railway premises to the mills and *vice versa*. It is admitted that the carts going to or coming from the mills do not come anywhere near the main road or the toll bar. Half way along the road from the goods shed another road joins it and goes in a north-easterly direction and after crossing the railway lines, reaches the mill, which has already been stated, is outside the Municipal boundaries.

[5] The learned counsel for the opposite party relying on rules 2 and 3 of the rules for the assessment and collection of terminal toll in Bahraich Municipality has contended that although a person or cart may enter into Municipal limits, no toll is chargeable unless it passes the barrier situated in that portion on the Municipal area which is intended to be sheltered by the barrier and which no loaded carts etc., may enter without paying the toll. Rule 2 runs as follows:

"No person shall bring within the limits of Bahraich Municipality any head load or laden vehicle, pack animal or *bahngi* on or in respect of which terminal toll is leviable until the toll due has been paid to such person and at such barrier as the Board may from time to time appoint."

[6] The learned counsel for the applicant, however, contends that upon a strict interpretation of R. 2 tolls become payable the moment a cart enters even the remotest part of Municipal limits and it would not make any difference whether a toll bar is passed or not and he invites me to construe the rule with absolute strictness. If the rule is construed in the manner I am invited to do by the learned counsel, startling absurdities would inevitably result, for prima facie the language of the rule is capable of the construction that no cart or person of the class mentioned in the rule can enter within Municipal limits before the toll is paid. It, therefore, follows that a person in charge of a cart or carrying a load must stop outside the Municipal boundary or deposit the load there and walk to the toll bar which may be a considerable distance away, to pay the toll and then return to his cart or load. If this construction is accepted, it would obviously result in harassment and inconvenience to the public at large and it is difficult to conceive that the Municipal Board intended the rule to operate in that manner. To me it is clear that by placing the barrier at some distance from the actual limits of the Municipality, it was intended that entry into such area as was not covered by the barrier was to be free from the payment of toll and it was only when a toll barrier was crossed, that the toll became payable. Had it been otherwise, the toll barrier would have been erected at the actual boundary of the Municipality and not where it is, which I understand is about half a mile from the goods shed and the railway station.

[7] Moreover, it is obvious that the toll tax or terminal tax is intended to be levied only if persons of the class mentioned in the rule entered Municipal limits for the purpose of transacting business there. People in transit who of necessity have to traverse some parts of the area within the Municipal limits were never intended to be taxed. I am fortified in this opinion by the attitude of the Government in the matter of the unsuccessful attempt made by the Bahraich Municipal Board to impose terminal tax upon the goods intended for the Sheo Rice Mills.

[8] I am satisfied that the opposite party has been rightly acquitted. There is no substance in this application and it is accordingly dismissed.

D.S. *Application dismissed.*

A. I. R. (35) 1948 Oudh 183 *[C. N. 68.]*

KIDWAI J.

Jagnarain — Accused — Applicant v. *Emperor.*

Criminal Revn. No. 54 of 1947, Decided on 6-11-1947, from order of Sess. Judge, Rae Bareli, D/- 24-2-1947.

Defence of India Rules (1939), R. 81 (4)— U. P. Controlled Cotton Cloth and Yarn Dealer's Licensing Order — License under, in Form "C"—Partabgarh District Controlled Cotton Cloth Distribution Order 1946—Order not published in newspaper as stated therein — Accused having information of Order and acting under it—He is liable to prosecution for breach of Order — License in Form "C" held not superseded by latter Order—Accused held liable for failure to comply with conditions of license — Defence of India Rules (1939), R. 119 (as amended in 1945). [Para 7]

Cases referred :—

1. ('44) 31 A. I. R. 1944 Nag. 40 : I. L. R. (1944) Nag. 150 : 211 I. C. 29 : 45 Cr. L. J. 250, Shakoor Hasan v. Emperor.
2. ('45) 32 A.I.R. 1945 Bom. 368 : I.L.R. (1945) Bom. 681 : 221 I. C. 239 : 47 Cr. L. J. 123, Leslie Gwilt v. Emperor.
3. ('46) 33 A.I.R. 1946 All. 223 : 224 I. C. 76 : 47 Cr. L. J. 556, Emperor v. Akbar.
4. ('45) 24 Pat. 29: 32 A.I.R. 1945 Pat. 307, Jagarnath v. Emperor.

K. P. Misra and S. P. Misra — for Applicant.

Asst. Government Advocate — for the Crown.

Order.—The applicant, Jagnarain, and three other persons, Thakur Jagdamba Singh, Pandit Raj Narain and Phoolchand held licences in Form "C" under the U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order for the retail sale of cloth in village Jagnipur, District Partabgarh and each of them was carrying a business of his own.

[2] By an order dated 28-1-1946, called the Partabgarh District Controlled Cotton Cloth Distribution Order, 1946, the District Magistrate, however, altered this system and divided the villages in the district into groups each of which was to be attached to a group of license holders in Form "C". The groups were to be formed by the license-holders on their own responsibility subject to the approval of the District Supply Officer and they were to elect a head to be known as the group holder and they were to supply cloth to all householders in the group of villages to be attached to them. They were required to keep the shop of the group open from 9 A. M. to 6 P. M. every day except some holidays. The order also prescribed that the mode of publication under R. 119 of the Defence of India Rules was to be that the order would be published in two local newspapers, would be affixed at some conspicuous places mentioned in the order and would be proclaimed by beat of drum.

[3] The four persons mentioned at the commencement of this judgment formed themselves into a group and elected Jagnarain their group holder. The group shop was also located in his house and it carried on business. Jagnarain maintained the accounts of the group in accordance with conditions 6 and 7 of the license.

[4] On 4-4-1946 some of the householders re-

siding in the village attached to this group complained to the Deputy Commissioner that the group-holders—excepting Jagnarain—were not giving them cloth and were selling to other persons who were not entitled to buy. An inquiry was ordered but before this could take place Jagnarain through his son also filed an application on 9-4-1946 complaining that the other members of the group were black marketting cloth and did not listen to him and had threatened to beat him when he stopped the issue of false receipts. This was also sent for inquiry. The inquiry appears to have led the authorities concerned to direct the prosecution of all the persons involved including the applicant on two charges, namely, (1) that they had failed to maintain the accounts in accordance with the conditions of their license and (2) that they had, without reasonable cause, closed their shop from 8th April to 12th April.

[5] The Magistrate before whom the case came for trial convicted all the accused persons holding that their liability was joint and several. All the accused appealed to the Court of Session. The Sessions Judge of Rai Bareli wholly dismissed the applicant's appeal and partly allowed the appeal of Jagdamba and others and set aside their conviction on the first charge holding that Jagnarain alone was liable to maintain the accounts. Jagnarain has applied to this Court in revision.

[6] The first contention of Mr. Misra, counsel for the applicant is that the Partabgarh District Controlled Cotton Cloth Distribution Order, 1946, never came into force because it is now agreed that it was never published in the local newspapers. In support of this contention he relied upon A.I.R. 1944 Nag 40,[1] A. I. R. 1945 Bom. 368,[2] A.I.R. 1946 ALL. 223[3] and 24 Pat. 29.[4] These decisions no doubt support his contention but they are no longer good law because probably with a view to meet the situation created by them, R. 119 of the Defence of India Rules was amended on 21-7-1945 by the addition of the following sub-rule:

"If, in the course of judicial proceedings a question arises whether a person was duly informed of an order made in pursuance of these Rules, compliance with sub-r. (1) or, in a case to which sub-r. (1A) applies, the notification of the order shall be conclusive proof that he was so informed; but a failure to comply with sub-r. (1):

(i) shall not preclude proof by other means that he had information of the order; and

(ii) shall not affect the validity of the order."

[7] In the present case it is amply proved that the applicant had information of the order and acted under it in joining a group created by it. He was, therefore, liable to prosecution for breach of the order which was a valid and operative order. His conviction, as well as that of the others under the order for not opening the shops on the dates specified cannot, therefore, be set aside and must be maintained.

[8] As to conviction of the applicant for the failure to maintain accounts that too cannot be set aside. The license in Form "C" was not superseded by the formation of a group and no new license was issued nor were any new conditions laid down. The formation of the group was done by the group holders and their own responsibility and their liabilities continued to be the same. Every license holder in Form "C" was, therefore, liable to maintain the registers and accounts (*sic*) was punishable under the Defence of India Rules. It is admitted that Jagnarain held a license in Form "C". He was, therefore, bound to see that conditions of that license were observed. The fact that others became associated with him in the responsibility would not diminish his responsibility. Each member of the group was liable to maintain the registers and accounts provided for by conditions 6 and 7 and their failure to maintain those registers and accounts made them liable to the penalty. The learned Magistrate rightly convicted them all and the fact that the Sessions Judge, on a wrong appreciation of the legal position, has acquitted three persons is no ground for the acquittal of the fourth person also.

[9] The result is that this application fails and is dismissed.

S.C. *Application dismissed.*

A. I. R. (35) 1948 Oudh 184 [C. N. 69.]

KIDWAI J.

Ch. Abdul Aziz Khan—Applicant v. *Badri and others — Opposite Party.*

Criminal Ref. No. 27 of 1947, Decided on 6-11-1947, made by Addl. Sessions Judge, Bahraich, D/- 11-4-1947.

Criminal P. C. (1898), S. 145 — Jurisdiction — Failure to pass order under S. 145 (1) at any stage —No sufficient material on record to pass such order—Proceedings under S. 145 are without jurisdiction — Order attaching crops passed — Proper order in such case is to withdraw attachment and deliver crops to persons on whose land they were produced.

Normally criminal Courts cannot deal with cases of possession of immovable property. Section 145, however, gives them power to deal even with that class of cases but the condition precedent is that the Court should be satisfied that there exists an apprehension of a breach of the peace. It is only when there is an apprehension of a breach of the peace that the matter comes within the jurisdiction of the criminal Courts; otherwise the matter is one of a civil nature. Before, therefore, a criminal Court can be said to have any jurisdiction with regard to a case relating to the possession of immovable property, it must indicate that it is satisfied that an apprehension of a breach of the peace exists. That is why an order under S. 145, Cl. (1) is to be passed before any further proceedings are taken. When the Court fails to pass such an order at any stage of the

proceedings and there is not sufficient material on the record on the basis of which such an order can be passed, it cannot be held that the criminal Court had jurisdiction to take proceedings under S. 145. Where in such a case the Magistrate has attached the crops, the proper order to be passed is to withdraw the attachment and direct the return of the crops to persons on whose land they were produced : 36 Cr. L. J. 656 ; 34 A. I. R. 1947 Oudh 159 and 32 A. I. R. 1945 Oudh 62, *Rel. on* ; 15 Cr. L. J. 279 ; 26 Cr. L. J. 1333 and 18 Cr. L. J. 156, *Disting.*; 26 Cr. L. J. 512, *Ref.*

[Paras 8, 14]

Annotation: ('46-Com.) Cr. P. C., S. 145, Ns. 3, 7, 15

Cases referred :—

1. ('14) 1 A. I. R. 1914 Lah. 295 : 23 I. C. 487 : 15 Cr. L. J. 279, Mahomed Sharif v. Dhanpat Rai.
2. ('32) 19 A.I.R. 1932 All. 446 : 141 I. C. 131: 34 Cr. L. J. 156, Madan Mohan v. Sheoraj Kunwar.
3. ('32) 19 A. I. R. 1932 All. 681 : 54 All. 1002 : 142 I. C. 532 : 34 Cr.L.J. 425, Barhma Singh v. Emperor.
4. ('26) 13 A.I. R. 1926 Sind 85 : 18 S. L. R. 278: 89 I. C. 309 : 26 Cr. L. J. 1333, Moolyamal Topandas v. Ali Mahomed.
5. ('25) 12 A.I.R. 1925 Oudh 46 : 75 I. C. 736 : 25 Cr. L. J. 48, Sher Bahadur Singh v. Fazal Ali.
6. ('18) 5 A.I.R. 1918 Mad. 1203 : 37 I. C. 524 : 18 Cr. L. J. 156, In re Tirumalayappa Mudaliar.
7. ('35) (1935) 12 O. W. N. 454 : 22 A.I.R. 1935 Oudh 316: 11 Luck. 157 : 155 I. C. 169 : 36 Cr. L. J. 656, Asghari Khanam Bibi v. Emperor.
8. ('47) 1947 O.W.N. 139 : 34 A.I.R. 1947 Oudh 159 : 230 I. C. 229, Lakhpat v. Mt. Maharana.
9. ('44) 1944 O. W. N. 479 : 32 A. I. R. 1945 Oudh 62, Bisram v. Kamta Prasad.
10. ('25) 12 A. I. R. 1925 Mad. 327 : 85 I. C. 256 : 26 Cr. L. J. 512, Natesa Naicken v. Raghavachari.
11. ('39) 26 A. I. R. 1939 Oudh 284: 184 I. C. 290 : 15 Luck. 19 : 40 Cr. L. J. 930, Daljit Singh v. Tej Singh.

R. F. Bahadurji and Rajbir Prasad — for Applicant.

K. P. Misra and S. P. Misra—for Opposite Party.

Order.—On 24-9-1946, Chaudhri Abdul Aziz Khan, who is a tenant of about 900 bighas of land in village Dikaulia, District Bahraich, on behalf of the Kapurthala estate, filed an application under S. 145, Criminal P. C., against nine persons. He alleged that he was a hereditary tenant of the plots given in the list attached to the application, the total area of which was 193 acres and odd and that he had been in possession for a long time, but that for some time past some mischievous persons were trying to create a disturbance in the viliage and that it was apprehended that they would attempt to cut the crops sown by the applicant in the plots mentioned above. This application was forwarded by the Deputy Commissioner to the Sub-Divisional Officer concerned, and the Sub-Divisional Officer, after recording the statement of the applicant, directed him to file extracts from the present Khasra of the village. After this had been done, on 1-10-1946, he ordered the police to attach the crops in order to avoid trouble and he also directed the station officer to report.

[2] The attachment was made in pursuance of this order but it appears that the police did not consider it necessary to submit any report with regard to the danger apprehended to the peace. Accordingly an order was passed on 18th October for a report on the question as to whether there was any apprehension of a breach of the peace, and 29th October was fixed for the submission of this report and the report was received, but the learned Magistrate was not present and consequently the case was adjourned to 7-11-1946.

[3] Up to this time no order at all had been issued by the Magistrate under S. 145 (1), Criminal P. C., and no notice had been sent to the opposite parties. On 2nd November, however, 59 persons filed an application purporting to be written statement under S. 145, Criminal P. C., and alleging that the allegations of Chaudhari Abdul Aziz Khan were false and fictitious and that the plots in dispute were all actually in the cultivation of Shikmi tenants. None of these 59 persons had been made parties to the proceedings. Out of the persons who were actually treated as opposite parties only one, Maiku, filed a written statement, in which he contested the possession of Chaudhri Abdul Aziz Khan, but he also stated that there was no apprehension of a breach of the peace and that the application had been filed merely with a view to obtain an illegal order of attachment. Four of the other opposite parties also filed an application on 8th November, stating that they were not in possession of the land and had nothing to do with it. The remaining four persons, who were mentioned as opposite parties, did not turn up at all. The application filed by the 59 persons was not complete inasmuch as it did not specify the plots over which the said persons claimed to be in possession. They were accordingly allowed an opportunity of giving a list of these plots which they did. On 11th November, and thereafter a date was fixed for the hearing of the case and for the evidence of the parties. After the evidence of the parties had been recorded, the learned Magistrate came to the conclusion that the statements of the witnesses of neither side were credible and he accordingly summoned the village patwari under S. 540, Cr. P. C. The patwari gave evidence and produced an extract of the khasra for 1354 Fasli which has been brought on the record as Ex. A-1. In this khasra were found the names of all the objectors as sub-tenants "bila Tasfia". The "partal" was carried out from 15-10-1946, to 6-11-1946 and these entries were made on 27-10-1946. The learned Magistrate accepted the statement of the patwari, and by his order dated 31-12-1946, he held that the persons mentioned in the list Ex. X, annexed to his judgment were in possession of the land specified against their names and they were entitled to remain

in possession thereof until evicted in due course of law. He also held that the remaining plots were in possession of the applicant. He, therefore, directed the attachment to be withdrawn and the crops to be released in favour of the persons whom he had held to be in possession.

[4] Chaudhri Abdul Aziz Khan applied in revision to the Additional Sessions Judge of Bahraich who was of the opinion that the proceedings before the Magistrate were wholly illegal and without jurisdiction and should be set aside. He has recommended that the entire crops attached should be released in favour of Chaudhri Abdul Aziz Khan and that it should be declared that he was in possession of the entire land.

[5] I have heard the parties at considerable length. Mr. Misra, counsel for the opposite parties contends that, at the most, there has been an irregularity in the proceedings before the learned Magistrate and, since this has not resulted in any failure of justice, the irregularity should be condoned under the provisions of S. 537, Cr. P. C. In support of this view he has relied upon A. I. R. 1914 Lah. 295,[1] A. I. R. 1932 ALL. 446,[2] A. I. R. 1932 ALL. 631,[3] A. I. R. 1926 Sind 85,[4] A. I. R. 1925 Oudh 46[5] and A. I. R. 1918 Mad. 1203.[6]

[6] In A. I. R. 1914 Lah. 295[1] the learned Judge was of the opinion that there had been substantial compliance with the provisions of S. 145 (1) and that, therefore, the proceedings were not without jurisdiction. In that case when the parties had actually appeared an order under S. 145 (1) was recorded. This was belated order but nevertheless there was an order and proceedings subsequent thereto could not be deemed to be without jurisdiction. It was on this ground that the learned Judge distinguished an earlier case, which he mentions, in which the view taken was that without determining the question whether there was an apprehension of a breach of the peace or not, the Magistrate had no jurisdiction to summon the parties and to deal with the case.

[7] A. I. R. 1926 Sind 85[4] does not deal with the question as to what is the result of a Magistrate proceeding with a case under S. 145 without recording an order under cl. (1) of that section and is, therefore, not relevant to this case. In A. I. R. 1918 Mad. 1203[6] there was an order issued under S. 145 (1), but it did not give all the reasons for the order. It was held that this failure of the Magistrate did not deprive him of the jurisdiction to deal with the case. This case too is not applicable to the facts of the present case, because in that case the Magistrate did proceed in accordance with law, and, therefore, acquired jurisdiction to deal with such a case although he committed an irregularity in not complying with the provisions of the section in not giving the reasons for his conclusion. This was merely an irregularity which could be condoned under the provisions of S. 537, Criminal P. C.

[8] A. I. R. 1932 ALL. 446[2] is more helpful to Mr. Misra's contention. In that case there was no order holding that there was an apprehension of a breach of the peace but there was an order for the issue of the notice to the opposite parties to file their written statements, and thereafter the proceedings took place and both the parties produced their evidence. In giving his decision in that case the learned Judge held that there was no question of any lack of jurisdiction in the Magistrate by reason of the fact that no proper order under S. 145 (1) had been passed. He was of the opinion that there could only be lack of jurisdiction if (a) no power was conferred to deal with offences or matters of the class in question and (b) no power was conferred to deal with the offenders or persons of the class in question. With all respect to the learned Judge, I cannot agree that lack of jurisdiction only arises in the two methods mentioned by him. There may be a third method, namely that the Court may be competent to deal with the case if particular conditions are satisfied but may not be competent to deal with it unless those conditions are fulfilled. Normally, criminal Courts cannot deal with cases of possession of immovable property. Section 145, Criminal P. C., however, gives them power to deal even with that class of cases but the condition precedent is that the Court should be satisfied that there exists an apprehension of a breach of the peace. It is only when there is an apprehension of a breach of the peace that the matter comes within the jurisdiction of the criminal Courts: otherwise the matter is one of a civil nature. Before, therefore, a criminal Court can be said to have any jurisdiction with regard to a case relating to the possession of immovable property, it must indicate that it is satisfied that an apprehension of a breach of the peace exists. That is why an order under S. 145, Clause (1) is to be passed before any further proceedings are taken. When the Court fails to pass such an order at any stage of the proceedings and there is not sufficient material on the record on the basis of which such an order could be passed, it cannot be held that the criminal Court had jurisdiction to take proceedings under S. 145, Criminal P. C. Thus in a case such as the present the Court would have no jurisdiction to deal with the case.

[9] I am supported in this view by the re-

marks of the learned Chief Judge of this Court in (1935) 12 O. W. N. 454[7] in which it is said,

"I think it must be conceded that a Magistrate cannot take action under S. 145, sub-s. (1) unless he is satisfied regarding the existence of a dispute likely to cause a breach of the peace. If he is not so satisfied, then I think he would have no jurisdiction to take action."

Three learned Judges of this Court participated in the decision of that case, and, on this point, there was no disagreement between them, though as to what was sufficient to satisfy the learned Magistrate created a difference of opinion. This is also the view taken by learned Single Judges of this Court in 1947 O. W. N. 139[8] and 1944 O. W. N. 479[9].

[10] In the present case not only did the learned Magistrate not pass an order under S. 145 but there does not exist any material on the record upon which he could pass such an order. No doubt the applicant himself stated that there was an apprehension of a breach of the peace. The learned Magistrate thought this a good reason for exercising his emergency powers and attaching the property but he did not think it sufficient to justify him in passing an order under S. 145 cl. (1) and he called for a police report. The police report, when it was received, was against the contention of the applicant that there was an apprehension of a breach of the peace. Further when the opposite parties to the proceedings appeared they also did not assert that there was any apprehension of a breach of the peace. In these circumstances not to pass an order under S. 145 (1) was not merely a formal defect but went to the root of the jurisdiction. The learned Magistrate not only did not but could not pass an order holding that there was an apprehension of a breach of the peace. In these circumstances it must be held that the entire proceedings taken by him were without jurisdiction and the proper course for him to adopt was to withdraw the attachment.

[11] In this case, since no order under cl. (1) of S. 145 had been passed, no question arose of the cancellation of any such order. The result should, therefore, have been that the Magistrate should have withdrawn the attachment and allowed the person from whose possession the property had been taken to re-enter and thus the "status quo" would have been restored. There can, therefore, be no doubt that the order passed by the learned Magistrate should be set aside.

[12] The question then arises as to what order should be passed. The learned Additional Sessions Judge has recommended that the order should be to restore possession and to release the attached crops in favour of Chaudhri Abdul Aziz Khan. This recommendation cannot be accepted because it would mean that the Court held that Chaudhri Abdul Aziz Khan was in possession and, if the proceedings were without jurisdiction, there could be no finding of a Court to this effect. The only proper order which could be passed is that the attachment is withdrawn and the police is directed to vacate the land so that that person may enter into possession from whose possession the police had taken it over. This is the order that was passed in 1944 O. W. N. 479.[9]

[13] There then arises the question as to what should be done with the crops. Mr. Misra contended that that should be allowed to remain in attachment till such time as one of the parties has established his right in a Court of law. He relies upon A. I. R. 1925 Mad. 327[10] and A. I. R. 1933 Oudh. 284[11] to support his argument that such a course is a proper course to adopt in these circumstances. There is no provision in the Code of Criminal Procedure for such an order but in the last mentioned case it is made clear that the order was passed in exercise of the powers of the Court under s. 561A of the Code of Criminal Procedure. This is an extraordinary procedure and recourse should not be had to it except in exceptional circumstances. In the present case the objectors did not claim the whole of the crops and the trial Court also did not award to them the whole of those crops, but only the crops of less than half the area which was the subject-matter of the dispute. With regard to half of the crops at least Chaudhri Abdul Aziz Khan was held by that Court also to be the owner. In these circumstances there is no reason why he should be compelled to institute a suit to recover property at least half of which is admittedly his. In these circumstances I see no reason to differentiate between the crops and the lands on which those crops were produced.

[14] The order of the learned Magistrate is accordingly set aside and it is ordered that the attachment will be withdrawn, the police will vacate the land in dispute and restore possession of it to the person or persons from whose possession it took it over. The crops attached will also be released and returned to person or persons on whose land they were produced.

S.C. *Order accordingly.*

A. I. R. (35) 1948 Oudh 187 [C. N. 70.]

KAUL AND WALFORD JJ.

Pukhai—Accused—Applicant v. *Emperor*.

Criminal Revn. N0. 118 of 1946, Decided on 20-12-1946, against order of Sessions Judge, Hardoi, D/-1-4-1946.

Arms Act (1878), S. 29—Offence under S. 19 (f) committed in Hardoi District of Oudh—Sanction, if necessary.

Sanction of the District Magistrate under S. 29 is necessary for the prosecution of any person in Hardoi District of Oudh under S. 19 (f): Cri. Rev. Appln. NO. 17 of 1912, *Ref.* [Paras 4, 5]

Annotation:— (46 Man.) Arms Act, S. 29, N. 3.

Cases referred:—

1. Cri. Revn. Appln. NO. 17 of 1912, D/- 14-5-1912, Pobop Singh v. Emperor.
2. ('26) 13 A. I. R. 1926 All. 143 : 91 I. C. 47 : 27 Cr. L. J. 15, Amir Ahmad v. Emperor.

Hakim Uddin—for Applicant.

Nasir Ullah Beg, Government Advocate — for the Crown.

Order.— This is a revision application by Pukhai against his conviction under S. 19 (f) of the Arms Act for being in possession of a country-made pistol and cartridges without a licence. He was sentenced to two years' rigorous imprisonment. It was heard by a Single Judge of this Court, before whom it was contended that inasmuch as the sanction of the District Magistrate for the prosecution of the petitioner as required by S. 29 of the Arms Act was not obtained, the trial was illegal. Reliance in support of this contention was placed on a decision of Mr. Lindsay who, as Judicial Commissioner, in Cri. Revn. Appln. NO. 17 of 1912 D/- 14-5-1912[1] expressed the opinion that on the material placed before him Hardoi was a district where, in view of the provisions S. 29 of the Indian Arms Act, no prosecution for an offence under S. 19 (f) of the Act, could be started without the previous sanction of the District Magistrate. One of us before whom the matter came was inclined to doubt the correctness of the view taken by Mr. Lindsay, and as the question was one of general importance, the case was referred to a Bench.

[2] Section 29 of the Indian Arms Act provided that where an offence punishable under S. 19 (f) has been committed within three months from the date on which that Act came into force in any province, district or place to which S. 32, cl. 2 of Act XXXI of 1860 applied, or where such an offence has been committed in any part of British India, not being such a district, province, or place no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the District Magistrate, or, in a Presidency town, of the Commissioner of Police. Clearly, therefore, if the place in which the offence was committed is a place to which S. 32 (2) of Act 31 of 1860 applied at the date when Arms Act 11 of 1878 came into force, and the offence was committed after the lapse of three months from the date of the coming into force of the said Act, no sanction is required for institution of proceedings for an offence under S. 19 (f). In the case before us, no sanction of the District Magistrate for the prosecution of the applicant was obtained, and the question for consideration, therefore, is whether such sanction was necessary. This was the only point raised on behalf of the petitioner.

[3] Section 32 of Act 31 of 1860 runs as follows:

"*Clause 1.* It shall be lawful for the Governor-General of India in Council or for the Executive Government of any Presidency or for any Lieutenant Governor, or with the sanction of the Governor-General in Council for the Chief Commissioner or Commissioner of any Province, District or place subject to their administration respectively, whenever it shall appear necessary for the public safety, to order that any Province, District, or place shall be disarmed."

"*Clause 2.* In every such Province, District or place as well as in any Province, District, or place in which an order for a general search for arms has been issued and is still in operation under Act XXVIII of 1857, it shall not be lawful for any person to have in his possession any arms of the description mentioned in S. 6 of this Act, or any percussion caps, sulphur, gunpowder or other ammunition without a licence."

[4] An examination of clause 2 of this section makes it clear that the previous sanction of the District Magistrate for a prosecution for an offence under S. 19 (f) of the Indian Arms Act, 11 of 1878 would not be necessary if an order for a general search for arms was made either under Act, 28 of 1857 and was still in force on the 1st October, 1860 (the date up to which Act 28 of 1857 continued to be operative) or an order for disarmament under clause (1) was made in Hardoi district. Mr. Lindsay was not satisfied that such an order either for a general search for arms, or for disarmament, was passed in respect of Hardoi. The learned counsel for the Crown invited our attention to a notification in the Calcutta Gazette, (NO. 5336, January to June, 1859, page 16) which reads as follows:

"Allahabad, the 21st December 1858. Notification. The Right Hon'ble the Governor-General has been pleased to extend the provisions of Ss. 1, 2 and 5, Act XXVIII of 1857, to the North-Western Provinces of the Bengal Presidency. "His Lordship having resolved on disarming such parts of those Provinces as lied to the North of the Rivers Jumna and Ganges, has further been pleased under S. 24, Act XXVIII of 1857, to authorise a general search and seizure of arms by the Magistrates and Collectors, within the tract above specified. The Magistrate and Collector may delegate the same authority to any officer of his Establishment of rank not lower than a Jemadar."

The learned counsel contended that as the District of Hardoi lies to the north of the Rivers Jumna and Ganges this order of the Governor-General should be deemed to apply to that district. Reliance was further placed upon a case which arose within the jurisdiction of the Allahabad High Court, A. I. R. 1926 ALL. 143[2] where this contention was upheld. In further confirmation of the view urged by the learned Government Advocate, reference was also made to Para. 92, Arms Act, Manual, Edn. 6, (G. K. Roy) page 253 where is quoted G. O. NO. 2920, dated 10-7-1914, and it is said

"that all parts of the United Provinces except that

portion of the Mirzapur District lying to the south of the Sone have been disarmed."

The G. O. further adds:

"Consequently any one not coming under any exemptions, who has in his possession or under his control arms of any description, ammunition or military stores, except under a licence and in the manner and to the extent permitted thereby, is punishable under S. 19 (f), Act XI of 1878, with imprisonment for a term which may extend to three years, or with fine, or with both....."

It may be pointed out at once that though the District of Hardoi lies to the north of the Rivers Jumna and the Ganges, the notification published in the Calcutta Gazette was intended to apply only to the North-Western Provinces of the Bengal Presidency. In 1858 Oudh was a separate Province and it did not form part of the territory designated "North-Western Provinces of the Bengal Presidency." What the Governor-General resolved was the disarmament of such parts of "those provinces," as lay to the north of the river Jumna and the Ganges. In our opinion on the language of this notification it was only certain parts of the North-Western Provinces of the Bengal Presidency that were ordered to be disarmed under this notification.

[5] It is true that, as mentioned in Para. 92, Arms Act, Manual, Oudh was also disarmed; but the disarmament of Oudh was not made either under Act 28 of 1857 or under Act 31 of 1860. So far as we can find, Act 28 of 1857 was never applied to Oudh which was a "Non-regulation Province." That was a temporary Act (*See* Index to the Acts passed by the Legislative Council of India in the year 1857,—volume containing the Acts for that year, p. 3) and by S. 33 thereof the whole or any part of it was to take effect in any district or place to which the same was extended by order of the Governor-General in Council or the Executive Government of the place. No order extending the Act to Oudh, or to any part of that province, was brought to our notice. It is true that Act 31 of 1860 was applicable to Oudh. A reference, however to Chap. VIII, Para. 261 of the General Report on the administration of the Province of Oudh (Oudh Papers, Vol. VIII, p. 30) shows that disarmament of Oudh was carried out during the process of "re-conquest" of the province after the Mutiny of 1857, when the Civil Government had ceased to function and the Army was engaged in bringing the province under subjugation. This report is dated 22-4-1859. This was the first report of its kind to the Government since the annexation of the province. Paragraph 261 runs as follows.

"The necessity of disarming the whole population destroying all forts and clearing away jungles, has occupied the earnest attention of the Chief Commissioner. Detachments of columns placed at his disposal, or regiments of civil police told off to this duty, were accompanied by civil officers, whose sole business was to disarm the people. Deputy Commissioners, assistants, and every available officer, by force or persuasion, extracted the arms. From the powerful Talookdar, whose guns defend his fort, to the low caste Bassee who handles the bow with deadly effect, all classes have been called on to give up their arms. Evasion, refusal, and general concealment had to be met with firmness, perseverance, and painstaking search....."

This, it is clear, could not have been done under the provisions of Act 31 of 1860 or of the Act of 1857. The destruction of forts, clearing the jungle, etc., and the disarmament of the people of the province, in the manner set out in the report, were part of the operations undertaken by the military authorities. It was not a procedure adopted under the Acts above mentioned. The fact that S. 32 (2) of Act 31 of 1860 was applicable to Oudh would not necessarily lead to the conclusion that any order, as contemplated by that section, was made in respect of the province of Oudh. On the other hand as we find from the report to which reference has been made, disarmament of Oudh was carried out before Act 31 of 1860 came into force. Thus the requirements which would make the previous sanction of the District Magistrate unnecessary for institution of proceedings against any person in respect of an offence under S. 19 (f), Arms Act, committed in Hardoi District as contemplated by S. 29 of the said Act, have not been fulfilled.

[6] We are confirmed in this opinion by the fact that after the decision of Mr. Lindsay in Cri. Revn. Appln. No. 17 of 1912,[1] the Government of the United Provinces issued a circular letter to all the Deputy Commissioners in Oudh calling their attention to the decision of the Judicial Commissioner and directing them that in future no prosecution under S. 19 (f), Arms Act, should be instituted in any district "until specific sanction had been accorded by the Deputy Commissioner to its institution," (*See* G. O. No. 749/VI-811 of 1912. dated 28-2-1913). It may be recalled that Mr. Lindsay had not definitely held that no prosecution for an offence under S. 19 (f) could be instituted against an accused in Hardoi District without the sanction of the District Magistrate, He observed:

"It is possible that further search may show that this section was in fact so specifically applied but I can only go on the materials which are before me and which have been produced by the learned Government pleader after he has had notice of the question of law to be determined. At present all I can say is that I am not satisfied that it has been proved that S. 32, cl. (2) of Act XXXI of 1860 did apply to the District of Hardoi at the date when present Arms Act was introduced and from this it follows that a trial for an offence under S. 19 (f) which was held without previous sanction having been given was void as being without jurisdiction."

If the Government had been in possession of materials showing that any order for a general disarmament as contemplated by Act 31 of 1860, S. 32, cl. (2), had been made in regard to Oudh in general, or to the District of Hardoi in particular, it would not have issued the general circular letter to which reference has been made. In any case no materials have been placed before us which would go to show that the previous sanction of the District Magistrate was unnecessary. We refrained from pronouncing the order in this case for a considerable time to enable the Government Advocate to place before us any material which further research on his part might bring to light. We waited for four weeks, but no such material has been placed before us. At the hearing the Government Advocate placed before us type-written copies of what purportod to be a proclamation for disarmament applicable to Oudh, but there was nothing to show that this was issued under Act 28 of 1857 or Act 31 of 1860.

[7] For the reasons given above it must be held that the trial of Pukhai without the previous sanction of the District Magistrate was illegal. The application is allowed and the conviction and the sentence passed upon Pukhai are set aside. He shall be set at liberty forthwith if not otherwise wanted.

S.C. *Application allowed.*

A. I. R. (35) 1948 Oudh 190 *[C. N. 71.]*

KIDWAI AND CHANDIRAMANI JJ.

B. Sheo Kumar and others—Defendants—Appellants v. *Mt. Jai Rani and others — Plaintiffs—Respondents.*

First Appeal No. 72 of 1944, Decided on 26-2-1948 from order of Addl. Civil Judge, Unao, D/- 27-3-1944.

U. P. Temporary Postponement of Execution of Decrees Act (X of 1937), S. 5— Suit is against agriculturists even if some only of defendants are agriculturists.

A suit is "against an agriculturist" within the meaning of S. 5 (1), even if one of the defendants is not an agriculturist. This is borne out by the general scheme of the Act, specially S. 2 (2), which omits from the definition of "agriculturists", the proviso to the definition as given in the Agriculturists Relief Act and Ss. 3 and 4. [Paras 3, 4 and 5]

Anand Madhava—for Appellants.

S. N. Bajpai, N. Benerji and Shree Bilas Pande—for Respondents (Nos. 1 & 2)

Judgment.—On the 12th Oct. 1927 Mst. Ram Piary and her sons, Sheo Kumar, Nand Kumar and Jagdish Kumar executed a deed of mortgage in favour of Sheoratan Lal and Chandika Prasad to secure a loan of Rs. 5,000. The mortgage was by way of conditional sale and the term fixed for three years. Out of the mortgage money a sum of Rs. 1,200 was not paid. Mst. Ram Piari died on 15th April 1938 and the two mortgagees are also dead and each of them is represented by his widow, Mst. Jai Rani, respondent 1, being widow of Sheoratan Lal and Mt. Ambica Devi, widow of Pandit Chandika Prasad. The two widows as well as one Mt. Ram Piari, who was the widow of Sheo Dularey, brother of Sheoratan Lal and Chandika Prasad, instituted a suit for foreclosure on the basis of this mortgage on 4th October 1943 in the Court of the Civil Judge, Unao. They stated that limitation began to run on 12th October 1930 but that they were entitled to an extension of time under the provisions of Act X of 1937.

[2] Among the various pleas that the defendants took was a plea that the suit was barred by limitation and that Act X of 1937 did not apply to it. The learned Civil Judge decided various issues necessary to give relief to the plaintiff in their favour and he also held that the suit was not barred by limitation because the plaintiffs were entitled to the benefit of S. 5 of Act X of 1937. He accordingly passed a preliminary decree for foreclosure. Defendants have now come up in appeal.

[3] The grounds of appeal raise a large number of points but the learned advocate for the appellants has confined his argument to the applicability of Act X of 1937 to the present cass. Sub-section (1) of S. 5 of Act X of 1937 reads as follows :—

"5 (1). In computing the period of limitation prescribed by the Indian limitation Act, 1908, or any other law for the time being in force, for (a) the institution of a suit in a Civil Court against an agriculturists for money or for foreclosure or sale in enforcement of a mortgage, and (b) the execution of such decree as is referred to in S. 3, and not covered by S. 6, the period during which this Act shall remain in force, shall be excluded."

We have, therefore, to consider whether the present suit has been instituted against "an agriculturist." It is not denied that two of the defendants, namely, defendants 2 and 3 were agriculturists. It is also agreed that defendant 1 is not an agriculturist because he pays income-tax. It is contended on the basis of this fact that the suit cannot be deemed to be a suit against "an agriculturist." We cannot accept this contention because it is undoubted that two of the defendants in the case were agriculturist. Thus the suit was a suit against "an agriculturist" in the case of at least two of the defendants and, therefore, in determining limitation in such a suit the whole period during which the Act remained in force is to be excluded.

[4] This interpretation is borne out by a consideration of the various provisions of the enactment. The preamble shows that the legislation was of a temporary nature in order to give

time for further legislation to grant relief from indebtedness to agriculturists. The legislature did not anticipate the exact nature of the legislation that was going to be passed and, therefore, very general words have been used in the enactment. Then when we come to the definition of agriculturist given in sub-section (2) of S. 2 of the Act, we find that it is very similar to the definition of that term used in the Agriculturists Relief Act but a very important omission occurs in this definition. In the Agriculturists Relief Act the definition contains a proviso that if a non-agriculturist joins with an agriculturist in any transaction of loan, save for the purpose of adding his name as security the agriculturist shall not be considered as such for the purpose of that transaction. In the definition of agriculturist in Act X of 1937 there is no such proviso. This fact is of great importance as showing that the legislature, while it was adopting the definitton of agriculturist given in the Agriculturists Relief Act, thought it proper to omit that portion of the definition which would deprive an agriculturist of the benefit of Act X of 1937 if he joined a non-agriculturist.

[5] Sections 3 and 4 of Act X of 1937 also make it clear that a judgment-debtor is entitled to get the benefit of these sections even if he himself is not an agriculturist, if one or more of the other judgment-debtors are agriculturists. It is reasonable to suppose that the benefit, which section 5 conferred upon the creditor, was meant to be equally extensive and to cover those cases in which any of the proposed defendants was an agriculturist. No doubt there is a difference in the language used in the two sets of sections but that difference was necessitated by the circumstances of the two sets of cases. If that language had not been used in Ss. 3 and 4, then the objection by a non-agriculturist judgment-debtor to further execution or to his continued detention in prison might well have been rejected on the ground that he himself was not an agriculturist. The legislature, therefore, thought fit to make it clear that if any one or more of the judgment-debtors was an agriculturist, even non-agriculturist would be entitled to benefit under these sections. The same meaning has been given to the words of S. 5 by using the word, 'an' before 'agriculturist'. This clearly implies that even if one of the defendants is an agriculturist, the extended period of time will be allowed.

[6] Thus the suit was instituted by the plaintiff within time by reason of S. 5 of Act X of 1937 and the decree passed by the learned Civil Judge must be upheld.

[7] Respondent 3 has presented an application disclaiming all interest in the property and making it clear that the mortgage in suit was in favour of the husbands of respondents 1 and 2 and that respondents 1 and 2 alone are entitled to a decree. This application is supported by an affidavit and has been presented through an advocate of this Court who supports it. In these circumstances, while dismissing the appeal of the appellants, we modify the decree of the learned Civil Judge and pass a preliminary decree for foreclosure only in favour of plaintiffs-respondents 1 and 2. The appellants will pay the cost of this appeal to respondents 1 and 2.

R G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 191 *[C. N. 72]*

GHULAM HASAN C. J.

Mt. Ram Rati — Defendant-Appellant v. *Ram Das Misra, Plaintiff and another, Defendant—Respondents.*

Second Appeal No. 327 of 1942, Decided on 7-1-1947, from order of Civil Judge, Sultanpur, D/- 21-5-1942.

Oudh Laws Act (1876), S. 9— Superior proprietor and under-proprietor— Distinction— Under-proprietor cannot carve out under-proprieitary right— *Held*, that deed in question was not sale of under-proprietary rights but was perpetual lease and was not liable to pre-emption.

There is a distinction between the case of a superior proprietor and that of an under-proprietor, in so far as while a superior proprietor can carve out an under-proprietary right, such a position is not available to an under-proprietor. An under-proprietor can only carve out a subordinate interest. [Para 8]

By a deed described as *patta Istemarari Malahli* an under-proprietor transferred two plots of land, conferring on the transferee heritable and transferable rights in the plot for a certain nazarana and declaring that the transferee shall be in possession of the plots generation by generation with full rights by appropriation and possession of rights of transfer of all kinds. The transferee was to pay Re. 1 per annum along with *haq malikana lagan* of the plots to the transferor and his heirs year after year. The transferee was given the right to get her name mutated as under-proprietor in the Revenue papers. The transferor reserved no right of re-entry in his favour or in favour of his heirs. Nothing was said in the deed as to the liability for payment of the under-proprietary rent payable by the transferor to the superior proprietor :

Held, that the deed was not a sale of under-proprietary rights but was a perpetual lease and, therefore, the transaction was not liable to pre-emption : *Case law referred.* [Paras 5 and 8]

Cases referred:—

1. ('34) 1934-11 O. W. N. 1494 : 22 A. I. R. 1935 Oudh 217 : 10 Luck. 392 : 153 I. C. 334 (F. B.), Jagdeo Singh v. Ram Naresh Singh.
2. ('42) 1942 O. W. N. 504 : 30 A. I. R. 1943 Oudh 125 : 18 Luck. 303 : 204 I. C. 85, Sri Nath v. Ram Narain.
3. ('44) 1944 O. W. N. 155 : 31 A. I. R. 1944 Oudh 263 : 20 Luck. 15 : 218 I. C. 322, Jagdeo Misir v. Sita Ram.
4. ('41) 1941 O. W. N. 1122 : 29 A. I. R. 1942 Oudh 55 : 17 Luck. 281 : 196 I. C. 617, Sita Ram Singh v. Jagdeo Misir.

5. ('47) 1947 O. W. N. 500 : 35 A. I. R. 1948 Oudh 7, Kamla Prasad v. Ram Narain.
6. ('37) 1937 O. W. N. 1007 : 24 A. I. R. 1937 Oudh 492 : 171 I. C. 63, Kazim Husain v. Mahfooz Ali.

Ali Hasan — for Appellant.

K. N. Tandon—for Respondent No. 1.

Judgment.— This is a vendee's appeal in a suit for pre-emption. The transaction which was the subject-matter of dispute was evidenced by a deed dated 24th February 1940 (Ex. 1) executed by Rishi Narain Singh in favour of Mt. Ram Rati. This deed formed the bone of contention between the parties. The plaintiff filed a suit for pre-emption on the ground that he was an under-proprietor and entitled to pre-empt as against Mt. Ram Rati, who was an utter stranger. He described the deed (Ex. 1) as a sale.

[2] The main defence was that the deed was only a perpetual lease and not a sale of under-proprietary rights and was, therefore, not liable to pre-emption. The other defence was a denial of the plaintiff's right to pre-empt but this controversy no longer survives.

(3) The trial Court framed several issues but the crucial issue with which we are now concerned is the first issue whether the deed in suit is pre-emptible. In oral pleadings before the Court the plaintiff's pleader thus stated on the date of the issues:

"Even if the deed in suit is not held to be a sale deed, the sale of under-proprietary right has been effected by it and under-proprietary right has been carved out. As such it is pre-emptible."

In view of this statement the trial Court did not think it necessary to decide whether the deed in suit is a sale or not. According to the view taken by that Court the transferor, who was admittedly an under-proprietor, conferred under-proprietary rights upon the transferee who was entered in the village papers as an under-proprietor. His finding may be reproduced in his own words:

"So it is clear that defendant 2 who is a *pukhtadar* has transferred under-proprietary rights or carved out an under-proprietary and as such gives a right of pre-emption, *vide* 1934 O. W. N. 1494."

The pre-emptor's suit was thereupon decreed.

[4] The vendee appealed but with no success. In that Court although the first issue was challenged in the grounds of appeal, yet I do not find any clear reference in the judgment of the lower appellate Court upon that point. On the other hand, the sole question to which he addressed himself was whether the pre-emptor belongs to any of the classes enumerated under S. 9, Avadh Laws Act, or not and he held that he was an under-proprietor and the vendee a stranger and confirmed the decision with a slight variation in the decree, which is not material.

[5] In second appeal by the vendee before me it has been contended that the deed (Ex. 1), upon a true construction, does not constitute a sale of under-proprietary rights and the transferor, who was himself an under-proprietor, had no right to carve out another under-proprietary right in favour of the transferee. I have examined the deed carefully. The deed is described as *patta Istemrari matahti*. Rishi Narain Singh is admittedly an under-proprietor and the superior proprietor is the Ajudhia estate. The property transferred under the deed consists of two plots, No. 1937 measuring one biswa and No. 1938 measuring two Bighas and four biswas *haqiat pukhtadari* with seven mango trees situate in village Katka Khanpur. The transferor confers heritable and transferable rights in the plots in dispute for a *nazrana* of Rs. 155 declaring that the transferee shall be in possession of the plots in suit generation by generation with full rights by appropriation and possession of rights of transfer of all kinds. It is further laid down that the transferee shall pay Re. 1 per annum along with *haq malikana lagan* of the plots to the transferor and his heirs year after year. The transferee was given the right to get her name mutated as under-proprietor in the Revenue papers. Lastly the transferor reserved no right of re-entry in his favour or in favour of his heirs. These are the essential features of the deed. It is not denied that the Ajudhia estate is the superior proprietor of the village in which the plots are situate and Rishi Narain Singh is an under-proprietor of a part of the village including these plots. As an under-proprietor he pays rent to the superior proprietor. Nothing is said in the deed as to the liability for payment of this under-proprietary rent to the superior proprietor. No relationship between the transferee and the superior proprietor is created by this transaction. The deed imposes the liability to pay the annual rent of Re. 1 not only on the transferee but upon her heirs. It is clear, therefore, that the transferor has not divested himself of all rights in the plots in suit. Possibly the imposition of the rent was a device to defeat pre-emption and hence it was taken in the form of a lease. Such a device is permissible. I am of opinion, therefore, that the terms of the deed read as a whole do not support the inference that the transferor meant to execute a sale of his under-proprietary right. On the other hand, they show that his intention was to execute a permanent lease only and not to divest himself of his rights in the property. On the part of the transferee the intention to take a lease may well have been to avoid a suit for pre-emption. Accordingly I hold that no sale of under-proprietary rights having taken place, the deed was not subject to pre-emption.

[6] In 1942 O. W. N. 504[2] it was held that where a heritable transferable lease is executed

by an under-proprietor for a specified premium reserving an annual rent and malikana, the reservation is inconsistent with the transaction being a sale, as an under-proprietor cannot sell his under-proprietary right and still continue to be an under-proprietor. The case of superior proprietor is different, as he can carve out an under-proprietary holding by executing a heritable transferable lease. The fact that no right of re-entry is reserved will confer on the transferee an interest in the land so as to entitle him to be a member of the village community and claim pre-emption under S. 9, Oudh Laws Act, but cannot convert the transaction into a sale subject to the liability to pre-emption. The Full Bench decision in 1934 O. W. N. 1494,[1] which was referred to by the trial Court is, among other cases, also noticed in this judgment and is explained by the fact that there the transfer was by a superior proprietor. At p. 508 the learned Judge (Bennett J.) observed :

"A distinction must therefore in my opinion be drawn between deeds of this nature executed by superior proprietors and similar deeds executed by under-proprietors. The position of the parties is in the one case consistent with a sale ; in the other it is not. If the under-proprietor has not transferred all his interest in the land I fail to see that he has transferred any interest except by way of lease. The Courts below have not shown what the transferor has sold. It is clear that he cannot have sold any proprietary interest. I hold therefore that the deed under consideration was a lease and not a sale deed."

This decision was given on 20-8-1942, and was not available to the lower appellate Court, whose decision was given on 21-8-1942. It was followed by a Bench in 1944 O. W. N. 155,[3] where it was held that where a lease executed by an under-proprietor purports to transfer rights of a heritable and transferable nature, but reserves to the transferor an annual rent though nominal and does not transfer the under-proprietor's liability to pay rent to the superior proprietor for the property transferred, the document is a lease and not a sale and the grantee is a lessee and not an under-proprietor. That decision was given on appeal under S. 12 (2), Oudh Courts Act, from a decision of Madeley J. in 1941 O. W. N. 1122.[4]

[7] The most recent decision of this Court is to be found in 1947 O. W. N. 500[5] which followed 1942 O. W. N. 504[2] and 1944 O. W. N. 155.[3]

[8] Learned counsel for the respondent urges that the words of transfer in Ex. 1 show that the transferor was transferring out and out his under-proprietary rights and this is confirmed by the fact that the transferee was entered in the revenue papers as an under-proprietor. As remarked in 1947 O. W. N. 500[5] mutation of names cannot confer a title which does not exist. Further the deed cannot be construed to evidence a complete transfer of under-proprietary rights, although it purports to do so. The terms and conditions inserted in the deed not only do not warrant any such inference but contradict it. The reference to a decision of a single Judge of this Court in 1937 O. W. N. 1007[6] is hardly helpful to the respondent's case. There also the vendor who had transferred the plots was a superior proprietor. The authorities that have been referred to above emphasise the distinction between the case of a superior proprietor and that of an under-proprietor, in so far as while a superior proprietor can carve out an under-proprietary right, such a position is not available to an under-proprietor. An under-proprietor can only carve out a subordinate interest. I hold, therefore, that the deed is not a sale of under-proprietary rights but is a perpetual lease. If this view be correct, the transaction is not liable to pre-emption.

[9] Accordingly I allow the appeal, set aside the decree of the lower appellate Court and dismiss the plaintiff-respondent's suit with costs in all the Courts.

V.R. *Appeal allowed.*

**** A. I. R. (35) 1948 Oudh 193** *[C. N. 73.]*

FULL BENCH

MISRA, KAUL AND WALFORD JJ.

Naziruddin Ahmad—Decree-holder—Appellant v. *Parmanand and others—Respondents.*

Second Rent Appeal No. 48 of 1941, Decided on 27-11-1947, against order of Dist. Judge, Rae Bareli, D/-12-8-1941.

**Limitation Act (1908), S. 20—"Person liable to pay the debt"—Joint decree against several persons—Payment by one does not save limitation against others—Limitation Act (1908), Ss. 19 and 21.

Section 21 is explanatory of S. 19 as well as S. 20 and does not constitute an exception in the case of either of these sections. Where, therefore, a joint decree for under-proprietary rent is obtained by the superior proprietor against a number of persons a payment towards the decree made by one of them does not save limitation against the other judgment-debtors also : *Case law reviewed.* [Paras 1 and 14]

Annotation:—('42-Com) Lim. Act, S. 21 N. 6 Pts. 5 and 9 to 16.

Cases referred:—

1. ('05) 27 All. 575, Ahsanullah v. Dakhini Din.
2. ('19) 41 All. 111 : 5 A. I. R. 1918 All. 61 : 47 I. C. 845, Raushan Lal v. Kanhaiya Lal.
3. ('27) 14 A. I. R. 1927 All. 209 : 99 I. C. 424, Ibrahim v. Jagdish Prasad.
4. ('37) I. L. R. (1937) All. 272 : 23 A. I. R. 1936 All. 82 : 166 I. C. 106 (FB), Mahomed Taqi Khan v. Raja Ram.
5. ('35) 22 A. I. R. 1935 Cal. 648 : 158 I. C. 512, Ananda Charan Mishra v. Jhatu Charan Roy.
6. ('33) 20 A. I. R. 1933 Pat. 1 : 12 Pat. 93 : 140 I. C. 145, Badri Das v. Pasupati Banerji.
7. ('12) 14 I. C. 128 (Cal), Arjun Ram Pal v. Rohima Banu.
8. ('20) 7 A. I. R. 1920 Mad. 418 : 55 I. C. 763, Muthu Chettiar v. Mohd. Hussain.

9. ('29) 16 A. I. R. 1929 Mad. 881 : 53 Mad. 119 : 121 I. C. 858, Thayamal v. Muthu Kumaraswami.
10. (1886) 11 A C. 639 : 55 L. J. P. C. 75 : 55 L. T. 410, Lewin v. Wilson.
11. ('38) 25 A. I. R. 1938 Cal. 129 : 176 I. C. 191, Azizur Rahaman v. Upendra Nath.

Hyder Hussain and Jagdish Chandra—for Appellant.

Harish Chandra—for Respondent 1.

Judgment.—The following question has been referred to a Full Bench by a Division Bench:

"Where a joint decree for under-proprietary rent is obtained by the superior proprietor against a number of persons does a payment towards the decree made by one of them save limitation against the other judgment-debtors also ?"

The answer to the question mooted above depends upon the construction to be put upon Ss. 20 and 21, Limitation Act which so far as relevant for our purposes run as follows:

"*20.* (1) Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made. . . . . ,.

(2) Where mortgaged land is in the possession of the mortgagee, the receipt of the rent of produce of such land shall be deemed to be a payment for the purpose of sub-section (1). Explanation—Debt includes money payable under a decree or order of Court."

"*21.* (1) The expression 'agent duly authorised in this behalf,' in Ss. 19 and 20, shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the payment.

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only or a written acknowledgment signed or of a payment made by or by the agent of, any other or others of them.

(3) for the purposes of the said sections —

(a) an acknowledgment signed, or a payment made, in respect of any liability, by, or by the duly authorised agent of any widow or other limited owner of property who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability; and,

(b) where a liability has been incurred by, or on behalf of a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorised agent of the manager of the family for the time being shall be deemed to have been made on behalf of the whole family."

It was considered desirable to refer the matter to a Full Bench as there was conflict of opinion among different High Courts and sometimes in the same High Court over the correct construction to be put upon the words "the person liable to pay the debt or legacy" occurring in S. 20; nor is there unanimity of opinion on the question whether the categories mentioned in S. 21 (2) are exceptions to Ss. 19 and 20 or are only explanatory. As pointed out by the Division Bench which made the reference it was argued on behalf of the appellants that the words "the person liable to pay the debt" do not mean all the persons liable and that a payment made by any one of the persons thus liable was sufficient to save limitation against others also except in cases covered by S. 21 (2), that is joint contractors, partners, executors or mortgagees. The contention on the other side was that "the person liable to pay the debt" was not the same thing as "a person liable to pay the debt," that is where the liability of a number of persons was joint payment made by one of the joint debtors would not save limitation against any one except himself.

[2] The case-law on the point was reviewed at some length in the order of reference by the Division Bench and it is unnecessary for us to refer to those cases in detail. The view taken by the Allahabad High Court in 27 ALL. 575[1] was that a payment by one of several persons jointly liable under a decree otherwise than as agent of his co-judgment-debtors cannot operate to save limitation as against any one of the judgment-debtors other than himself. In the same Court a different view was taken in 41 ALL. 111[2] and A. I. R. 1927 ALL. 209.[3] These cases were however overruled by a Full Bench in I. L. R. (1937) ALL. 272[4] at page 285. It may be mentioned that the Full Bench decision was given in a case which arose under S. 19 and not under S. 20, Limitation Act.

[3] The same view was taken in some of the cases of the Calcutta High Court: A. I. R. 1935 Cal. 648[5]; though there are cases of that Court in which a contrary view has been taken. Reliance in some of those cases was placed upon the two decisions of the Allahabad High Court which were overruled by the Full Bench in I. L. R. (1937) ALL. 272.[4]

[4] A different view was taken in Patna in A. I. R. 1933 Pat. 1[6] where the following observations were made by Rowland J:

"Though S. 20 may not apply to one debtor by reason of a payment made by another debtor in cases where the debts or liabilities are distinct and though S. 21 (2) may apply where a mortgage has been entered into by two or more persons or where two persons jointly execute a simple money bond, limitation is saved where the debt is a single debt and the liability is one and indivisible notwithstanding that a part of the property liable for the debt may be in hands other than those of the person making the payment. Such a case falls within S. 20 and is not taken out of its operation by S. 21 (2) of the Act."

He dissented from the view taken in 14 I. C. 128,[7] and referred to a large number of cases of the Calcutta High Court in support of his view. Reference was also made by him to the two cases of the Allahabad High Court—41 ALL, 111[2] and A. I. R. 1927 ALL. 209[3]— cases which were subse-

quently held by the Full Bench case in I. L. R. (1937) ALL. 272[4] as not laying down good law. In the Madras High Court also, it appears that the view taken is the same as that taken by Rowland J. : *see* A. I. R. 1920 Mad. 418[8] and A. I. R. 1929 Mad. 881.[9] He refused to follow the decision of Blair and Banerji JJ. in 27 ALL. 575[1] and relied primarily on the observations of Lord Hobhouse in (1886) 11 A. C. 639[10]:

"Payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties he is in full enjoyment of his bargain and is not put upon any further assertion of his rights."

[5] It appears to us with the greatest respect that in interpreting the section due regard has not been given to the history of the provisions of the Limitation Act dealing with the keeping alive of limitation by acknowledgment and payment. As pointed out by U. N. Mittra in his 'Tagore Law Lectures' 1882, Vol. I, page 362, the exception in respect of acknowledgments of liability, by the party against whom a claim is made, has to some extent or other been always recognised by the law of British India. The first exception was to be found under S. 14, Regulation 3 [III] of 1793 (Bengal Code). Then came Act 14 [XIV] of 1859. Section 4 of this Act runs thus:

"If, in respect of any legacy or debt, the person who, but for the law of limitation would be liable to pay the same shall have admitted that such debt or legacy or any part thereof, is due by an acknowledgment in writing signed by him a new period of limitation according to the nature of the original liability shall be computed from the date of such admission:

Provided that, if more than one person be liable none of them shall become chargeable by reason only of a written acknowledgment signed by another of them."

It is significant to note that the form in which this section was cast resembles very closely the form of S. 20 (1) of the present Act. The proviso to this section made it clear that where more persons than one were jointly liable an acknowledgment by one of them would not save limitation against others. There were two other provisions in Act 14 [XIV] of 1859 which recognised an acknowledgment in writing, namely, S. 1 (15) and S. 19. By clause 15 of S. 1, if the title of the depositor, pawnor or mortgagor, or his right of redemption was acknowledged in writing signed by the depositary, pawnee or mortgagee, or some person claiming under him, the period of limitation was renewed. Section 19 referred to a decree or order of Court established by Royal Charter.

[6] The law was again altered in some respects by Act 9 [IX] of 1871. Section 20 of this Act was as follows:

"*20.* (a) No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, unless such promise or acknowledgment is contained in some writing signed, before the expiration of the prescribed period by the party to be charged therewith or by his agent generally or specially authorised in this behalf.

(b) When such writing exists, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the promise or acknowledgment was signed.

(c) When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.

Explanation 1. For purposes of this section, a compromise or acknowledgment may be sufficient, though it omits to specify the exact amount of the debt or legacy or avers that the time for payment or delivery has not yet come, or is accompanied by a refusal to pay or deliver or is coupled with a claim to a set off' or is addressed to any person other than the creditor or legatee; but it must amount to an express undertatking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting.

Explanation 2. Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them."

The form in which S. 4 of the Act of 1859 was cast was changed and the proviso to this section appeared in the new Act in the form of Explanation (2) in a modified form. It was in 1871 that under the Indian Law payment as distinct from acknowledgment was recognised for the first time as a ground for renewing the period of limitation. Section 21 of Act 9 [IX] of 1871 ran as follows:

"When interest on a debt or legacy is, before the expiration of the prescribed period paid as such by the person liable to pay the debt or legacy or by his agent generally or specially authorised in this behalf or when part of the principal of a debt is before the expiration of the prescribed period paid by the debtor or by his agent generally or specially authorised in this behalf a new period of limitation according to the nature of the original liability shall be computed from the time when the payment was made:

"Provided that, in the case of part-payment of principal, the debt has arisen from a contract in writing and the fact of the payment appears in the handwriting of the person making the same on the instrument or in his own books, or in the books of the creditor."

This was followed by Act 15 [XV] of 1877. Section 19 of this ran thus:

"If, before the expiration of the period prescribed for a suit or application in respect of any property or right an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability a new period of limitation, according to the nature of the original liability shall be computed from the time when the acknowledgment was so signed:

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

Explanation 1:—For the purpose of this section, an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off or is addressed to a

person other than the person entitled to the property or right.

Explanation 2: — In this section 'signed' means signed either personally or by an agent duly authorised in this behalf."

It enlarged the scope of the section relating to acknowledgments which now was applicable to any property or right instead of being limited to cases referred to in S. 1 (15), S. 4 and S. 19 of the Act of 1859, or S. 20 and Art. 148 of the Act of 1871. In the Act of 1877 what was originally a proviso to S. 4, and then appeared as Explanation (2) to S. 20 in the Act of 1871 was enacted as S. 21 in the Act of 1877. It ran as follows:

"Nothing in Ss. 19 and 20 renders one of several joint contractors, partners, executors, or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by or by the agent of any other or others of them."

The present S. 21 contains three sub-sections. Sub-section (2) is the same as old S. 21 of 1877, sub-section (1) was added in 1908, and sub-section (3) by the Limitation Amendment Act 1 [I] of 1927.

[7] It will thus be seen that originally the proviso to S. 4 of the Act of 1859 had a very wide scope. In that section reference was made to an acknowledgment in writing signed by the person "liable to pay" the debt or legacy. The form of that section resembled closely the form of sub-section (1) of our present S. 20. With the alteration of the form of S. 20 in Act 9 [IX] of 1871, it became unnecessary to have the proviso in the same general form. In the main part of the section, it was made clear that no promise or acknowledgment which is not signed "by the party *to be charged therewith* or by his agent generally or specially authorised in this behalf" could renew limitation. Explanation (2) therefore was limited to partners or executors where ordinarily one partner would in matters of the partnership business, represent other partners and the powers of all executors (where there are more executors than one) may be exercised by any one of them. The Legislature made it clear that even in such cases an acknowledgment given by one would not affect others. Under the Indian law till the year 1871 though acknowledgment could be relied on for the purposes of renewing limitation, payment of principal or interest had no such effect. It was by Act 9 [IX] of 1871 that payment of principal or interest as such was recognised as a ground like acknowledgment for renewing limitation. This was only an extension of the same principle which underlay the provisions relating to acknowledgments. No proviso or explanation, such as was the case in the Acts of 1859 and of 1871 was added to S. 21 of Act 9 [IX] of 1871, when payment of interest or part of principal was for the first time recognised in the Indian law as a ground for renewal of limitation. Can this be a ground for holding that the Legislature, though it did not in the case of an acknowledgment allow the act of one person to bind others who were jointly liable with him, followed a different line with regard to payments in the matter of renewal of limitation? The expression used in S. 21 of Act 9 [IX] of 1871 was "when interest .. is before the expiration of the prescribed period paid . . . *by the person liable to pay the debt or legacy*." This is not the same thing as "when interest . . . . is paid as such by any person liable to pay the debt or legacy." It will be remembered that it is the same form of expression which was used in S. 4 of Act 14 [XIV] of 1859, in relation to an acknowledgment. It is difficult to conceive that though originally the law would not treat a payment for the purposes of renewal of limitation even on the same footing as an acknowledgment it would, when once it recognised a payment as a ground for renewing limitation, make a payment made by one co-debtor effective to save limitation as against others, though it could not be so in the case of an acknowledgment. There is no good ground in our opinion for holding that "the person liable to pay the debt or legacy" has the same meaning as "any person liable to pay the debt or legacy."

[8] We are confirmed in this opinion by an examination of sub-section 3 (b) of section 21. It reads thus:

"Where a liability has been incurred by or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorised agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family."

This makes it clear that if a payment is made by a member other than the manager of the family it would not be deemed to have been made on behalf of the whole family. Thus if a bond is executed by four members of a joint family A, B, C and D, of which A is the manager, payment of interest or part of principal by B, C, D, who were all liable to pay the debt, would not extend limitation against all. If the view taken by the Calcutta High Court and in the Patna case, referred to earlier, against that taken by Blair and Banerji JJ. in 27 ALL. 575[1] were correct, a payment made by B, C or D would renew limitation against all the four debtors. Moreover it will be seen that if the construction put upon sub-s. (1) of S. 20 by the Calcutta and Patna cases were right it would be wholly unnecessary to add sub-s. (3) (b) to S. 21 for irrespective whether the payment was made by the manager of the family or by any other member, every one of whom is liable to pay the debt, it would be sufficient to give a fresh start of limitation for bringing a suit for recovery of the debt against all the members.

[9] There does not appear to be any good ground for holding that S. 21 is an exception to S. 20.

[10] It is clear that for the purposes of S. 21, Ss. 19 and 20 are treated as having common scope. Both are treated on the same footing and it will be difficult to hold that this section would operate as an explanation so far as S. 19 is concerned and an exception in the case of S. 20; obviously so far as S. 19 is concerned, S. 21 is only explanatory because on the language of that section it is only an acknowledgment given by the person against whom the property or right is claimed that can have the effect of renewing limitation. The law has, *abundanti cautela* made it clear that even in the case of several joint contractors, partners, executors or mortgagees, an acknowledgment given by one of them would not be effective to save limitation against others unless of course the person making the acknowledgmeut was acting as the agent for others. There does not appear to be any sound reason to hold that if S. 21 was explanatory of S. 19, it was intended to have the effect of an exception so far as S. 20 was concerned. Is there any reason of the numerous categories to which persons subject to joint liability may belong only these four joint contractors, partners, executors or mortgagees, should be selected for special treatment?

[11] To put the construction contended for by appellants decree-holders in a case like that which necessitated this reference would create numerous anomalies and give rise to a crop of difficult questions. If there are several joint contractors and one of them dies are his heirs joint contractors with the remaining contractors? If a contractor leaves several heirs, are they all joint contractors for the purpose of S. 21? If one of several mortgagors transferred a part of his mortgaged property to some one is the purchaser from such mortgagor a joint contractor with the other mortgagors?

[12] Reference in certain cases has been made to the Privy Council decision in (1886) 11 A. C. 639[10] especially to the following observations of their Lordships:

"It must be remembered that payment and acknowledgment are two very different things. As regards the person making them, acknowledgment may .... be made by a person who, though a party to a mortgage contract has ceased to have any substantial interest in it and has nothing to lose by acknowledgment, whereas payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties he is in full enjoyment of his bargain and is not put upon any further assertion of his rights; but not so if he only receives acknowledgment. If therefore we find that the Legislature has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning it."

The observations were made in connection with certain sections of the Statute of New Brunswick dealing with limitation of Real Actions, and it has been taken for granted that the observations of their Lordships in that case should be applied to the provisions of Ss. 19 and 20, Indian Limitation Act. We may with the greatest respect observe that in a matter like the one before us it is unsafe to try to seek light from observations made on the construction to be put upon a Statute of New Brunswick, especially as the language of Ss. 29 and 30 of that Statute is not the same as that of our Act. As pointed out by Nasim Ali J. in A. I. R. 1938 Cal. 129:[11]

"Under the English law there is a distinction between secured debts and unsecured debts. By S. 8 of R. P. L. A., 1874, part payment of principal or interest checks the running of the statute in case of secured debts. There is no statutory provision regulating the effect of payment upon unsecured debts and payment only saves the debt when it is such that a promise to pay the debt can be implied. The Limitation Act, however, makes no such distinction. In India it is not necessary to import the doctrine of implied promise to save by payment a simple debt from limitation."

[13] We have been at pains to trace the history of S. 21 of our Limitation Act in order to show the line on which the law has developed in this country and its process of growth. We have not the same information as regards the Statute of New Brunswick and having regard to the difference in the language of the Statutes in the two countries, we should not merely on account of certain common expressions in the two Statutes assume that what was observed by their Lordships of the Privy Council as regards certain sections of a statute in another country would be equally applicable to the interpretation of Ss. 19 and 20, Indian Limitation Act.

[14] We are for the reasons given above of opinion that S. 21 is explanatory of Ss. 19 as well as 20 and does not constitute an exception in the case of either of these sections. We therefore answer the question referred to us by the Division Bench in the negative.

V.R. *Reference answered in the negative.*

A. I. R. (35) 1948 Oudh 197 *[C. N. 74.]*

KAUL AND MISRA JJ.

Collector of Moradabad — Defendant — Appellant v. *Equity Insurance Co. Ltd. — Plaintiff — Respondent.*

First Appeal No. 71 of 1942, Decided on 11-12-1947, from decree of Civil Judge, Malihabad, Lucknow, D/- 30-4-1942.

(a) Companies Act (1913), S. 24 (1) — Certificate under, is conclusive as to number of shares subscriber took — Proof to contrary not permissible — Companies Act (1913), S. 6 (3), and Evidence Act (1872), S. 4.

A certificate of registration given by the Registrar in respect of a Company is conclusive evidence of the fact that each subscriber wrote opposite his name the number of shares he took, and in view of the provisions of S. 6 read with S. 24 a subscriber cannot be permitted to prove the contrary: (1867) 2 Ch. 674 and 40 Cal. 1 (P. C.), *Ref.* [Para 12]

Annotation:— ('46-Man) Companies Act, S. 6, Note 1 and S. 24, Note 1.

(b) Companies Act (1913), S. 30(1)—Subscribers become members ipso facto on incorporation of company—Neither allotment of shares nor entry of their names in members' register is necessary.

In the case of subscribers of memorandum, no allotment of shares is necessary; nor is the entry of their names on the register of members necessary. Every subscriber becomes a member ipso facto on the incorporation of the company, and liable as the holder of whatever number of shares he has subscribed for: (1900) 2 Ch. 56, (1877) 5 Ch. D. 525; (1885) 29 Ch. D. 421 and 25 A. I. R. 1938 Sind 187, *Rel. on.* [Para 13]

Annotation:—('46-Man) Companies Act, S. 30 Note 2.

(c) Companies Act (1913), S. 30—Ways by which person may become member or shareholder stated.

A person may become a member or a shareholder of a company in any of the following ways:

(1) by subscribing the memorandum of association before its registration;

(2) by agreeing with the company to take a share or shares and being placed on the register of members;

(3) by taking a transfer of a share or shares, and being placed on the register of members;

(4) by registration on succession to a deceased or bankrupt member; and

(5) by allowing his name to be on the register of members or otherwise holding himself out or allowing himself to be held out as a member. [Para 13]

Annotation:— ('46-Man) Companies Act, S. 30, Note 1.

(d) Companies Act (1913), S. 55—Surrender of share amounts to reduction of capital—Such surrender is unlawful unless confirmed by Court.

It is not open to a shareholder to surrender the shares held by him, or to the company to accept the surrender, unless the act of the company can be brought within the rules relating to forfeiture of shares. A surrender of share amounts to a reduction of capital which is unlawful, unless confirmed by the Court: (1902) 2 Ch. 14, *Foll.* [Para 16]

Annotation:—('46-Man) Companies Act, S. 55, Note 1.

(e) Companies Act (1913), S. 49 — Call Resolution authorising making of call —Time and place of payment need not be specified therein

It is not necessary that the time and place of payment should be specified in the resolution authorising the making of the call. This should be done subsequently: 29 A. I. R. 1942 Cal. 516, *Ref.* [Para 17]

Annotation:—('46-Man) Companies Act, S. 49 Note 1.

(f) Companies Act (1913), S. 207(1)—Affidavit by all directors not necessary.

Section 207 does not require that there should be an affidavit by each of the directors making the declaration. [Para 18]

Cases referred:—

1. (1867) 2 Ch. 674 : 36 L. J. Ch. 757 : 16 L. T. 780 : 15 W. R. 1100, Peel's case.
2. ('12) 39 I. A. 237 : 40 Cal. 1 : 16 I. C. 70 (P.C.), Ncosa Goolam Ariff v. Ebrahim Goolam Ariff.
3. (1900) 2 Ch. 56 : 69 L. J. Ch. 428 : 82 L. T. 400 : 48 W. R. 546, Alexandar v. Automatic Telephone Co.
4. (1877) 5 Ch. D. 525 : 46 L. J. Ch. 842 : 36 L. T. 545, In re London and Provincial etc. Co.
5. (1885) 29 Ch. D 421 : 52 L. T. 933, In re Florence Land and Public Works.
6. ('38) 25 A. I. R. 1938 Sind 187 : 32 S. L. R. 167 : 177 I. C. 577, Vazirmal Kevalram v. Makran Coast Steam Navigation Co. Ltd.
7. (1902) 2 Ch. 14 : 71 L. J. Ch. 541 : 86 L. T. 671 : 50 W. R. 566, Bellerby v. Rowland and Marwoods Steamship Co. Ltd.
8. (1887) 12 A. C. 409 : 57 L. J. Ch. 28 : 57 L. T. 457 : 36 W. R. 145, Trevar v. Whiteworth.
9. ('42) I. L. R. (1942) 1 Cal. 132 : 29 A. I. R. 1942 Cal 516 : 203 I. C. 469, In re Bengal Electric Lamp Works Ltd.
10. ('41) 16 Luck. 701 : 28 A. I. R. 1941 Oudh 254 : 192 I. C. 885, Deputy Commr. Kheri v. Dr. Ram Kumar Saxena.
11. ('38) 65 I. A. 66 : 25 A. I. R. 1938 P. C. 67 : I. L. R. (1938) 2 Cal. 72 : 32 S. L. R. 374 : 173 I. C. 15 (P. C.), B. N. Rly. Co. Ltd. v. Ruttanji Ramji.

Nasirullah Beg and J. K. Tandon—for Appellant.

Ram Prasad Verma and Sri Ram Gupta —for Respondent.

Judgment.—This is a defendant's appeal in a suit brought by the liquidator of Equity Insurance Co. Ltd., Lucknow (in liquidation) against the Collector of Moradabad, Manager, Court of Wards, Sahaspur Bilari Estate, Moradabad.

[2] The facts material for the decision of this appeal are as follows:— A limited liability company, called Equity Insurance Co. Ltd. Lucknow, was registered with the Registrar, Joint Stock Companies, U. P. on 12-5-1933, with a capital of 10 lacs divided into 40,000 shares of Rs. 25 each. The eight promoters of the Company who subscribed the Memorandum of Association were; (1) Jagat Kumar, Raja of Sahaspur, district Moradabad, (2) Goverdhan Prasad Bhargawa, (3) D. C. H. Dinshaw, (4) Krishna Narain, (5) T. C. Jaini, (6) Choudhary Mohammad Ismail, (7) Sikhar Chand Jaini, and (8) H. N. Kitchlu. The number of shares taken by Raja Jagat Kumar, as noted opposite his name in the Memorandum of Association, was 1500. Besides Raja Jagat Kumar, all the other promoters belonged to Lucknow, where the company had its head office. The Raja was a young man whose estate was being managed by the Court of Wards. It was released from the superintendence of the Court of Wards in January, 1933. Raja Jagat Kumar signed the company's Articles of Association also, and the number of shares taken by him as noted there was 1500, as in the Memorandum of Association. No money was paid by Raja Jagat Kumar in respect of these shares till his death which occurred on 8-3-1934, within a year of coming into existence of the company; nor does it appear that any shares were formally allotted to him.

[3] It appears that on the assumption of the superintendence of the estate of Raja Jagat Kumar by the Court of Wards, the usual notice under S. 17 of the Act was published in the Gazette. In response to this notice the company intimated to the Collector of Moradabad that the Raja held 1500 shares of Rs. 25 each as promoter of the company, and was also one of its directors. As no amount was paid by the Raja in respect of the application and allotment money, Rs. 15,000 was due from his estate (at Rs. 5 application money and Rs. 5 allotment money per share). In reply to this, the Collector intimated to the company that if the Raja had to pay any amount on account of the shares alleged to have been held by him, the Court of Wards "would like to withdraw from this position" as it no longer wanted to incur any further expenditure of this kind. By the same letter (Ex. 16) he asked the General Secretary of the Company to send him a detailed explanation of the fees claimed against the Raja. By a letter dated 8-11-1934, the managing agents of the company informed the Collector of Moradabad that in deference to his wishes, the company "would forego the claim".

[4] On 26-2-1936, a call in respect of Rs. 12-8-0 per share was made by the directors of the company. Jagat Kumar being dead, and as superintendence of his estate was assumed by the Court of Wards, (sometime in April 1934,) a notice of the call was served upon the Collector of Moradabad who was the manager of the Court of Wards in charge of Sahaspur Bilari Estate. The Court of Wards did not pay any money towards this call. The directors of the company made a second call of Rs. 12-8-0 per share on 27-8-1938. Notice of this call was served upon the Collector of Moradabad who denied the liability of the estate of Raja Jagat Kumar to pay anything.

[5] The company went into voluntary liquidation by a resolution of the shareholders passed on 7-12-1940. The liquidator made an application to bring a suit against the estate of Raja Jagat Kumar in respect of the money due for the second call, which was made in 1938, in *forma pauperis*. The application was dismissed. Thereupon the liquidator, Mr. Shyam Manohar Rastogi instituted on 27-8-1941, the suit which has given rise to the present appeal for recovery of Rs. 25,500 including Rs. 18,750 on account of the call money (due in respect of the second call made in 1938) and Rs. 6,750 on account of interest at the rate of 12 per cent. per annum.

[6] On behalf of the defendant, it was denied that Raja Jagat Kumar signed the Memorandum of Association or agreed to purchase 1500 shares. It was pointed out that no allotment of shares was made to the Raja, and that the notice of the call in respect of which the suit was brought was bad in law. It was further pleaded that even if the Raja be held to have purchased any shares in the plaintiff company, they were surrendered by the Collector after the Raja's death, and the surrender was accepted by the company. That a call in respect of 12/8 per share could not be made and that the proceedings relating to the company going into liquidation were not legal as the necessary formalities required by law were not complied with and accordingly the present liquidator had no right to institute the suit. The liability to pay interest was denied. It was also pleaded that the suit was barred under S. 20, Court of Wards Act. Two other pleas namely that the suit was barred by the law of limitation and that a fraud was practised upon Raja Jagat Kumar in inducing him to put his signature to the Memorandum of Association of the company, were also raised. It is, however, unnecessary to consider these pleas as they were not pressed in appeal.

[7] The learned Civil Judge of Malihabad, by whom the case was heard, framed the following issues:

1. (a) Did the late Raja Jagat Kumar sign the Articles of Association and Memorandum, as alleged by the plaintiffs? If so, its effect?

(b) Did the late Raja Jagat Kumar enter into an agreement to purchase 1500 shares at Rs. 25 each?

(c) Did the plaintiff make the calls as alleged? Were the calls valid? Could the plaintiff make a call for Rs. 12-8-0 per share on 27-8-1938, as alleged in paragraph 5 of the plaint?

2. Did the plaintiff agree to forego the claim in respect of the aforesaid shares, and did defendant surrender them, as alleged in paragraph 15 of the written statement? If so, its effect?

3. (a) Is the suit barred by time under S. 20, Court of Wards Act?

(b) Is the suit barred by time under the general law?

4. Whether the agreement about the purchase of 1500 shares is vitiated by fraud as alleged by the defendant?

5. Whether the plaintiff is entitled to get any interest? If so, at what rate?

6. To what relief, if any, is the plaintiff entitled?

7. Was no allotment necessary in case of the subscribers of the Memorandum of the Association, as alleged by the plaintiff? Was any allotment made?

8. Did the plaintiff company go into liquidation and is the plaintiff entitled to sue?

[8] The learned Judge held that Raja Jagat Kumar signed the Memorandum and the Articles of Association of the company and agreed to take 1500 shares of Rs. 25 each, and that a call for payment of Rs. 12-8-0 per share was made on 27-8-1938, which was a good and valid call. As regards the plea of surrender of shares, it was held that the Secretary of the company did forego the amount of the calls that had been made up to 8-11-1934, though he was not authorised to forego the allotment money and the application money. The pleas

based upon S. 20, U. P. Courts of Wards Act, the law of limitation and fraud were negatived. It was further held that no formal allotment of shares to Raja Jagat Kumar, who was one of the promoters of the company, was necessary; that the proceedings relating to the company going into liquidation were not vitiated by any defects and that in the circumstances the plaintiff company was entitled to the interest claimed. The suit was accordingly decreed. Dissatisfied with this decision, the defendant has preferred this appeal.

[9] All the pleas raised in the lower Court except those covered by issues 3 (a) and (b) and issue 4, were raised before us in appeal.

[10] It was contended that the plaintiff-respondent had failed to prove that Raja Jagat Kumar signed the Memorandum and the Articles of Association, or that he agreed to take 1500 shares. [After discussing the evidence on the point their Lordships held that Raja Jagat Kumar signed the Memorandum and the Articles of Association and agreed to take 1500 shares.]

[11] Lengthy arguments were addressed to us on the provisions of S. 24, Companies Act, and considerable time was devoted to a discussion of *Peel's case* (1867) 2 Ch. 674.[1] In view of the finding of fact at which we have arrived, it is unnecessary to examine in detail either S. 24, Companies Act, or the dicta laid down in (1867) 2 Ch. 674.[1] We may, however, point out that by S. 6 (3) in the case of a company limited by shares, each subscriber is required to write opposite his name the number of shares he takes. We find that in the Memorandum of Association of the company to which this appeal relates (Ex. 2/P. W. 1) the concluding portion of para. 6 is as follows :

"We the several persons whose names are subscribed, are desirous of being formed into a company in accordance with this Memorandum of Association and we respectively agree to take the number of shares in the capital of the company set opposite to our respective names."

Just below this paragraph are given the names of the persons who subscribed the Memorandum of Association and opposite each name is mentioned the number of shares taken by the subscriber. The first name is that of Raja Jagat Kumar, Raja of Sahaspur, with the figure 1500 noted against it in the column headed "number of shares taken by each subscriber." It is difficult to believe that Raja Jagat Kumar signed the Memorandum of Association in ignorance of what was clearly noted just above where he signed his name. This is another reason which confirms the view taken by us.

[12] Section 24 (1) reads as follows :

"A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with and that the association is a company authorised to be registered and duly registered under this Act."

This rule of evidence is applicable to associations constituted under the Indian Companies Act. Section 6 lays down what the memorandum of association of a company shall state. Admittedly a certificate of registration was given by the Registrar in respect of Equity Insurance Co., Ltd. The certificate is, therefore, conclusive evidence of the fact that each subscriber wrote opposite his name the number of shares he took. It is not disputed that Raja Jagat Kumar subscribed the memorandum of association. We find the figure indicating the number of shares taken by him noted opposite his name. In view of the provisions of S. 6, read with S. 24 the appellant cannot be permitted to prove the contrary (S. 4, Evidence Act, 1 [1] of 1872; and 39 I. A. 237.[2])

[13] It was suggested at one stage of arguments that even if Raja Jagat Kumar signed the memorandum of association for 1500 shares, there was no liability incurred to pay any calls made in respect of those shares because "there was no allotment of any shares to the Raja." The argument is without substance. A subscriber of the memorandum of association of a company is deemed under S. 30 of the Act to have agreed to become a member of the company and on the registration of the company the Act requires that his name shall be entered in the register of members. Section 30 of our Act corresponds to S. 25, English Companies Act of 1929 and to S. 24, English Companies Act of 1908. It was held by Lindley M. R. in (1900) 2 Ch. 56[3] that subscribers to the memorandum of association of a company limited by shares are liable, but only liable, by virtue of their subscription to pay up the amount of their shares as and when called up. A subscriber of a memorandum of association becomes by S. 23 (the Master of Rolls was dealing with the Act of 1862) a member in respect of the number of shares subscribed by him without any further application by him or allotment of shares to him. Every such subscriber becomes a member ipso facto on the incorporation of the company, and liable as the holder of whatever number of shares he has subscribed for. Section 30 of our Act is the same as S. 25 of the English Act of 1929. The section deals with two classes (1) persons who have subscribed the company's memorandum of association, and (2) those who have agreed to be members and whose names are entered in the register. A person may become a member or a shareholder in any of the following ways: (1) By subscribing the memorandum of association before its registration; (2) by agreeing with the com-

pany to take a share or shares and being placed on the register of members; (3) by taking a transfer of a share or shares, and being placed on the register of members; (4) by registration on succession to a deceased or bankrupt member, and (5) by allowing his name to be on the register of members or otherwise holding himself out or allowing himself to be held out as a member. The original subscribers are by the act of Legislature deemed to have taken shares set opposite their names, the object being that the public might rely with confidence on the subscribers of the Memorandum becoming members of the company. In the case of subscribers of the memorandum, no allotment of shares is necessary: *see* (1877) 5 Ch. D. 525.[4]. Nor is the entry of their names on the registers of members necessary, (1885) 29 Ch. D. 444[5] and A.I.R. 1938 Sind 187.[6]

[14] It was next argued that after the death of Raja Jagat Kumar, the Collector of Moradabad, as manager of Court of Wards, Sahaspur estate, surrendered the shares held by the Raja and that the surrender was accepted by the Secretary of the plaintiff company; accordingly Raja Jagat Kumar's liability in respect of the shares was extinguished. On 23rd April 1934, the following letter (Ex. 13) was written by the Secretary of the company to the Collector of Moradabad. This was in reply to the notice published in the Gazette calling upon all creditors of the Raja under S. 17, Court of Wards Act, to submit their claims:

"Sir,

Re: *Late Raja Jagat Kumar of Sahaspur.*

With reference to your notice about the claims against the late Raja Jagat Kumar of Sahaspur, Bilari estate, district Moradabad, we beg to inform you that the late Raja was holding 1500 shares of Rs. 25 each as a promoter of this company and was also a Director in the same. No amount was paid by the late Raja towards these shares and the application and allotment money at Rs. 5 each on each account or Rs. 10 per share of the share of Rs. 25 each has been made. At present a sum of Rs. 15,000 is due from the late Raja towards the application and allotment money and the remaining calls will be communicated to you as they are made. Hope you will make a note of this when inquiring into the extent of the late Raja's indebtedness."

To this the following reply was sent by the Collector (Ex 16):

"Dear Sir,

With reference to your registered letter dated 23rd April 1934, addressed to the Collector of Moradabad, regarding your claim of Rs. 15,000 against the late Raja Jagat Kumar of Sahaspur, I do not quite follow your claim. Does it mean that the Raja had to pay you this amount for holding shares? If that is so I would like to withdraw from this position as we no longer want to incur any further expenditure of this kind. Will you please send me a detailed explanation of your claim?"

On 8th November 1934, Dinshaw Trust Company, who were the Managing Agents of Equity Insurance Company, sent a reply Ex. A17 to the Collector of Moradabad as follows:

"Sir,

In reference to your letter No. 165 dated the 26th ultimo which reached us on the 6th current we have the honour to inform you that our claim against the late Raja Jagat Kumar is for the cost of 1500 shares of Rs. 25 each (Rs 10 paid up) which he had applied for as one of the signatories of this company.

Under separate cover we are sending you a copy of the Memorandum and Articles of Association, and the original documents with his signatures are filed with the Registrar of Joint Stock Companies, U.P., Lucknow.

As in your letter No. 278/X dated 3rd May 1934, you wished that estate should not be burdened with this debt, in deference to your wishes we will forego the claim, although legally we are entitled to enforce same, and the giving up of this amount entails a heavy strain on the company."

[15] It was contended on the basis of this correspondence that there was a surrender of shares by the Collector on behalf of the Raja and the surrender was accepted by the company through its managing agents. In reply to an argument advanced on behalf of the plaintiff-respondent that the letter of 8th November was sent by the General Secretary, who had no authority to accept any surrender of shares, it was pointed out that the acceptance of surrender was acted upon by the company as will appear from the copy of return of allotment of shares prepared under S. 104 of the Act, (Ex. A1), which does not contain the Raja's name. This document is dated 2nd October 1934. Though the letter accepting the surrender was despatched on 8th November, it appears that the company had decided upon acceptance of the surrender of shares subscribed by Raja Jagat Kumar before 2nd October 1934. The appellant's learned counsel further relied on the summary of capital and list of share-holders, Ex. A6, made up to 31st December 1934. The number of shares mentioned therein (2642) clearly shows that the shares subscribed by Raja Jagat Kumar were not included in this statement; nor do we find the Raja's name mentioned in the list of share holders. Article 34 of the Articles of Association gives the directors the authority to accept a surrender of any shares "on such terms as they think fit provided that no part of the assets of the company shall be employed in the purchase of the company's shares." Under Art. 119, the powers and duties which were expressly or impliedly vested in the directors by the Articles of Association, except the power of borrowing money, were to be taken as delegated to the managing agents. In view of the conclusion at which we have arrived on the legality of acceptance of the surrender of shares we will without any detailed examination of the material bearing on the point, assume that by their letter dated 8th November, the managing agents agreed to forego their claim against the Raja.

This must naturally relate to the claim which was then made. This is clear from para. 1 of the letter. The claim, it will be recalled, made by Ex. 13 was for Rs. 15,000. Specific reference is made to this claim by mentioning the number of shares subscribed by the Raja, the price of each share, and thereafter adding ("Rs. 10 paid up"). Though some support is lent to the appellant's contention by Ex. A1 and Ex. A6 having examined the entire correspondence on this subject, we are unable to hold that there was a surrender of the shares held by Raja Jagat Kumar, or that the company either through its directors, or managing agents, accepted this surrender.

[16] It appears to us, however, that even if the Collector intended to surrender the shares which is by no means clear and the secretary of the company intended to accept the same, the transaction would be ultra vires. There can be no doubt that the secretary's act in the present case would not only mean release by the company to the shareholder of the money due in respect of the calls that had already been made, but also release of uncalled capital on the shares held by him. This is not permitted by law. Under our law, it is not open to a shareholder to surrender the shares held by him, or to the company to accept the surrender, unless the act of the company can be brought within the rules relating to forfeiture of shares. That a surrender of share amounts to a reduction of capital, which is unlawful, unless sanctioned by the Court, was laid down by Cozens-Hardy L. J. in (1902) 2 Ch. 14[7] where it was held that a surrender of shares in a limited company, the company releasing the shareholder from further liability in respect of the shares, is equivalent to a purchase of the shares by the company and is therefore illegal and null and void, on the principle of the case in (1887) 12 A. C. 409.[8] Under S. 55 of our Act, the share capital of a company limited by shares can be reduced only if so authorised by its articles, and subject to confirmation by the Court. To reduce the share capital of the company in violation of the provisions of S. 55, unless it is done in conformity with some other provision of the Act is illegal and cannot be recognised. Admittedly in the present case the reduction of the share capital of the company was brought about not in any of the modes provided by the Act, and so must be held to be void. The result, therefore, is that the appellant cannot take advantage of any acceptance of surrender of shares, even if it could be established.

[17] Another point raised by the learned counsel for the appellant was that the call of 27th August 1938 was invalid. Article 23 of the Articles of Association reads thus:

"The directors may from time to time subject to any terms on which any share may have been issued make such calls as they think fit upon the shareholders in respect of all moneys unpaid on the shares held by them respectively and each member shall pay the amount of every call so made on him to the persons and at the times and places appointed by the directors. A call may be made payable by instalments."

It was urged that the directors failed to appoint the time, place and person to whom the call money was to be paid. There is a short reply to this argument. The directors delegated their power to make calls to the managing agents. Article 119 has already been referred to. Everything that could be done by the directors, except borrowing money on behalf of the company, could be done by the managing agents. On 27th August 1938 (Ex. 55) the Board of Directors passed the following resolution:

"On the managing agents pointing out in the meeting that funds were not available for depositing the security as ordered by the Chief Court of Avadh, and also for filing suits against the defaulting shareholders for recovery of arrears of previous call made on 26th February 1936, which they had not paid till now, it was resolved that a further call of the entire balance of the unpaid capital on the shares issued by the company, be and is hereby made in pursuance of article 23 of the Articles of Association of the company, and the managing agents are hereby authorised to take necessary steps in the matter."

The contention of the learned counsel for the appellant was that the resignation of Messrs. Bankers' Syndicate, who were the managing agents, was accepted and thereafter any person representing the Bankers' Syndicate could not act for the company. On 27th October 1937, the following resolution was passed by the Board of Directors under the chairmanship of Mr. Parshotam Das;

"Resolved that the resignation of Messrs. Bankers' Syndicate from the managing agency of the company be accepted but they should be requested to continue to function till such time as a new management is not introduced and they should cease to function as such Managing Agents from the date on which they hand over the charge to the new management."

We agree with the learned Judge in the Court below that the managing agents had the authority "to continue to carry on the business of the company" till the newly appointed General Manager took over charge. There is no evidence to show that any new manager had been appointed or that he took over charge on the date on which the notice for the call, forming the basis of the suit which has given rise to this appeal, was made. It is not necessary that the time and place of payment should be specified in the resolution authorising the making of the call. This should be done subsequently: *see* I. L. R. (1942) 1 Cal. 132[9].

[18] Another contention raised by the learned counsel for the appellant was that inasmuch as the provisions of S. 207 of the Act were not complied with, the entire proceeding relating to the

winding up of the Company was bad in law. It was urged that the declaration referred to in S. 207 (1) (EX. A 20) was not accompanied by an affidavit. We find however that EX. A 19 is an affidavit sworn by Jagannath, one of the directors of the company. It bears the same date as the declaration though it was sworn before Kh. Quamaruddin Ahmad, Special Magistrate, Lucknow, on 7th November 1940. We do not think that this affects the validity of the proceeding. It was also urged that the affidavit was sworn by only one director and not by all who signed the declaration. We are of opinion that S. 207 does not require that there should be an affidavit by each of the directors making the declaration. The expression used is "verified by an affidavit." We are clear that the requirements of the section were met by the affidavit sworn by Jagannath.

[19] The last point raised related to interest. Article 27 of the Articles of Association reads thus:

"If the sum payable in respect of any call or instalment be not paid before or on the day appointed for payment thereof the holder for the time being of the share in respect of which such call or instalment shall be due shall be liable to pay interest for the same at such rate as the Directors may determine not exceeding 12 per cent. per annum from the day appointed for payment thereof to the time of actual payment."

There is no evidence, however, that the directors fixed any rate in the present instance. By the plaint interest at the rate of 12 per cent. per annum "as provided in the Article of Association" was claimed from the date of notice, 27-8-1938, and the whole of it was decreed by the lower Court. Interest can be claimed by a creditor, (1) under a contract, (2) under a statute, or (3) on the grounds of usage : *see* 16 Luck. 701.[10] It was held by their Lordships of the Judicial Committee in 65 I. A. 66[11] that interest for the period prior to the date of the suit may be awarded if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provisions of any substantive law entitling the plaintiff to recover interest. Reliance in the present case was placed on Art. 27 of the Articles of Association, but no rate having been fixed by the Directors, it is not possible to decree the claim for interest on that basis. May be that the directors did not want to charge any interest on this call. Their failure to fix any rate of interest is capable of such a construction. Nor can the claim for interest succeed on any of the two other grounds mentioned above.

[20] We hold, therefore, that the decision of the lower Court as regards the payment of the call money must be upheld. The decree in so far as it awards interest up to the date of the suit is set aside. But for the modification noted above the appeal is dismissed. Parties shall get and pay costs in both Courts in proportion to their success and failure. The stay order dated 11-9-1942, is vacated.

V.R. *Appeal partly allowed.*

A. I. R. (35) 1948 Oudh 203 *[C. N. 75.]*

KIDWAI AND CHANDIRAMANI JJ.

Radha Krishna and others — Defendants —Appellants v. *Lachhmi Narain and others —Plaintiffs—Respondents.*

First Appeal No. 115 of 1942, Decided on 8-12-1947, from decree of Civil Judge, Mohanlalganj, Lucknow, D/-21-10-1942.

(a) Civil P. C. (1908), S. 92—Public or private trust—Tests—Real test is not whether "Utsarg" was proved but whether facts and circumstances prove that that user by public was as of right.

The performance of the ceremony of "Prasad Utsarg" does not provide the infallible indication of the nature of the trust. "Utsarg" is nothing more than parting with the proprietary right which is just as much necessary in private endowments as in public endowments. The real test as to whether a trust was a private or a public trust is not whether the "Utsarg" is proved but whether the facts and circumstances establish that the user by the public was as of right: *Case law referred.* [Paras 18, 23]

Annotation:—('44-Com) C. P. C., S. 92, N. 15.

(b) Civil P.C. (1908), S. 92—Scope—Suit for administration of trust, removal of trustees and appointment of new ones—One of plaintiffs claiming to be sole surviving trustee — Defendants alleged to be not properly appointed trustees — Suit held fell within S. 92.

It cannot be said that a suit brought by several plaintiffs for the due administration of the trust, removal of trustees, appointment of new trustees and for accounts, alleging that plaintiff 1 was the sole surviving trustee and defendants were not properly appointed trustees, does not come within the scope of S. 92 merely because it was open to plaintiff 1 to follow a different course, namely, to bring a suit for the vindication of his personal rights. The position of the defendants in such a case is not that of trespassers but that of trustees de son tort: 1 A. I. R. 1914 Oudh 408 25 A. I. R. 1938 Rang. 339 and 27 A. I. R. 1940 Pat. 425, *Ref.* [Paras 29, 30]

(c) Civil P. C. (1908), S. 92—Breach of trust alleged in plaint is sufficient to give jurisdiction under S. 92.

It is the allegations contained in the plaint that determine jurisdiction. If, therefore, a breach of trust is alleged in the plaint that is sufficient to confer jurisdiction under S. 92: 27 A. I. R. 1940 Pat. 425 and 10 A. I. R. 1923 Bom. 67, *Rel. on.* [Para 41]

If once a Court has jurisdiction, it is not necessary that a breach of trust should be proved before the reliefs contemplated by S. 92, Civil P. C., or any of them is granted : 21 A. I. R. 1934 Bom. 26, *Foll.* [Para 43]

It is as much a breach of trust for a person not entitled to act as trustee to meddle with trust property as it is for a properly appointed trustee not to manage the property. [Para 44]

Annotation:—('44-Com) C. P. C., S. 92, N. 2.

(d) Civil P. C. (1908), S. 92—Suit to get fresh trustees appointed on ground that no validly appointed trustees were in existence falls under S. 92.

A suit to get fresh trustees appointed on the ground that there are no validly appointed trustees in existence clearly comes within the second category of suit contemplated by S. 92, Civil P. C., namely, "where the direction of the Court is deemed necessary for the administration of any such trust:" 1 A. I. R. 1914 Oudh 408, *Foll.* [Para 41]

Annotation:—('44-Com) C. P. C., S. 92, N. 6.

(e) Civil P. C. (1908), S. 92—Scope—Suit for vindication of private rights is beyond scope of S. 92.

If the suit is for the vindication of the private rights of the plaintiffs or any of them and not for the protection of the trust it is a suit which should have been brought in the regular manner and it would be beyond the scope of S. 92, Civil P. C.: 14 A. I. R. 1927 Mad. 338, *Foll.* [Para 46]

Annotation:—('44-Com) C. P. C., S. 92, N. 2.

(f) Civil P. C. (1908), O. 41, R. 2—New plea—Plea not raised in trial Court or in grounds of appeal and at variance with original pleadings cannot be allowed to be raised in appeal.

Where in a suit under S. 92 both the parties accepted the position that there was only one trust and the case proceeded on those lines, a new plea that there were several trusts and the suit related to only one of them which was not raised in the trial Court or in the grounds of appeal and which was inconsistent with the original pleadings of the defendants cannot be allowed to be raised for the first time in appeal. [Para 64]

Annotation:—('44-Com) C. P. C., O. 41, R. 1, N. 12.

(g) Civil P. C. (1908), S. 35—Trust case—Suit for appointing new trustees after removal of defendants—Trial Court ordering costs of plaintiffs to be paid by defendants personally—Order held justified.

A suit under S. 92 was brought for the removal of the defendants who were alleged to be trustees not properly appointed and for appointing new ones and for accounts. The defendants opposed the grant of the sanction by the Advocate General. The suit was contested on the ground that the trust was a private trust although under a compromise which was not accepted by the Court the parties had agreed that the trust was a public trust. The defendants took a plea that they were lawfully appointed trustees which was clearly untenable in view of the clear terms of the trust deed. The trial Court made the plaintiff's costs payable by the defendants personally.

Held, that the order of the Court was justified in the circumstances. [Para 63]

Annotation:—('44-Com) C. P. C., S. 35, N. 16.

Cases referred:—

1. ('34) 11 O. W. N. 1435: 22 A. I. R. 1935 Oudh 96: 152 I. C. 861, Girbar Saroop v. Bhagwan Din.
2. ('39) 1939 O. W. N. 1078: 27 A. I. R. 1940 P. C. 7: 15 Luck. 1: I. L. R. (1940) Kar. P. C. 25: 67 I. A. 1: 185 I. C. 305 (P. C.), Bhawan Din v. Girbar Saroop.
3. ('34) 61 I. A. 405: 21 A. I. R. 1934 P. C. 230: 58 Mad. 91: 151 I. C. 329 (P. C.), Mundacheri Koman v. Achuthan Nair.
4. ('24) 11 A. I. R. 1924 P. C. 44: 81 I. C. 518 (P. C.), Lakshmana Goundan v Subramania Ayyar.
5. ('32) 9 O. W. N. 966: 20 A. I. R. 1933 Oudh 22: 8 Luck. 266: 140 I. C. 896, Mt. Premo v. Sheo Nath.
6. ('26) 3 O. W. N. 645: 13 A. I. R. 1926 Oudh 578: 1 Luck. 489: 97 I. C. 853, Hari Kishen v. Raghubar Dayal.
7. ('15) 18 O. C. 38: 1 A. I. R. 1914 Oudh 408: 27 I. C. 389, Mahommad Nasim v. Mahommad Ahmad.
8. ('38) 25 A. I. R. 1938 Rang. 339: 1938 Rang. L. R. 276: 177 I. C. 851, M. E. Mitchla v. A. M. Mitchla.
9. ('40) 27 A. I. R. 1940 Pat. 425: 186 I. C. 359, Ramdas Bhagat v. Krishna Prasad Tewari.
10. ('21) 8 A. I. R. 1921 All. 116: 62 I. C. 744, Mahomad Bakhsh v. M. Piari.
11. ('28) 15 A. I. R. 1928 P. C. 16: 55 Cal. 519: 55 I. A. 96: 108 I. C. 361 (P. C.), Abdur Rahim v. Abu Mahomed Barkat Ali.
12. ('28) 50 All. 165: 15 A. I. R. 1928 All. 33: 106 I. C. 389, Ganga Charan v. Ram Chandra.
13. ('36) 23 A. I. R. 1936 Mad. 449: 164 I. C. 615, Anjaneya Sastri v. Kothandapani Chettiar.
14. ('22) 46 Bom. 101: 10 A. I. R. 1923 Bom. 67: 64 I. C. 353, Nilkanth Devrao v. Ramkrishna Vithal.
15. ('34) 21 A. I. R. 1934 Bom. 26: 148 I. C. 1153, Chhaganlal Uderam v. Sobharam Harishankar.
16. ('27) 14 A. I. R. 1927 Mad. 338: 97 I. C. 480, Alagappa Chettiar v. Arunachellam Chetty.

B. N. Shargha and B. P. Misra—for Appellants.

S. C. Das and Ram Krishna Shrivastava—for Respondents 1 to 3.

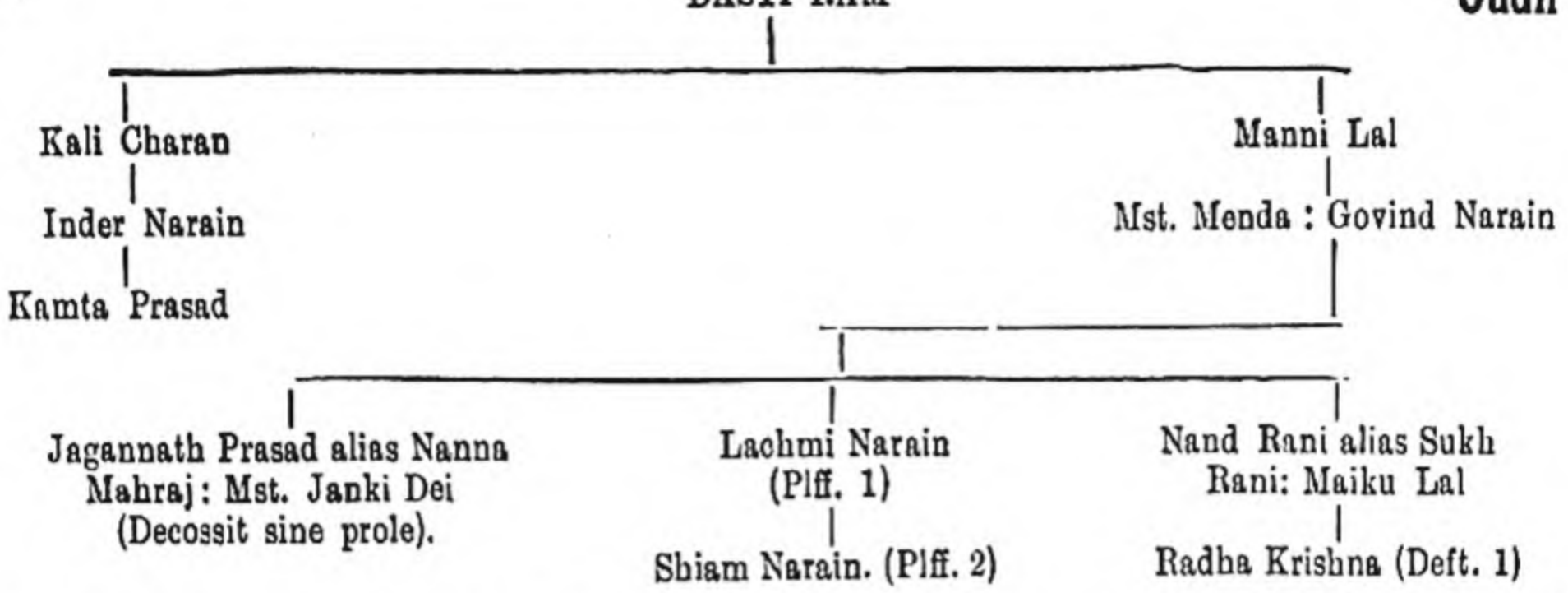
Judgment :— The following short pedigree will help to elucidate the facts of the case :

(See pedigree on page 205.)

[2] In mohalla Top Darwaza in the city of Lucknow there existed a temple (Shivala) built by the ancestors of Jagannath Prasad. In 1895 he built a Thakurdwara near that temple and installed in it an idol of Sri Radha Krishnaji Maharaj on 7th February 1895. On 17th September 1905, there was a partition of their ancestral property between Jagannath Prasad and Lachhmi Narain, and on 21st September 1905, both the brothers executed a deed of trust dedicating property to Sheoji and Thakurji—each set of properties being separately specified in the deed (Ex. 1). The properties dedicated to Thakurji consisted of moveable and immovable property and were valued at Rs. 1,250 including the Thakurdwara itself, which was valued at Rs. 500. The properties dedicated to Sheoji were valued at Rs. 125 and were a "dalan" behind the Shivala and a shop. By the deed five persons, the two authors of the Trust, Munshi Mata Prasad, Pandit Kesho Nath and Pandit Gauri Shankar, were appointed trustees and a scheme was laid down for the appointment of fresh trustees in case any of the trustees "is not fit to work or refuses to work."

[3] On 19th September 1907, Jagannath Prasad alone executed another deed of trust (Ex. A-2), conveying a house in Kashmiri Mohalla in the city of Lucknow to Sri Radha Krishnaji Mahraj and appointing the same persons as those appointed by the deed of 1905, with the exception of Lachmi Narain, as managers. All the conditions of the deed of 1905 were made applicable. In 1908 he, as manager of the Thakurdwara, acquired a house in Mohalla Top Darwaza (*vide* Ex. A-3 sale-deed).

[4] On 16th April 1917, Kamta Prasad, a cousin of Jagannath Prasad, executed a deed


BASTI RAM
Kali Charan
Inder Narain
Kamta Prasad
Manni Lal
Mst. Menda : Govind Narain
Jagannath Prasad alias Nanna Mahraj : Mst. Janki Dei (Decossit sine prole).
Lachmi Narain (Plff. 1)
Sbiam Narain. (Plff. 2)
Nand Rani alias Sukh Rani: Maiku Lal
Radha Krishna (Deft. 1)

(Ex. A-4) dedicating some land in village Rudhoi, district Lucknow, some trees in village Bhumar, district Lucknow and a half share in a house in Moballa Top Darwaza in the city of Lucknow. By this deed he appointed Jagannath Prasad, Pandit Gauri Shankar, Pandit Kesho Nath and Radha Krishna Shukul (defendant 1) trustees. Thus it will be seen that Lachmi Narain was omitted from the list of trustees and Radha Krishna was added. It is agreed that Mata Prasad had died in 1914.

[5] On 25th March 1940, Jagannath Prasad died leaving no issue. His widow, Janki Dei, became his successor and on 26th November 1940, she executed a will, Ex. 3. In this will the lady recited the religious bent of mind and the charitable inclinations of her husband. She then stated that she was in financial difficulties with regard to the necessary ceremonies for the benefit of her husband's soul and for her own maintenance so much so that the trustees had to grant her Rs. 8 per month for her subsistence in consideration of which she had agreed to execute a will dedicating all the property in her possession. She, therefore, proceeded to execute the will to

"express my personal opinion and reduce to writing directions of my husband in this deed which is to take effect after my death."

It is further stated that the testator's husband had always treated his nephew, Radha Krishna, as his son and that she also did the same, while there had been hostility between Jagannath Prasad and his brother, Lachmi Narain. She accordingly dedicated the entire property of which she might die possessed stipulating that, so long as she was alive, she would remain in enjoyment of it. Nine persons are named in this deed as trustees of whom 7 were defendants 1 to 4 and 6 to 8.

[6] Mt. Janki Dei died on 25th March 1941, and disputes began at once between the trustees and Pandit Lachmi Narain, so that on 27th May 1941, the trustees gave notice to the latter to vacate a house belonging to the trust which he was occupying because

"since the death of Jagannath Chaturvedi some overt acts done on your behalf indicate your intention that you have become against the trust" (Ex. A-26).

To this the sons of Lachmi Narain replied by making a claim to considerable moveable property which, they alleged their uncle, Jagannath, had left (Ex. A-28). This claim was repudiated by the trustees who insisted upon Lachmi Narain vacating the house (Ex. A-29).

[7] Thereafter the present plaintiffs applied for permission to file a suit under S. 92, Civil P. C., and permission having been granted by the Advocate-General on 3rd December 1941, the suit, out of which this appeal arises, was instituted on 2nd January 1941. The plaintiffs alleged : (1) That the temple had been dedicated for the benefit of the Hindu Public generally, and property had been dedicated for their upkeep by several persons. (2) That under the conditions of the deed of trust, Jagannath Prasad was appointed manager by the trustees and he continued to work as such till his death. (3) That Kesho Nath, Gauri Shankar and Mata Prasad had died during the lifetime of Jagannath: thus on the latter's death plaintiff 1, Lachmi Narain was the sole surviving trustee. (4) That defendant 1, Radha Krishna had great influence and he used it to create mischief and quarrels in the family which he utilised to induce Mt. Janki Dei to create a fictitious trust. (5) That all the defendants combined to allow defendant 1, to derive unlawful advantage from the trust and, after the death of Mt. Janki Dei "the defendants, now alleging themselves to be trustees, do not allow plaintiff 1 to manage the trust property." (6) That it is necessary to appoint trustees in the place of all the trustees except plaintiff 1, and to take accounts from the defendants who are not lawful trustees.

[8] Consequently the suit was filed with the sanction of the Advocate-General and the following reliefs were claimed : (1) A declaration be granted that the defendants are not lawful trustees of the Trust of Thakurji and Mahadeoji situated at Top Darwaza and they be removed from the trusteesbip. (2) That four new trustees be appointed according to the conditions of the trust deed and a proper scheme be prepared for the management of the trust. (3) That accounts of the income and expenditure of the trust property be taken from the defendants.

[9] The defendants filed a joint written statement in which they pleaded: (1) That Lachmi Narain had nothing to do with the construction of the Thakurdwara and temple, nor did he dedicate any property but all the property dedicated belonged to Jagannath who only got Lachmi Narain's signature to the deed by way of precaution. (2) It was admitted that Jagannath Maharaj himself as well as other persons had dedicated various properties at different times to the said temples. (3) It was denied that Lachmi Narain was a trustee. He had been opposed to the trust and had caused loss to it. He never took any interest in the trust and did not perform any work relating to the trust so he was removed long ago. (4) That there is no conspiracy to enable defendant 1, to enjoy the profits and the defendants do not rely upon the will of Janki Dei for their status as trustees but they were duly appointed by Jagannath Maharaj under the terms of the deed of trust. (5) That Lachmi Narain claimed property dedicated by Kamta Prasad as his own property. (6) That after the death of Jagannath Prasad and his widow, plaintiffs 1 and 2 asserted title to property belonging to the trust and tried to induce tenants not to pay rents. They thus acted against the interest of the trust. (7) That the trust involved in suit is a private trust and S. 92, Civil P. C. is not applicable. (8) That there is no charge of mismanagement against any of the trustees who are respectable and responsible men. (9) That the suit is mala fide to serve the acts of plaintiffs 1 and 2.

[10] It was pleaded later on that, according to the allegations in the plaint, the defendants were nothing more than trespassers and consequently no suit under S. 92, Civil P. C. could be maintained against them.

[11] Upon these pleadings, the Civil Judge of Mohanlalganj at Lucknow, framed the following issues:

1. Did Jagannath make a public trust as alleged?
2. Are the plaintiffs the representatives of the Hindu public of Lucknow and can they maintain the present suit?
3. Did defendant 1 not allow plaintiff 1 to carry out the duties as a trustee? If so, its effect?
4. Is the interest of the plaintiffs 1 and 2 adverse to the trust? If so, its effect?
5. Have the plaintiffs left out any of the trust properties? If so, what are the trust properties?
6. Have the plaintiffs got any cause of action for the suit?
7. To what relief are the plaintiffs entitled?
8. Are the defendants duly elected trustees?
9. If not so, can the present suit under S. 92 be maintained?

[12] The learned Civil Judge found:

1. That the trust is a public trust.
2. That plaintiff 1, being a founder of the trust and defendant 2 being his son, they had a sufficient interest in the trust property to justify them in commencing proceeding under S. 92, Civil P. C.
3. That defendant 1 did not allow plaintiff 1 to carry out his duties as a trustee.
4. That the defendants are not duly appointed trustees.
5. That, in spite of this, they are not rank trespassers but trustees de son tort and consequently they may be sued under S. 92, Civil P. C.
6. That the interests of plaintiffs 1 and 2 are not adverse to the trust, and any claims made by them to property of the trust was made under a bona fide belief of right.
7. That all the property shown in Ex. A-32 on pp. 5 to 9 except the houses shown as items 15 and 16 on page 9 are trust property.
8. That the trust is not being administered according to the wishes of the founder.

[13] The Court accordingly directed the removal of the defendants and appointed five new trustees—Lachmi Narain is not one of them. It also directed that accounts be taken and that defendant 1 should hand over the trust property to the new trustees. It refused to frame any new scheme and held that the scheme laid down in EX. 1, the first trust deed, was suitable. The defendants have appealed to this Court and the plaintiffs have filed cross-objections.

[14] The appellants' learned advocate has divided his contentions under the following heads:

I. That the suit did not come within the purview of S. 92, Civil P. C. on the following grounds: (a) it did not relate to a public trust but to a private trust; (b) it was not a suit against trustees since the defendants were alleged by the plaintiffs to be trespassers and plaintiff 1 claimed to be the sole trustee; (c) the interest of plaintiffs 1 and 2 is adverse to the trust; (d) no breach of trust has been proved and no necessity for any directions by the Court has been shown: (e) the suit is not bona fide since it is intended to enforce the private rights of Luchmi Narain and not to safeguard the trust.

II .That the defendants are duly appointed trustees and they are not liable to be removed without proof of breach of trust which has not been proved in this case.

III. That costs of the suit have been wrongly allowed against the defendants.

IV. That some properties belonging to the trust have been omitted.

V. That there were two trusts and two sets of trustees and the suit relates only to the first trust. Hence no decree can be passed in respect of the other trusts.

[15] The sole questions raised in the cross-objections relate to the extent of the trust properties; the plaintiffs contending that only the properties, entered in lists A and B attached to the plaint are trust properties, and the failure of the Civil Judge to appoint plaintiff 1 as trustee.

[16] With regard to his first point, the appellants, learned advocate bases his contention upon the absence of evidence to show that the "utsarg" was performed. He contends that the difference between a public and a private endowment is that, in the former, "utsarg" is performed while in the latter it is not. In support of this contention he relies upon the decisions of a Bench of this Court in 11 O. W. N. 1435[1] in which, he contends that, the learned Judges have upheld this contention. No doubt the head-note supports his argument but a reference to the judgment itself at page 1450 shows that there was no decision by the Court to this effect but that it was only mentioned that a certain witness, R. S. Narain Swami, had deposed that the real criterion of a temple being a public one is proof of the performance of the ceremony known as the "Prasad Utsarg." The learned Judges, in that case did hold that the temple was a private one not because no "utsarg" was formed—indeed no evidence as to this could be given since the temple had been in existence for a century and a half at least—but because they could not believe that a Muslim ruler, like the Nawob Asafuddaula, would have made a grant to a temple for the worship of an idol and thereafter there was no evidence that the grantee had performed the "Prasad Utsarg" and

"there is no evidence that even after the grant of five bighas of waste land by Nawab Asafuddaula to Dariao Gir, the latter or any descendant of his ever consecrated this land or the buildings standing thereon to the idol of Bhaironji."

They then held:

"In the absence of any such evidence we fail to see how the rights of private ownership granted to Dariao Gir in nawabi times and inherited by his descendants and subsequently re-invested in them by the British Government at the time of the preparation of the khasra abadi of the city of Lucknow can be snatched away by us from the plaintiffs and be made to vest arbitrarily in the idol of Bhaironji."

In another part of the same judgment, at page 1452, the learned Judges say:

"The learned counsel for the defendants-appellants has argued that user can convert a private temple into a public trust, but that user must be unfettered and unrestricted by any act on the part of the owners of the temple. In other words, the owner or owners of the temple must allow the general public the free use of the temple at all hours of the day and night without let or hindrance and further the offerings made to the idol in the temple should be utilised for the upkeep of the temple. In the present case there is evidence, which is accepted by us as true and which goes to show that the temple of Bhaironji remained closed for some time in the year, and nobody challenged the rights of the plaintiffs to do so. Further it is proved to our satisfaction in this case that the offerings made to the idol were used by the plaintiffs for their own personal benefit and were shared equally by the three branches of Dariao Gir's family."

[17] There was an appeal from this judgment to His Majesty in Council and the decision of their Lordships of the Judicial Committee is reported in 1939 O. W. N. 1078.[2] In this judgment the absence of proof of the ceremony of Prasad Utsarg is not even mentioned by their Lordships. Their Lordships considered the proved facts of that case and held that they did establish the claim that the temple was a private trust. The following passage, to be found at page 1085 of the judgment, is instructive:

"Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting in such a case as the present; and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and as worship generally implies offerings of some kind it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity. Thus in 61 I. A. 405[3] the Board expressed itself as being slow to act on the mere fact of the public having been freely admitted to a temple. The value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right."

[18] Thus this decision does not bear out the appellants' contention and real test laid down by their Lordships, as well as the learned Judges of this Court, was not whether the "utsarg" was proved but whether the facts and circumstances established that the user by the public was as of right. This is also the test that has been laid down in a large number of decisions of various Courts which are collected together in Ghosh's Law of Endowments, 2nd edition, page 140. Neither Ghosh nor Mulla mention the performance of the ceremony of "Prasad Utsarg" as providing the infallible indication of the nature of the trust.

[19] In A. I. R. 1924 P. C. 44[4] also, their Lordships did not even mention the ceremony of "Prasad Utsarg" but held that

"It could be a legitimate inference to draw that the founder of the temple had ..... dedicated the temple to the public if it was found that he had held out the temple to the public as a pubiic temple."

[20] Mulla in his Hindu Law, paragraph 424 (1) says:

"*424.* (1) Religious endowments are either public or private. In a public endowment the dedication is for the use or benefit of the public. When property is set apart for the worship of a family god in which the public are not interested, the endowment is a private one. Where the main purpose of the endowment was the puja of a deity established by the settlor in a house, and the surplus income was directed to be utilised for feeding the poor and helping the students, it was held the trust was a private trust and that all the trustees must join in its execution. The distinction between public and private endowments is important, for it has been held by the Judicial Committee that, where a temple is a public temple, the dedication may be such

that the family itself could not put an end of it, but in the case of property dedicated to a family idol, the consensus of the whole family might give the property another direction. This is regarded as one test to determine whether the endowment is private or public. It has accordingly been held that where the heirs of the founder are unable to carry on the worship of the family idol out of the income of the endowment, they may transfer the idol and its property to another family for the purpose of carrying on the worship. Such a transfer, if made without consideration and for the benefit of the idol, is valid and binding on the heirs of the transferors. In other respects, however, there is no distinction between the two kinds of endowments. Thus property dedicated to the services of a family idol cannot be alienated except for unavoidable necessity, nor can it be taken in execution of a personal decree against the shebait."

[21] Again in paragraph 407 (2) the learned author says:

"407 (2) A Hindu, who wishes to establish a religious or charitable institution, may according to his law, express his purpose and endow it. A trust is not required for that purpose. All that is necessary is that the religious or charitable purposes should be clearly specified and that the property intended for the endowment should be set apart for or dedicated to those purposes, Even in the case of a dedication to an idol, which cannot itself physically hold lands, it is not necessary, though it is usual, to vest the lands in trustees. Nor is it necessary that there should be any express words of gift to the idol. No religious ceremony such as sankalp or samarpan is necessary and a clear and unequivocal manifestation of intention to create a trust and vesting of the same in the donor or another as a trustee is enough to constitute dedication."

[22] Similarly, we find no mention of this test—namely, the performance of the "Prashad Utsarg"—either in Golapchandra Sarkar Sastri's works on Hindu Law or in Gour's Hindu Code.

[23] Saraswati in his Hindu Law of Endowments does mention the "utsarg" in para. 86 at page 127 but he only mentions it as the formula by which the owner divests himself of proprietary right and vests it in the deity. Ghosh in his Hindu Law of Endowment, p. 217, says the same; neither of them mentions it as a point of distinction between a private and a public endowment and, according to this view, it would appear that "utsarg" is nothing more than parting with the proprietary right which is just as much necessary in private endowments as in public endowments.

[24] It is surprising that, if the performance of the "Pershad Utsarg" was such an essential element in a public endowment, as distinguished from a private endowment, neither their Lordships of the Judicial Committee, nor the learned Judges of various High Courts noticed it in dealing with the numerous cases that came before them in which the question involved was whether a particular endowment was public or private endowment. Further it is equally surprising that the eminent Hindu jurists who wrote the text books on the subject should not have noticed this distinction. We must, therefore, consider not the question whether the "utsarg" is proved to have been performed, but whether the other tests laid down for distinguishing public from private endowments are shown to exist.

[25] There is a considerable body of evidence on this point and the plaintiffs and defendants' witnesses both agree that "the Shivala is always open. Every member of the public is free to go and worship at the Shivala": *see* D. W. 1, Pandit Sidh Nath Misra. The same witness further admits "no private individual or private family draws benefit under the trust in suit." The most important evidence, however, of the nature of the trust is furnished by the deed of dedication, Ex. 1, by which Jagannath Prasad and Lachmi Narain dedicated property for the upkeep of the Thakurdwara and Shivala. This deed clearly recognises the right of the public in this matter. Firstly, among the first trustees appointed there were only two members of the family and the three others were strangers. The line of trustees was to continue is the line of these five trustees. Secondly, the deed provides that, if the successors of the executants fail to appoint fresh trustees within two months of any vacancy,

"the people of the mohalla or the Hindus who had the right to worship *(jo mustahaq puja karne ke hain)* or the authorities for the time being should appoint members . . . ."

This obviously recognises the right of the public to worship in the temple. The public were admitted not as a matter of permission or favour but as a matter of right according to the wishes of the founder. Thus one of the principal tests laid down for determining whether a temple is a public one, namely, whether the public is admitted as of right, is found to exist in this case: *see* 9 O. W. N. 966,[5] 3 O. W. N. 645[6] at p. 664 and 61 I. A. 405.[3]

[26] Further it is found that other members of the public have made endowments to the temple: *vide* Ex. A-10 and the statement of D. W. 3 Chutkoo Singh. The fact that there was dedication is admitted by the defendants who themselves claim that there is a trust in existence though they say that it is a private trust. Further Ex. A-11, which is proved to have been written by Jagannath Prasad and is a copy of the inscription which he got put up in the temple, shows that all the necessary ceremonies were performed and some houses and shops were dedicated ("Krishna Arpan") to the temple. All this evidence read together satisfactorily establishes the public character of the trust.

[27] It is true that plaintiff 1, Lachmi Narain, who was alive at the time of the dedication, has not come forward to make any statement as to

the nature of the endowment. In the circumstances of the present case, his evidence was, however, not necessary. In 1895 when the temple was founded, no property was dedicated and, according to EX. A-11, the foundation of the temple was the act of Jagannath Prasad alone. Thus the evidence of Lachmi Narain could have thrown no light upon what actually happened at that time. When the time for dedicating property came, it was done by means of a deed, EX. 1, and the evidence provided by that Lachmi Narain might make.

[28] The appellants' learned advocate next contended that even if it is established that the wakf is a public one, the case still does not come within the purview of S. 92, Civil P. C., because, according to the case disclosed in the plaint, the suit is by persons, one of whom is alleged to be a trustee, against persons all of whom are alleged to be trespassers. It is in reality a suit for the vindication of the personal rights of plaintiff 1 and not for the protection of the trust and consequently no suit under S. 92, Civil P. C., lies. This contention does not find support in the facts of the present case.

[29] It is no doubt true that the plaintiffs allege that plaintiff 1 is the sole surviving trustee and the defendants are not properly appointed trustees, but the plaintiffs do not claim possession for plaintiff 1 on this ground. No doubt plaintiff 1 could have brought a regular suit alleging himself to be the sole trustee and claiming possession of the trust property from alleged trespassers but plaintiffs 2 and 3 could not have joined such a suit nor could they have prayed for such a relief. When, therefore, they join and transform the suit into one not for the vindication of the personal rights of plaintiff 1 but one for the due administration of the trust, it cannot be said that this suit does not come within the scope of S. 92, Civil P. C. merely because it was open to one out of several plaintiffs to pursue a different course. The reliefs claimed are removal of trustees, appointment of new trustees and accounting, all of which are reliefs which may be granted under S. 92, Civil P. C. Further, in view of the uncertainty of the position, which will appear in a subsequent portion of our judgment plaintiff 1 might well have considered it undesirable to vindicate his personal right to trusteeship and might have preferred to safeguard the interests of the trust by providing for its due administration by properly appointed trustees. There is nothing in S. 92, Civil P. C., which will prevent him from doing so.

[30] With regard to the contention that a suit under S. 92, Civil P. C., is not maintainable against trespassers, we would point out that, in the present case, the defendants are not really alleged to be trespassers but a position is assigned to them which would make them trustees *de son tort*. The plaintiffs definitely allege that the defendants call themselves trustees although they are not trustees in law, and it is also prayed that the defendants not being the lawful trustees should "be removed from the trusteeship."

[31] In 18 O. C. 38[7] a Bench of the Court of the Judicial Commissioner of Avadh discussed the matter and held that S. 92, Civil P. C., covered a suit for the removal of a person who, though not a trustee *de jure*, had taken upon himself the management of the trust property and thus become trustee *de son tort*. The same view was also taken in A. I. R. 1936 Rang. 339[8] and A. I. R. 1940 Pat. 425.[9]

[32] The learned counsel relied upon a large number of decisions which, he contends, have laid down the proposition that S. 92, Civil P. C., does not cover a suit against a trespasser. The position of a trespasser is different to that of a trustee *de son tort*: the former claims adversely to the trust and so he cannot be deemed to be a trustee within the meaning of the section, while the latter does not claim adversely though there may be a defect in his title to act as trustee. Moreover, the facts of these cases were different.

[33] In A. I. R. 1921 ALL. 116[10] it was said:

"There is no allegation whatever that of the defendants those who are the heirs of Ramzan Shah were either appointed as, or ever took upon themselves the duties of trustees, and therefore they could not be charged with committing a breach of the trust. They are trespassers pure and simple, having regard to the way in which they have dealt with the property and we think the proper course for the plaintiffs to proceed against them should have been by an ordinary suit in the civil Court for ejectment."

[34] This authority by no means lays down any general rule that S. 92, Civil P. C., does not apply to the case of persons who are alleged to have taken "upon themselves the duties of trustees." In that case a *takiadar* began alienating portions of the cemetry of which he was *takiadar* as his private property and the suit was by a person claiming that his ancestors were buried in the cemetry. Thus that was not a suit against a trustee *de son tort*.

[35] In A. I. R. 1928 P. C. 16[11] the suit was merely for declaration that the property in the possession of the defendants was wakf property and their Lordships of the Judicial Committee held that such a suit did not fall within the scope of S. 92, Civil P. C., because none of the reliefs specified in that section was claimed. In the present case all the reliefs claimed are mentioned in S. 92, Civil P. C. The case is, therefore, not relevant.

[36] In 50 ALL. 165=A.I.R. 1928 ALL. 33[12] the contest was between two persons each of whom

claimed to be a trustee. The suit was brought merely to enforce the personal right of the plaintiff and was not a representative suit instituted to safeguard the interests of the trust.

[37] The case in A.I.R. 1936 Mad. 449[13] instead of supporting the appellants' contention supports the opposite view. In that case it was held that if, in a suit brought against a person who has come into possession of trust property through or in right of a settlor or of a trustee, the defendant denies the title of the trust or the existence of the trust, the jurisdiction of the Court under S. 92, Civil P. C., is not ousted. At p. 451 of the report the learned Judges say:

"It is well settled that the mere fact of a trustee *de jure or de facto* denying the existence of the trust or the title of the trust to the property in his possession does not oust the jurisdiction of the Court under S. 92, Civil P. C."

Thus in the present case the jurisdiction of the Court acting under S. 92, Civil P. C., was not ousted.

[38] It was next urged that although plaintiffs 1 and 2 have an interest in the trust that interest was adverse and consequently they had no *locus standi* to sue. There is nothing in the language of S. 92, Civil P. C., to support this contention and there does not appear to be any good reason for engrafting such a rule on to the section. In dealing with a case under S. 92, Civil P. C., the principal object is the protection of the trust. In the present case, it is agreed that plaintiff 1 is one of the founders of the trust and plaintiff 2 as his son is interested in the trust. Plaintiff 3 is a Brahmin resident of the locality and, having a right of worship in the temple, is interested by reason of the provisions of the deed of endowment, EX. 1, in the appointment of proper trustees. With regard to him, there is nothing to indicate that he has any interest adverse to the trust. The only allegation against him — an allegation of which there is no proof—is that he is a friend of plaintiff 1. As to plaintiff 2 the only allegation against him is that he is the son of plaintiff 1 and consequently he would take his father's side. This, however, does not deprive him of his interest, as the son of one of the founders, to see that proper trustees exist. Thus as to the right of two at least out of the three plaintiffs to sue as representatives of the public there can be no doubt.

[39] Even with regard to plaintiff 1 we see no reason to deprive him of the right to sue. He is one of the founders and consequently it is a matter of great concern to him that the trust should be properly administered by properly appointed trustees. Even if the contention of the appellants is accepted that he claims some of the trust property as his own, this may be a very good ground for refusing to sanction his continuance as a trustee or for his removal from that office, but it would be no ground for refusing to allow him to move the Court with a view to getting properly appointed trustees to administer the trust.

[40] We have, therefore, come to the conclusion that the three plaintiffs, having obtained the sanction of the Advocate-General, were competent to sue as representatives of the public.

[41] The appellants' learned advocate next urged that a suit under S. 92, Civil P. C., can only be brought if a breach of trust is alleged or a direction of a Court is necessary. He contends that in the present case no breach of trust is alleged — much less proved — and no occasion arose for any directions. It is quite true that even the plaintiffs' witnesses state the property of the trust is well managed and that the trustees are responsible persons but the plaint does allege breach of trust in that it alleges that defendant 1 is utilising the profits for his purposes and that the remaining defendants have conspired to allow him to do this. It is no doubt true that no evidence has been given of this but, in accordance with the principle that it is allegations contained in the plaint that determine jurisdiction, the Patna High Court has held in A. I. R. 1940 Pat. 425[9] that if a breach of trust is alleged in the plaint that is sufficient to confer jurisdiction under S. 92, Civil P. C. — *see also* 46 Bom. 101.[14] In that view of the matter the plaint in this case sufficiently complies with the provisions of the law to give the Court jurisdiction under S. 92, Civil P. C. It is, however, not necessary for us to go further into the matter because, a suit which seems to get fresh trustees appointed on the ground that there are no validly appointed trustees in existence clearly comes within the second category of suit contemplated by S. 92, Civil P. C., namely, "where the direction of the Court is deemed necessary for the administration of any such trust": *vide* 18 O. C. 38[7] in which the matter is fully discussed with reference to authorities and A. I. R. 1938 Rang. 339.[8]

[42] In A. I. R. 1934 Bom. 26[15] the learned Judges say at page 27:

"The lower appellate Court took the view that S. 92, Civil P. C., could be held to apply only where the suit alleged a breach of any express or constructive trust and asked for a direction of the Court for the administration of such a trust. It was of opinion that in this case no direction of the Court could be said to have been asked for. Section 92, Civil P. C., does not say that the direction of the Court can be asked for only where there has been a breach of any express or constructive trust. It contemplates cases where the direction of the Court may be necessary even though there has been no such breach of trust."

[43] Thus this objection also fails. We must, however, notice another argument advanced by the appellants' learned advocate in this connexion.

He contended that even though the Court may have jurisdiction to deal with the case under S. 92, Civil P. C., the defendants have committed no breach of trust and cannot be removed. He referred to the statements of the plaintiffs' witnesses who themselves clearly stated that there was no mismanagement and that the defendants were all responsible and respectable persons. The answer to this is furnished firstly by the passage in A. I. R. 1934 Bom. 26[15] which we have just quoted and which makes it clear that if once a Court has jurisdiction, it is not necessary that a breach of trust should be proved before the reliefs contemplated by S. 92, Civil P. C., or any of them is granted.

[44] Secondly, it must be remembered that not only is it necessary that a trust should be properly administered but it is equally necessary that it should be administered by a person entitled to administer. If a person having no title as trustee takes possession of the trust property, he does so in contravention of the provisions of the deed of trust and commits a breach of it. It is as much a breach of trust for a person not entitled to act as trustee to meddle with trust property as it is for a properly appointed trustee not to manage the property. Were this not so, any one who had somehow obtained possession of the trust property and was managing it efficiently could always continue in possession inspite of the specific provisions of the deed of trust.

[45] The appellants' learned advocate relied upon a passage in 46 Bom. 101[14] in which one learned Judge says :

"I do not think that this suit comes directly within the provisions of S. 92, and I do not think that merely because the suit concerns the validity of the appointment of defendants 1 to 4 as trustees of the temple and because it might on that account be considered that the suit was somewhat akin to suits which come within the provisions of S. 92, Civil P. C., that, therefore, we are entitled to hold that the suit in the language of English lawyers is a suit that comes within the equity of the statute ....."

These remarks must, however, be read in the light of the facts of the case. That case was one purely for a declaration that the defendants were not properly appointed trustees, and this was held by the learned Judges neither to be an allegation of breach of trust nor a request for directions as to the administration of the trust. Moreover, the relief did not come within the scope of S. 92, Civil P. C. That decision, therefore, has no application to the facts of the present case. This objection too must be overruled.

[46] The last contention of the appellants' learned advocate under this head is that the suit is in reality a suit for the benefit of plaintiff 1 and not for the protection of the trust estate and consequently is beyond the scope of S. 92, Civil P. C. We agree that if the suit is for the vindication of the private rights of the plaintiffs or any of them and not for the protection of the trust it is suit which should have been brought in the regular manner and it would be beyond the scope of S. 92, Civil P. C., as has been very properly stated in A.I.R 1927 Mad. 333[16] at p. 339:

"Now, the real test whether S. 92, Civil P.C. applies or not is, I take it, whether the suit is fundamentally on behalf of the public for the vindication of a public right, or on behalf of a private individual for the vindication of his private rights."

An examination of the facts of the case, however, discloses that it is a suit of the former category.

[47] No doubt plaintiff 1 could have claimed possession for himself as the sole surviving trustee but he has not done so. It is true that it has been asserted that plaintiff 1 is a trustee but no prayer is made that he should be placed in possession of the property on that ground : indeed the prayer is that the trustees appointed by the Court should be placed in possession.

[48] Further, although it would have been more advantageous for plaintiffs 1 and 2 assert that the trust is a private trust of their family because then they might, in certain eventualities have a right to divert it to other purposes, they seek to vindicate the right of the public in the trust.

[49] It is true that the suit seems to have been brought very shortly after the defendants served plaintiff 1 with notice to quit a house. It is also true that the plaintiffs have not shown that house in the list of trust properties. But by getting new trustees appointed by the Court and getting possession delivered to those trustees, even though one of them was plaintiff 1 himself, plaintiffs 1 and 2 could not escape liability to be compelled to vacate the house if the house was found to be trust property. If this was their object, it could have been attained much more easily by plaintiff 1 himself appointing as the sole surviving founder, his own nominees as trustees and then suing for possession of the trust property. He has not done so but has placed the matter in the hands of the Court which is bound, when the matter has properly come before it, to see that the trust is administered by properly appointed trustees. Thus this ground too fails.

[50] The appellants' learned advocate next urged that, in any case, the defendants were all properly appointed trustees and, no breach of trust having been proved against them, they could not be removed. The positions of defendants 2 to 9 need not detain us long. It is admitted that they are not in any way connected with the five original trustees. In view of the provisions of Ex. 1, they could only be appointed trustees if the descendants of the five original

trustees refused to act or were unfit to act as trustees. No evidence has been led to prove this nor is it shown that those trustees left no descendants. In the absence of such evidence, the condition precedent to the appointment of strangers as trustees is not fulfilled. Moreover, Ex. 1 provided for the appointment of five trustees altogether. In no case, therefore, could nine trustees be appointed under its terms. The appointment of defendants 2 to 9 even if it is deemed in fact to have been made, is bad and does not constitute them properly appointed trustees.

[51] With regard to defendant 1, the case made in the written statement was that he had been appointed in the place of the plaintiff who was removed by the trustees. This was the case which the defendant sought to establish by his evidence but he has wholly failed to do so. According to this case, it was first of all necessary to prove that the plaintiff 1 had ceased to be a trustee.

[52] Exhibit 1, the deed of trust does not contain any provision for the removal of the five trustees appointed by it. Paragraph 2, however, does provide for appointment of another person in the place of any member who "is not fit to work or refuses to work." There is absolutely no evidence in the case that plaintiff 1 was not fit to work or refused to work.

[53] In the present case, although two of the defendants stated in the witness box that accounts and a minute book used to be maintained no accounts have been produced and no minute book is traceable. Defendants 1 and 2 have stated they could not be found. It is somewhat remarkable that not a single paper of this nature should be found if it, in fact, existed, because according to his case, defendant 1 was a trustee taking an active part in the management for 23 years before the death of Jagannath and the other defendants had become trustees about 4 years before that event. Further the evidence is that Jagannath Prasad had himself become paralytic towards the end of his life and would not keep the papers himself. The absence of the papers then only leads to the inference which the trial Court has drawn, that no such papers were, in fact, kept. Further this is in accordance with probabilities also since the property was small and Jagannath Prasad was looked upon practically as its owner. It was, therefore, not likely that he would keep accounts or minutes, even if any meeting of trustees was ever held. Be that as it may, no documentary evidence is available of the alleged removal of plaintiff 1 or the appointment of any of the defendants and we have to fall back upon the oral evidence which is not of such a nature as can be relied upon.

[54] In this connection, as we have already pointed out, the case made in the written statement was that defendant 1 was appointed in the place of plaintiff 1 after the latter had been removed for acting against the trust in claiming property given to it by Kamta Prasad by means of Ex. A-4 as his. Exhibit A-4 is dated 16th April 1917 and disputes can only have arisen thereafter but the only evidence as to actually when they arose is furnished by Ex. A-15 which is a judgment delivered by the Munsif of Lucknow on 17th February 1919. This indicates that the suit was filed some time at the end of 1916 or the beginning of 1919 and we cannot place this dispute earlier than that period. Yet the defendant swears that he was appointed in 1917 and that Lachmi Narain was a trustee only till 1916. This witness had stated in an earlier case—*vide* Ex. 4—that Lachmi Narain was removed after he himself had been appointed. The whole of this statement was read over to the witness who said that he "cannot tell if this statement of mine is correct or not."

[55] The appellants' learned advocate referred us to some documentary evidence—Exs. A-5, A-15 and A-3—which showed that the relations between Jagannath and Lachmi Narain were bad. This may well have been so and perhaps that is the reason why Jagannath tried to foist other trustees on the trust which he had no right to do. Exhibits A-2, A-4, and A-6 to A-10 are also indications to the same effect and indicate that it was the endeavour of Jagannath Prasad that Lachmi Narain should not have a hand in the management of the trust. They cannot, however, prove that Lachmi Narain had rendered himself unfit or was in fact removed. It is to be noticed that it is agreed that up to the time of the execution of Ex. A-4 at least Lachmi Narain was a trustee and defendant 2 was not and yet in Ex. A-4 it is clearly stated—quite false—that defendant 1 was one of the trustees of the endowment created by Ex. 1.

[56] It may also be noticed that defendant 2 admits that Lachmi Narain did not create any difficulties till after the death of Mt. Janki, the widow of Jagannath and it is significant that in Ex. A-26 the notice given by the defendants after the death of Mt. Janki to vacate the house, it is stated

"since the death of Jagannath Chaturvedi some overt acts done on your behalf indicate your intention that you have become against the said trust ....."

Thus at that time the case was that the hostility to the trust—as distinct from hostility to Jagannath only began after Jagannath's death. The evidence adduced by the defendants, therefore, does not satisfactorily establish the refusal of Lachmi Narain to work as a trustee or his inability to do so, nor is it established that he was removed from the trusteeship.

[57] Even, however, if it is assumed that he was so removed, the only evidence of the appointment of Radha Krishna is his own statement as D. W. 3. He is such a highly interested witness and his statement is not correct in so many particulars that it cannot be accepted on this point. With regard to a previous statement of his own on oath, Ex. 4, he clearly stated that he could not say whether it was true or false. His evidence by itself is wholly insufficient to establish his appointment. Moreover, even if it is accepted it is not established that the conditions precedent to his appointment were fulfilled. By the terms of Ex. 1, he could only be appointed in the place of Lachmi Narain, if the sons of the latter were unwilling, or unfit, to act as trustees. It is agreed that Lachmi Narain has sons—plaintiff 2 is one of them—and there is no evidence of any sort either, as to their unwillingness to act or their unfitness for the office of trustees. Thus the appointment of defendant 1 is also not established.

[58] The appellants' learned advocate next contended that the plaintiffs had not shown all the properties of the trust in the list attached to the plaint. They particularly alleged that three houses which they specified in paragraph 25 of their written statement were also trust property but the learned Civil Judge has not accepted this plea. We have come to the conclusion that the decision of the learned Civil Judge on this point is incorrect.

[59] Houses Nos. 1 and 2 mentioned in paragraph 25 are houses occupied by kahars on rent. There is no evidence to show when or by whom they were purchased but the defendants have produced some sarkhats executed by their tenants on various dates. These are Exs. A-20, A-33 and A-34. Each of these documents is executed in favour of Jagannath Prasad as "member karkum" of the trust committee of Sri Radha Krishna Temple. Thus this clearly indicates that Jagannath Prasad, who is alleged to have been the owner of these houses, treated himself only as manager of the trust in respect of them. From the evidence which has been given of his character, it would appear very probable that, even if he purchased the property himself, he would give it to the trust. He had no offspring and he was very religiously inclined. He had founded the temple and had made considerable donations for its upkeep. In these circumstances, it is highly probable that this property, even if t had belonged to him at one time, would be conveyed by him to the trust. There is no evidence in rebuttal of this evidence. These two houses should, therefore, have been held to be trust property.

[60] The third house, which is in the occupation of plaintiffs 1 and 2 is also trust property. The sale deed Ex A-3. is in the name of the trust, Jagannath Prasad having purchased it in his capacity of manager of the Thakurdwara '*Be hasiyat manager thakurdwara*". In these circumstances, it was for the plaintiffs to prove that the property was not that of the trust and they have led no evidence on this point. Even Lachmi Narain who lives in this house has not come into the witness box to depose as to how he came to occupy his house. It must, therefore, be held that this house is trust property.

[61] There is another piece of documentary evidence which has a great bearing on this point and that is Ex. A-11. This is the copy of an inscription put up in the Thakurdwara by Jagannath Prasad. It is proved to be in the writing of Jagannath Prasad himself and it states that Jagannath had dedicated 16 houses and shops. If list A alone is considered to be the dedicated property there are only 12 houses and shops whilst if these three houses (which are in reality four since the third consists of two houses) are added, the total comes to 16 houses and shops. Thus there can be no doubt that the alleged owner, Jagannath, treated these three houses also as trust property and they should have been held by the Civil Judge to be trust property.

[62] The next question relates to costs. The Civil Judge has made the plaintiffs' costs payable by the defendants. The appellants argue that they fought for the protection of the trust and not for their private rights and so the costs should come out of the trust estate. The proceedings in this case do not bear this out.

[63] To begin with, the defendants opposed the grant of sanction by the Advocate-General and sent a lawyer to represent them before the Advocate-General. Then after the suit had commenced and the written statement had been filed the parties compromised the case and agreed that the trust was a public one. As to the property of the trust it was agreed that that matter should be left over for decision by the newly appointed trustees who were named. Unfortunately, this compromise could not have effect because, after it had been accepted the learned Civil Judge observed that the suit, being one under S. 92, Civil P.C., could not be compromised and he called upon the parties to proceed. In spite of this, however, there was no further reason for the contest and the defendants might well have left matters to the discretion of the Court. Instead of doing so, they contested the case on the ground that it was a private trust. Further they took the plea that all of them were lawfully appointed trustees—a plea which was clearly untenable in view of the terms of Ex. 1. This had nothing to do with the protection of the trust or of its due administration. In these circumstances, the learned Civil Judge

was quite justified in allowing costs against the defendants personally.

[64] The last point raised is that there were several trusts, evidenced by Exs. A-1, A-2, A-4 and A-10 etc., and the sanction of the Advocate-General was received with regard to one only—the trust evidenced by Ex. 1. It was, therefore, contended that the relief granted must be confined to Ex. 1 alone. This is entirely a new plea : it was not taken in the trial Court and it is not mentioned in the grounds of appeal in this Court. In the trial Court the position accepted by both the parties was that there was only one trust—that created by Ex. 1—and various persons added property to it. The case proceeded on these lines and was disposed of in accordance with those pleadings. We cannot allow the defendants to depart from their pleadings and to take up a position which is not only not taken up in those pleadings but is clearly at variance with them. In this Court this plea is taken probably because in none of those other trust deeds is Lachmi Narain mentioned as a trustee while in most of them Radha Krishna is. No doubt it was the difficulty created by this position that induced Lachmi Narain to join a suit under S. 92, Civil P. C. rather than sue for possession in his own rights; in the latter event, it might eaily have been argued that he was not a trustee of the properties covered by Exs. A-2, A-3 and A-6 to A-10. As matters stand, however we must treat this suit as relating to one endowment to which properties have been accreted from time to time and we cannot entertain this new plea now raised.

[65] The plaintiffs have filed cross-objections by which they assert the right of plaintiff 1 to be one of the trustees and they challenge the finding of the learned Civil Judge as to the property.

[66] We have held, in agreement with the learned Civil Judge that plaintiff 1 never ceased to be a trustee. When, however, the matter comes before the Court in a case under S. 92, Civil P. C., it is the interests of the trust that are the primary considerations. If the Court holds that it is in the interests of the trust that an existing trustee should be removed, the Court is justified in removing him. In the present case there is a conflict of interest between the personal rights of plaintiff 1 and the rights of the trust : the fomer claims to be the sole heir of his brother, Jagannath Prasad, while the latter claims to have become entitled to his property by reason of a will. Further the extent and nature of the trust properties is also in dispute. It would, therefore, be prejudicial to the interest of the trust to allow plaintiff 1 to be one of the trustees and the trial Court was quite right in removing him. It will appear that plaintiff 1 had agreed to his own removal when the parties compromised the case and that is why the learned Civil Judge has not given any reasons for not making him one of the trustees. Nevertheless, the action of the Court was fully justified by the circumstances of the case.

[67] During the course of the arguments it was pointed out to us that one of the trustees appointed, Mr. Shargha, Advocate, had resigned and we were asked to substitute Lachmi Narain for him. We have already given reasons for holding that Lachmi Narain is not a proper trustee for this trust. Moreover, by subsequent proceedings, the Court has appointed another trustee in his place. We are not called upon to decide the merits of this appointment but we will only say that if this is a valid appointment, there is no vacancy in the trust.

[68] As to the second objection it must prevail. The plaintiffs put forward lists of trust properties and defendants put forward supplementary lists. The Court below had no justification for proceeding on the basis of a separate list, the correctness of which was not admitted by the plaintiff. Further that other list does not describe the property at all accurately and its adoption is likely to lead to confusion.

[69] The result is that the appeal and the cross-objections are both partly allowed and only the property entered in lists A and B attached to the plaint together with the property entered in paragraph 25 of the written statement will also be considered to be trust property. In this view the plaintiffs are not entitled to their full costs because they deliberately kept some trust property out of the list of trust properties with a view to benefit one of them. Nevertheless they have succeeded in the main part of their case, namely, in their claim that the trust was one of a public nature and they have had trustees appointed. They will, therefore, receive only half their costs of the trial Court as well as of this Court from the defendants-appellants personally.

S.C. *Appeal partly allowed.*

A. I. R. (35) 1948 Oudh 214 *[C. N. 76.]*

FULL BENCH

KAUL, WALFORD AND KIDWAI JJ.

Ram Lakhan Misir—Defendant—Applicant v. *Bishesar Misir—Plaintiff—Opposite Party.*

Application No. 70 of 1943, Decided on 27-11-1947, from order of Dist. Judge, Faizabad, D/- 24-3-1943.

(a) U.P. Agriculturists' Relief Act (27 [XXVII] of 1934), Ss. 10 and 12—Mortgage and deed of further charge—Principal amount secured by mortgage not exceeding Rs. 500 but principal sum secured by mort-

gage and further charge exceeding Rs. 500—Mortgagor applying for redemption of mortgage only—Collector has jurisdiction to entertain it.

If a mortgagor applies for redemption of only one mortgage, it is the principal sum under that mortgage that determines jurisdiction. The mortgagor cannot be compelled by the fact that a deed of further charge is proved to exist to sue for redemption for that deed also at the same time, notwithstanding a contract prohibiting separate redemption in the deed of further charge and the money due under that deed must be ignored in determining jurisdiction. If, on the other hand, the mortgagor sues for redemption of more mortgages than one, jurisdiction will be determined by sum total of the principal of all the mortgages. Thus, where a mortgagor applies under S. 12 for redemption of a mortgage the principal money secured by which does not exceed Rs. 500, the Collector has jurisdiction to entertain the application notwithstanding that it is found at the close of trial that the mortgaged property was subject to a deed of further charge and the principal sum secured by the deed of mortgage and the deed of further charge exceeds Rs. 500: 30 A. I. R. 1943 Oudh 300, *Dissent.*; 32 A. I. R. 1945 All 204, *Expl.* [Para 17]

(b) Interpretation of Statutes—Interpretation of enactment is to be made of all its parts together.

The interpretation of an enactment is to be made of all its parts together and not of one part by itself. Such a survey is always indispensable even when the words are plain, for the true meaning of any passage in a statute is that which best harmonises with the subject and with every other part, so that inconsistencies might be avoided and operative effect might be given to every provision of the statute, if a reasonable construction so permits. Where there is no other alternative but to admit that the fact is inconsistent and unintelligible it is permissible to construe the Act in a manner which might be regarded as dangerously near to the process of legislative enactment. If, however, an intelligible construction can be put upon a provision contained in a statute, there is no justification for a construction which would necessitate the insertion of words which are not to be found therein. [Para 11]

Cases referred:—

1. ('43) 1943 O. W. N. 169 : 30 A. I. R. 1943 Oudh 300 : 208 I. C. 45, Murli Shukul v. Lalta Singh.
2. ('45) 1945 O. W. N. 130 : 32 A. I. R. 1945 All. 204 : I. L. R. (1945) All. 301 : 220 I. C. 151, Lal Behari Kurmi v. Mahadeo Singh.

K. N. Tandon—for Applicant.

Sri Ram—for Opposite Party No. 1.

Order.—Sugrim Misir and two nephews of his, Jagrup Misir and Jagmohan Misir, owned 21 bighas 10 biswas of zemindari land in village Hiranpur, pargana and tahsil Akbarpur, district Faizabad. On 26th July 1898, they mortgaged this land with possession to Mahadeo Sukul for a consideration of Rs. 415. The term of the mortgage was stated to be 50 years. On the 12th January 1904, the mortgagee sold his interest to Ram Lakhan Misir. On 5th June 1915, Ram Surat, grandson of Sugrim, executed a deed, which he called a deed of further charge, in consideration of Rs. 325 in favour of Ram Lakhan Misir. This deed stipulated that the money due under it would be paid before the mortgagor could redeem the mortgage executed by Sugrim in favour of Mahadeo Shukul and that the mortgagor and his heirs could not redeem the earlier mortgage without first paying off the money due under the deed of further charge.

[2] Jagrup Misir died issueless, Jagmohan died leaving one son, Panchu, and Ram Surat died leaving five sons of whom Ram Nain was said to be untraced and Ram Newal and Ram Dawal were minors, and the other two, Ram Pratap and Raj Kishore, were majors. On 3-8-1937, Panchu and Ram Partap purporting to act for himself and his minor brothers, Ram Newal and Ram Dawal, and as "karta" of the family, and Raj Kishore sold the equity of redemption in the entire mortgaged property to Bisheshar Misir, opposite party.

[3] On 11-10-1941, Bisheshar Misir presented an application under S. 12, U. P. Agriculturists' Relief Act, in the Court of the Sub-Divisional Magistrate, Akbarpur, district Faizabad, for redemption of the mortgage of 26-7-1898. He also claimed the benefit of the provisions of the U. P. Debt Redemption Act in order to enable him to sue before the expiry of the term fixed in the deed and to get the interest reduced. It was further pleaded that the whole of the debt had been liquidated out of the usufruct and that the applicant was entitled to get back the property without payment. The deed of further charge was not mentioned at all and the valuation given was Rs. 415, being the principal sum secured by the deed of 26-7-1898.

[4] The opposite party raised various pleas but the only plea which calls for notice at this stage is the plea that the mortgage could not be redeemed without the payment of the entire sum due in respect of the deed of further charge which was set up. No plea of want of jurisdiction was specifically taken but it was considered by the learned Sub-Divisional Officer under the fourth issue which is as follows :

"Whether the subsequent deed dated 5-6-1915, is a further charge on the properties in suit? If so, to what effect?"

[5] The learned Sub-Divisional Officer held that the deed in question was a deed of further charge and that, in view of the terms of S. 61, Transfer of Property Act, there had been a consolidation and the principal amount had thus become Rs. 740. He consequently held that his jurisdiction was ousted and he directed the return of the application for presentation to the proper Court.

[6] The applicant appealed and the learned District Judge of Faizabad allowed the appeal, holding that jurisdiction was determined on the basis of the mortgage to which the application related and that the deed of further charge could not be taken into consideration. The case was, therefore, remanded to the Court of the Sub-Divisional Officer to be disposed of according to

law. The opposite party, therefore, filed an application under S. 115, Civil P. C., in this Court. That application came before one of us, and, in view of the importance of the question involved, it was referred to a Bench of two Judges. It was then heard by the other two of us and it was found desirable to frame a question and refer it to a Full Bench for decision. The following question has accordingly been referred to the Full Bench for decision :

"If a mortgagor applies under S. 12, Agriculturists' Relief Act, for redemption of a mortgage, the principal money secured by which does not exceed Rs. 500, but it is found at the close of the trial that the mortgaged property was subject to a deed of further charge, and the principal sum secured by the two deeds exceeds Rs. 500, whether the Collector in whose Court an application for redemption is made has no jurisdiction to entertain it and must return the same for presentation to the proper Court."

[7] The answer to this question depends upon the interpretation to be placed upon Ss. 10 and 12, U. P. Agriculturists' Relief Act. The learned Advocate for the applicant desired to place before us, as he did before the Bench, the provisions of the Court-fees and Suits Valuation Acts and decisions of various High Courts to show us the difficulties and differences of opinion which exist as regards the valuation for purposes of jurisdiction of suits by mortgagors to redeem. The decisions have been sufficiently noticed in the judgment of the Bench and it is not necessary for us to refer to them further, because a consideration of them is unnecessary for the determination of the question which was eventually framed by the Bench and referred to us.

[8] By the express terms of S. 10, U. P. Agriculturists' Relief Act, it is only in cases in which "the principal money secured does not exceed Rs. 500," that the Collector has jurisdiction. If, therefore, in the present case the mortgagor was bound to sue for redemption of both the mortgages, the principal sum secured by both the mortgages would be more than Rs. 500 and the Sub-Divisional Officer would have no jurisdiction to entertain the application. If, on the other hand, the mortgagor was entitled to sue for redemption of one of the mortgages only, as he has done, then the valuation is below Rs. 500 and the Sub-Divisional Officer would have jurisdiction.

[9] Under the provisions of S. 61, Transfer of Property Act,

"A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more such mortgages together."

By virtue of this section, therefore, "in the absence of any contract to the contrary", the applicant could have sued for redemption of the first mortgage alone notwithstanding the fact that the money due under the deed of further charge had also fallen due. The applicant, however, contends that in the present case there is a contract to the contrary embodied in the deed of further charge, Ex.A-3, which specifically provides that the first mortgage cannot be redeemed without paying off the money due under the deed of further charge. He contends that by reason of this contract the money due under the two deeds has been consolidated and the total principal sum is now Rs. 740.

[10] Had the law which governs this case been the law as laid down in S. 61, T. P. Act, only, this line of argument could have been pursued but, in the present case, the law which governs the case is that laid down in S. 12, U.P. Agriculturists' Relief Act. The only basis for the contention that the mortgagor cannot sue for redemption of the principal mortgage alone is that there is a contract embodied in the deed of further charge prohibiting this. While S. 61, T. P. Act, respects contracts of this kind, S. 12, Agriculturists' Relief Act directs that they shall be ignored. It is specifically provided by that section that notwithstanding "any contract to the contrary" a mortgagor may institute a suit for redemption of a mortgage at any time after the principal money has become due. Thus, notwithstanding the contract entered into between the mortgagor and the mortgagee that the deed of 1898 shall not be redeemed unless the deed of further charge has been redeemed, it was open to the mortgagor to sue for the redemption of the first deed, since by reason of S. 7, U. P. Debt Redemption Act, it was no loger necessary for him to wait for the expiry of 50 years. The contract prohibiting him from doing so must be ignored. The language of the section is perfectly clear and it is wide enough to cover the case of all contracts. In accordance with the well recognised rules relating to the interpretation of statutes that the words used must have full effect given to them since the legislature must be taken to have meant that the language used by it has clearly expressed.

[11] It is, however, another elementary rule that the interpretation of an enactment is to be made of all its parts together and not of one part by itself. Such a survey is always indispensable even when the words are plain, for the true meaning of any passage in a statute is that which best harmonises with the subject and with every other part, so that inconsistencies might be avoided and operative effect might be given to every provision of the statute, if a reasonable construction so permits. Where there is no other alternative but to admit that the fact is inconsistent and unintelligible it is permissible to construe the Act in a manner which might be regar-

ded as dangerously near to the process of legislative enactment. If, however, an intelligible construction can be put upon a provision contained in a statute, there is no justification for a construction which would necessitate the insertion of words which are not to be found therein.

[12] In the present case, the learned Advocate for the applicant contends that the construction which the words seem to bear would create inconsistencies. He contends that S. 16, Agriculturists' Relief Act directs an account to be taken and this is only possible in respect of all the transactions between the parties which have been consolidated. There is, however, no difficulty in taking accounts of each transaction separately and a separate account would certainly have to be taken if there were several transactions between the same parties and there was no consolidation clause. Again it was contended that the language of the section makes it clear that where it was intended to derogate from the general law that law is specifically mentioned for it says that the right to apply is conferred "notwithstanding anything contained in S. 83, T. P. Act". The learned Advocate contends that if it was intended to depart from the principle of S. 61, of that Act, similar reference would have been made to it. The analogy is not correct. General words are used because it is not only S. 61, T. P. Act that is affected but also the provisions of the Contract Act and there may also be other enactments which are affected. The legislature, therefore, thought fit to introduce general words so that it might not be contended that it was only some particular class of contracts that was to be affected.

[13] Lastly the learned Advocate relied upon a decision of a learned single Judge (now the Chief Judge) of this Court in 1943 O. W. N. 169[1] and another of a single Judge of the Allahabad High Court in 1945 O. W. N. 130[2] (High Court Section), in both of which it has been laid down that the money due under a deed of further charge must be paid along with the money due under the principal mortgage in proceedings under S. 12, Agriculturists' Relief Act. The second of the two cases mentioned was strictly speaking not a case under S. 12 at all. The learned Judge took care to make the distinction clear but he felt, in accordance with the practice of the Allahabad High Court— a practice which is at variance with that of this Court— that

"if the matter is stripped of all technicalities, the simple position is that the occupancy tenant allowed another man to occupy his holding and cultivate it on the agreement that he would not eject him until he had paid him a certain sum of money which he had borrowed and that the Court will not help him to eject the person he has put into possession if he fails to carry out his obligation to pay back the money."

[14] The learned Judge proceeded on the basis that he who comes to seek relief at the hands of a Court may be put to terms. He did not consider the effect of the words notwithstanding "any contract to the contrary" contained in S. 12, Agriculturists' Relief Act and his decision cannot be relied upon as an authority on the effect to be given to those words.

[15] The decision in 1943 O. W. N. 169[1] is, however, fully applicable and the learned Judge deciding the case did interpret the words "any contract to the contrary". He says at page 170 :

"The words 'any contract to the contrary' used in S. 12 in my opinion refer to the right of redemption existing in favour of a mortgagor which cannot be hampered or thwarted by any contract to the contrary imposing any clog upon such right. It has no reference whatever to the amount which the mortgagor may be liable to pay in respect of the property mortgaged under subsequent deeds."

[16] The learned Judge does not give any reasons for confining the scope of the general words used by the Legislature to the particular cases mentioned by him and with all respect to him we cannot agree with the view which he has taken. According to his view, contracts referred are those which impose a clog upon the right of redemption. Such contracts can in any case not be enforced under the general law of the land. If it was intended to confine the words "any contract to the contrary" to contracts creating clogs, then they were wholly unnecessary. We are not prepared to hold that the Legislature introduced these words unnecessarily when the words are capable of being given full effect. Section 61, T. P. Act, indicates the policy of the law that a mortgagor should have a choice to redeem each mortgage separately or all the mortgages at the same time. That section, however, recognised the sanctity of contracts and stipulated that the parties would have the right to modify that position by contract. Section 12, Agriculturists' Relief Act provides that even a contract shall not stand in the way of the redemption of any one mortgage.

[17] For the reasons given above we answer the question put to us as follows: If a mortgagor applies for redemption of only one mortgage, it is the principal sum under that mortgage that determines jurisdiction. The mortgagor cannot be compelled by the fact that a deed of further charge is proved to exist to sue for redemption for that deed also at the same time, and the money due under that deed must be ignored in determining jurisdiction. If, on the other hand, the mortgagee sues for redemption of more mortgages than one, jurisdiction will be determined by sum total of the principal of all the mortgages.

D. S. *Answer accordingly.*

A. I. R. (35) 1948 Oudh 218 *[C. N. 77.]*

MISRA J.

Mt. Munna Kunwar — Plaintiff — Appellant v. Sripal Singh — Defendant — Respondent.

Second Appeal No. 510 of 1945, Decided on 12-7-1947, from order of Addl. Civil Judge, Fyzabad, D/- 29-8-1945.

Court-fees Act (1870), S. 7 (iv-A) (U. P.) — Suit for declaration of title on two allegations — Fraud alleged in previous suit and execution proceedings resulting in sale in favour of defendant — Second allegation that in subsequent partition, property in question was allotted to plaintiff—Suit held fell under S. 7 (iv-A) although cancellation of sale deed was not prayed for.

The plaintiff brought a suit for declaration of ownership of 7 annas under proprietary share in a village based upon two sets of allegations. The first set of facts put forward a case of fraud which was said to have been practised during the pendency of the earlier suit and of the execution proceedings which culminated in the sale in favour of defendant. In the second set of facts it was claimed that at a subsequent partition the aforesaid 7 annas under-proprietary share had been allotted to the plaintiff and a fresh title arose in consequence of it. The court-fee paid upon the plaint was on a purely declaratory relief:

Held, that each of the two grounds alleged in the plaint was distinct and was sufficient to entitle the plaintiff to the relief of declaration of his ownership. Although there was no prayer for cancellation of the sale certificate, the granting of the relief which was embodied in the plaint would necessarily have that effect and sub-section (iv-A) of S. 7, would therefore apply. The fact that a basis of title which was alleged to have arisen subsequent to the sale certificate was also pleaded did not have the effect of altering the nature of the suit or to take it out of the purview of sub-section (iv-A). [Paras 2, 3]

Annotation : ('44-Com) Court-fees Act, S. 7 (iv) (c), N. 21.

K. N. Tandon — for Appellant.

Nasirullah Beg — for Chief Revenue Controlling Authority.

Order.—The question which arises for determination on this office report is whether the suit, out of which this appeal arises involves cancellation of or adjudging void or voidable a sale certificate obtained by the defendant on 5-11-1942 in execution of a decree. The suit was for declaration that the plaintiff was the owner of 7 annas under-proprietary share in mahal Bargaon, village Terya in the district of Fyzabad. The declaration of ownership was based upon two sets of allegations. The first set of facts given in paras 1 to 11 put forward a case of fraud which was said to have been practised during the pendency of the earlier suit and of the execution on proceedings which culminated in the sale in favour of defendant Sripal Singh. The second set of facts were stated in para. 12. Therein it was claimed that at a subsequent partition the aforesaid 7 annas under-proprietary share had been allotted to the plaintiff and a fresh title arose in consequence of it. The court-fee paid upon the plaint was Rs. 18-12-0. This amount was due on a purely declaratory relief. The plaintiff lost and went up in appeal on a similar court-fee stamp. She failed again and has come up by way of second appeal paying again a court-fee of Rs. 18-12-0. According to the office report the plaintiff is liable to pay court-fee under S. 7, sub-section (iv-A) and there is deficiency of Rs. 131-4 in respect of all the three Courts. The office has been contested on behalf of the appellant.

[2] Section 7, sub-s (iv-A) prescribes that—

"In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing money or other property having such value.

(1) where the plaintiff or his predecessor-in-title was a party to the decree or instrument, according to the value of the subject-matter and

(2) where he or his predecessor-in-title was not a party to the decree or instrument, according to one-fifth of the value of the subject-matter, and such value shall be deemed to be . . . . . "

It is not disputed that the sale certificate would constitute "an instrument securing money or other property having a market value." It is urged, however, for the appellant that the relief of declaration cannot be said to involve the cancellation or adjudging void or voidable the sale certificate dated 5-11-1942 because the prayer contained in the plaint did not expressly require any adjudication with respect to the auction sale. This contention in my opinion is without force. The word "involve" according to the Oxford English Dictionary means "to include; to contain, imply, especially to contain implicity." It is hardly possible to argue that merely because the relief for cancellation of a document is not expressly claimed it cannot "involve" cancellation. It is clear to my mind that if the plaintiff succeeded in proving the fraud which she alleged the proceedings from the commencement of the suit up to the execution and satisfaction of the decree including the sale could not be allowed to stand and the declaration claimed would follow. The fact that another ground of attack namely the subsequent partition which was said to have been finalised in 1943 created a fresh title in the plaintiff, could not operate to override the effect of the first set of facts contained in paras. 1 to 11. Each of the two grounds was distinct and was sufficient to entitle the plaintiff to the relief of declaration of his ownership. It is clear to my mind that by filing the suit the plaintiff desired to get over the sale certificate. The paragraph containing the prayer was no doubt artistically framed so as to avoid any mention of cancellation of the sale certificate, but the granting of the relief which was embodied in the plaint would necessarily have the effect of swallowing up the sale certificate. This in my opinion is

exactly the circumstance in which sub-s. (iv-A) of S. 7, Court-fees Act would apply.

[3] I may mention that at one stage of the argument it was conceded that if the plaint contained only the first set of allegations embodied in paras. 1 to 11 there could be no escape from the provision of sub-s. (iv-A). The effect, however, of additional facts alleged in para. 12, it was claimed was to alter the nature of the suit from the one involving cancellation of a document to one praying for a mere declaration. I am unable to see any force in this. In my opinion, each of the two alternative grounds upon which the declaration of ownership was sought was in itself sufficient if proved to entitle the plaintiff to a decree and the fact that a basis of title which was alleged to have arisen subsequent to the sale certificate was also pleaded did not have the effect of altering the nature of the suit or to take it out of the purview of sub-s. (iv-A).

[4] The office report is not contested on any other ground. I accept it. The plaintiff shall make good the deficiency amounting to Rs. 131-4- within a month's time.

S.C. *Order accordingly.*

A. I. R. (35) 1948 Oudh 219 *[C. N. 78.]*

KIDWAI J.

Parag Singh — Plaintiff — Applicant v. *Jhabbo Singh — Defendant — Opposite-Party.*

Civil Revn. No. 75 of 1943, Decided on 6-2-1948, from order of Civil Judge, Kheri, D/- 29-1-1943.

U. P. Debt Redemption Act (13 [XIII] of 1940), S. 7—Section allows redemption of mortgage even when mortgage money has not become due — Mortgage money not becoming due — Application under S. 12, U.P. Agriculturists' Act is maintainable —U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 12.

A right of redemption arises only when the mortgage money has become due but S. 7 of the U. P. Debt Redemption Act was expressly enacted to remove this limitation and it makes no difference whether the remedy is by means of a regular suit or an application under S. 12 of the U. P. Agriculturists' Relief Act. Hence an application under S. 12 of the latter Act for redemption of a mortgage is maintainable even if the mortgage money has not become due. [Para 3]

Hyder Husain — for Applicant.
Mahabir Prasad Srivastava — for Opposite Party.

Order. — The applicant is the mortgagor of property held by the opposite party. He applied under the provisions of S. 12, Agriculturists' Relief Act for redemption. It was pleaded that S. 12, Agriculturists' Relief Act was not applicable because the mortgage money had not fallen due and secondly because in his written statement the defendant made a declaration under S. 4, U. P. Debt Redemption Act, stating that he would not realise it from the person or agricultural land of the judgment-debtor. The trial Court framed one issue which it tried as a preliminary issue as to whether the application was maintainable. It held that the application was not maintainable. The applicant went in appeal and the learned Civil Judge of Kheri has upheld the decision of the Munsif, on the ground that S. 12, Agriculturists' Relief Act, did not apply. The applicant has now come up in revision to this Court.

[2] Mr. Hyder Husain, the learned counsel for the applicant, contends that the decision of the Courts below is incorrect because the effect S. 7, U. P. Debt Redemption Act, is to enable a suit to be brought for the redemption of a mortgage in spite of the fact that the money has not become due. Section 2, sub-s. (17), Debt Redemption Act also defines a suit as including any proceeding. Under S. 25, Agriculturists' Relief Act, no suit can be filed to obtain a relief which can be obtained under Chapter III, Agriculturists' Relief Act. Thus, in a case such as the present proceedings can be taken under S. 12, Agriculturists' Relief Act, for redemption of the mortgage since those proceedings take the place of suits.

[3] According to the reasoning of the lower appellate Court because S. 12, Agriculturists' Relief Act, provides that such an application lies only when the money has become due, therefore, would that section is not applicable, a similar difficulty would arise in the case of a suit because S. 60, T. P. Act, also provides that the right of redemption arises only when the money has become due. It was expressly in order to remove this limitation that S. 7, U. P. Debt Redemption Act, was enacted and it makes no difference whether the remedy is by means of a regular suit or by means of an application under S. 12. The decision of the lower Courts that the application is not maintainable must, therefore, be set aside.

[4] It must be noted that in this case the defendant has made a declaration under S. 4. The question as to whether this declaration is a sufficient compliance with the provisions of law or not and whether it should be accepted has yet to be decided. Nothing that has been said with regard to the maintainability of the application will affect a decision of this question and the consequences which may flow therefrom.

[5] The result is that this application is allowed and the case is remitted to the Court of the Munsif, Kheri, with the direction that he would restore it to its old number and proceed to dispose of it according to law. The applicant will get his costs of this application.

K.S. *Application allowed.*

A. I. R. (35) 1948 Oudh 220 *[C. N. 79.]*

KAUL J.

S. Ashfaq Husain and others — Defendants-Appellants v. *Moharram Ali and another —Plaintiffs—Respondents.*

Second Appeals Nos. 145 and 146 of 1947, Decided on 4-12-1947, from decree of Dist. Judge, Gonda, D/- 30-10-1946.

(a) Civil P. C. (1908), S. 35 — Appeal as to costs —Non-appealable order.

When no appeal is provided for from an order on the merits, no appeal will lie against that portion of the order which relates to the award of costs only : 19 A. I. R. 1932 Mad. 714, *Foll.* [Para 5]

Annotation.—('44-Com.) C. P. C., S. 35 N. 29 pt. 1.

(b) Civil P. C. (1908), O. 41, R. 23—Applicability —Decision on all issues.

Order 41, R. 23 applies only when a case has been determined by the trial Court on a preliminary point, It can have no application to cases where all the issues framed have been determined and findings recorded thereon. If there is remand in such a case it must be taken to have been made under S. 151 in exercise of the inherent powers of the Court and no appeal would ordinarily lie in such a case against the order of remand. [Para 6]

Annotation.—('44-Com.) C. P. C., O. 41 R. 23 N. 4.

(c) Civil P. C. (1908), O. 41, R. 23 — Order of remand under S. 151 — Subsequent opinion by Court that it was under O. 41, R. 23—Effect of.

An expression of opinion by the Court subsequent to the passing of the remand order on an application made by one of the parties that the remand order was under O. 41, R. 23 cannot be permitted to influence the determination of the nature of the order. [Para 6]

Annotation.—('44-Com.) C. P. C., O. 41 R. 23 N. 2.

(d) Evidence Act (1872), S. 115 — Opinion on point of law.

The opinion of counsel or of a party as regards the provision of law under which an order already passed should be deemed to have been made is neither an act nor a declaration nor such an omission as is referred to in S. 115. [Para 8]

Annotation.—('46-Man.) Evi. Act, S. 115 N. 39.

Cases referred :—

1. ('45) 32 A. I, R. 1945 Oudh 133, Jagdish Singh v. Kateshar Singh.
2. ('32) 19 A. I. R, 1932 Mad. 714 : 139 I. C. 167, Somasundaram Pillai v. Muthumanicka Nadar.
3. ('31) 18 A. I. R. 1931 Oudh 123 : 5 Luck 645 : 124 I. C. 671, Mahadeo Singh v. Pudai Singh.

Faiyaz Ali, Badruzzaman and Ali Hassan — for Appellants.

Suraj Narain — for Respondents.

Judgment.— *(S. C. A. Nos. 145 and 146 of 1947.)* These two appeals may conveniently be disposed of by one common judgment. They arise on the following facts.

[2] Two Suits Nos. 21 of 1945 and 7 of 1945, were instituted in the Court of the Civil Judge, Gonda, by Mohammad Sher Khan for accounts and recovery of money due against persons whom he described as his partners. The defendants in one of the suits were Syed Ashfaq Husain, Lalta Prasad and Hameed Husain. The other suit was brought against Syed Ashfaq Husain alone. Mohammad Sher Khan died during the pendency of the suit and the names of two minors, Moharram Ali and Bashir Ali were substituted on the record as his legal representatives. These suits were subsequently transferred to the Court of the additional Civil Judge and were numbered as 53 and 52 of 1946. Suit No. 52, which was brought against Syed Ashfaq Husain alone, was fixed for evidence on 14th of May 1946. The case was adjourned as the plaintiffs' witnesses were not in attendance. The adjournment was made at the plaintiffs' request and they were directed to pay Ashfaq Hussain a certain sum by way of costs. On the next date the plaintiffs' counsel stated his case. All the plaintiffs' witnesses were not in attendance on that date also, but as it was considered that the record in evidence piecemeal would not be proper, the case was again adjourned to 11-6-1946. It may be mentioned that issues had been framed in the case on 2-10-1945. On 11th July, two witnesses for the plaintiffs were examined and then the Court rose for the day. The remaining witnesses were to be examined the next day. On 12-7-1946, neither the plaintiffs' next friend nor any of their witnesses were in attendance. The counsel for the plaintiffs stated that he had no instructions for that date from his clients. In these circumstances the Court purporting to act under O. 17, Civil P. C. recorded the evidence of one of the defendants' witnesses. The plaintiffs' counsel, as I find from a note on the record, was present throughout the proceedings, which he watched on behalf of his client, but did not cross-examine the only witness called for the defendants. On 16-7-1946 the Court recorded findings on all the issues and dismissed the suit with costs.

[3] In the other case 16-5-1946. was fixed for evidence. The plaintiffs applied for an adjournment which was allowed on condition of payment of costs and 13-7-1936, was fixed for evidence. On that date no one appeared for the plaintiffs, nor were the costs awarded on the previous hearing paid. In this case also the Court recorded an order that it would proceed to decide the case on the merits, under O. 17, R. 3, Civil P. C., "notwithstanding the absence of the plaintiff". On 13 7-1946, it pronounced its judgment. It decided all the five issues which were framed against the plaintiffs for want of evidence and dismissed the suit with costs.

[4] Two appeals were preferred in the two cases by the plaintiffs. The District Judge of Gonda, before whom these appeals came up for hearing allowed both of them as he was of opinion that the lower Court should have proceeded under O. 9, and under O. 17, Civil P. C. In either case respondents were made to pay the appellants' costs. Subsequently an application was

made in either appeal by the defendants, who were arrayed as respondents, that the decrees be amended by excluding from the taxed costs the amount of court-fee paid by the appellants in each case. These applications purporting to be made under Ss. 151 and 152, Civil P. C. were allowed and the learned District Judge recorded the opinion that inasmuch as he had remanded the case under O. 41, R. 23, Civil P. C., the amount of court-fee paid was to be refunded to the appellants under S. 13, Court-fees Act, and consequently should not be included in the taxed costs. The decrees in the two appeals were amended accordingly. It may be mentioned that taking advantage of this order the plaintiffs applied for refund of court-fee and this was allowed. The defendants who were respondents in the two appeals did not challenge the remand order in so far as it directed retrial of the two suits. They have, however, filed the two present appeals against those orders in so far as they direct the payment of costs to the appellants.

[5] It is contended on the other side that no appeal lies in such a case. Having heard the learned counsel for the parties, I am of opinion that the objection should prevail. It was frankly conceded by the learned counsel for the appellants that in view of the decision of this Court in A. I. R. 1945 Avadh 133[1] that where all the questions arising in the suit have been decided by the trial Court, and there is a remand on appeal against such a decree, the remand cannot be one under O. 41, R. 23, Civil P. C. In such a case it must be taken to be a remand under the inherent powers of the Court. In this view of the matter, if the remand in the two appeals disposed of by the learned District Judge was under the inherent powers of the Court, no appeal would lie and as held in A.I.R. 1932 Mad. 714,[2] when no appeal is provided for from an order on the merits no appeal will lie against that portion of the order which relates to the award of costs only.

[6] It was contended by the appellants' learned counsel that in these cases the Court had reviewed its previous order and held that the remand by it was ordered under O. 41, R. 23. This order was not appealed against and could not now be challenged by the respondents. I can see no merit in this contention. An expression of opinion by the learned District Judge subsequent to the passing of the remand order on an application made by one of the parties, whether the remand was under O. 41, R. 23, Civil P. C., or under O. 41, R. 25, Civil P. C., or under the inherent powers of the Court, cannot be permitted to influence the determination of the true nature of the order. When the District Judge passed the orders of remand in the two appeals to which reference has been made, he did not state that he was acting under O. 41, R. 23, and for obvious reasons he could not remand the cases which were before him in exercise of the powers conferred by that provision of law. Order 41, R. 23 applies only when a case has been determined by the trial Court on a preliminary point. It can have no application to cases where all the issues framed have been determined and findings recorded thereon. If there is a remand in such a case it must be taken to have been made under S. 151 in exercise of the inherent powers of the Court, and no appeal would ordinarily lie in such a case against the order of remand.

[7] The applications that were made for amendment of the decrees of the District Judge cannot be treated as applications for review. They purported to be made under Ss. 151 and 152, Civil P. C. The court-fee payable on an application for review was not paid. In the opening portion of his order the applications are described as applications for revision. I am clear that these were not applications for review, and of course the learned District Judge could not revise his own order because the powers of revision are vested under S. 115, Civil P. C., only in this Court. It may be pointed out that no grounds on which a review application could be made existed in either of these cases.

[8] Another argument urged by the learned counsel for the appellants was that the respondents were estopped from denying that the orders of remand by the District Judge in the two appeals were in exercise of power conferred upon him by O. 41, R. 23, Civil P. C. In support of his contention he relied on a decision of a Bench of this Court in A. I. R. 1931 Avadh. 123.[3] It was laid down by Srivastava and Wazir Hasan JJ. in that case that where a civil suit is the result of a judgment passed by the Board of Revenue which upholds the plea that the Court of Revenue has no jurisdiction to entertain the suit, the party putting forward the plea in the revenue Court cannot deny its truth when the plea has compelled the opposite party to put his plaint in a civil Court for adjudication. He further referred to the observations contained in Sarkar on Evidence, Edn. 6, p. 1025 para. 2 to the effect that it was not open to a party to assume inconsistent positions. I am clear that neither the case of this Court to which reference has been made, nor anything said by Sarkar in his Law of Evidence has any application to the facts of the present case. Section 115, Evidence Act, reads as follows :

"When one person has, by his declaration, act or omission, intentionally, caused or permitted another person to believe a thing to be true and to act upon

such belief neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing."

There was no declaration, act or omission by the respondents in the present case which caused the appellants to believe a thing and act thereon. The whole substratum which forms the foundation for this argument is the following observation by the learned District Judge in his order of 11-12-1946:

"After hearing the parties I consider it proper to make it clear that I meant to remand the case under O. 42, R, 23, Civil P. C. The counsel for the parties have also interpreted my judgment in that light."

There is no act, declaration or omission by the respondents in what is stated by the learned District Judge. The opinion of counsel or of a party as regards the provision of law under which an order already passed should be deemed to have been made is neither an act nor a declaration nor such an omission as is referred to in S. 115, Evidence Act. For the reasons given above I am satisfied that these appeals do not lie. They are dismissed with costs.

G.B. *Appeals dismissed.*

A. I. R. (35) 1948 Oudh 222 *[C. N. 80.]*

CHANDIRAMANI J.

Jugal Kishore — Creditor—Appellant v. *Bhagwat Sahai—Debtor—Respondent.*

Exn. of Decree Appeal No. 100 of 1943, Decided on 16-12-1947, from order of Dist. Judge, Lucknow, D/- 27-8-1943.

Civil P. C. (1908), O. 21, R. 19 — Two decrees for costs in same suit, one in favour of plaintiff and another in favour of defendant — Application for execution of decree for smaller amount is not maintainable — Question of limitation does not arise.

Rule 19 of O. 21 clearly lays down that the decree can be executed only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum and satisfaction for the smaller sum shall be entered upon the decree. It follows from this rule that the person having a decree for the smaller sum cannot execute his decree at all. Hence where two decrees for costs are passed in the suit, one in favour of the plaintiff and the other in favour of the defendant, an application for execution of decree for smaller amount is not maintainable. No question of limitation ever arises in respect of a claim to set off under R. 19 of O. 21. [Para 3]

Annotation :—('44-Com.) Civil P. C. 21 R. 19 N. 3.

N. Bannerjee — for Appellant.

T. N. Srivastava and Sri Ram — for Respondent.

Judgment. — On 22nd August 1935, a suit filed by Jagannath and Balbhaddar, Halwais for partition was dismissed. Jagannath Prasad Kayasth, father of Bhagwat Sahae, respondent of the present appeal, was one of the defendants in the partition suit. The Court directed the defendants in the suit to pay Rs. 208/6/- as costs to the plaintiffs of the suit and at the same time directed that the plaintiff's of the suit shall pay to the father of the appellant Rs. 226 as costs. Both the first and second appeals against the decree were dismissed. The second appeal was dismissed on 23-11-1936. On 12-1-1939 Jagannath and Balbhaddar, the plaintiffs of the partition suit, transferred their decree for costs to Jugal Kishore, the appellant in the present appeal. Jugal Kishore put his decree for Rs. 208/6/- plus Rs. 5/- as costs in execution against Bhagwati Sahae, the respondent. The respondent objected that the decree could not be executed without setting off his decree for costs for Rs. 226/. The executing Court allowed this and passed the following order:

"Note full satisfaction to the extent of Rs. 213/- by way of set off and the case be consigned to records."

Jugal Kishore being dissatisfied with this order went up in appeal and urged that the set-off could not be claimed as Bhagwat Sahae's decree was time-barred. It may be mentioned that the appeal to the Chief Court by the transfer of Jugal Kishore had been dismissed on 23-11-36 and that Jugal Kishore's application for execution was filed on 7-9-42. The learned lower appellate Court held that under the provisions of R. 19 of O. 21, Civil P. C. Jugal Kishore's application for execution was not maintainable, but at the same time the set off could not be claimed by Bhagwat Sahae as his decree had become time barred, and the appellate Court ordered accordingly.

[2] It has now been urged that the appellant's decree is executable. I have heard the learned counsel for the parties and see no reason to interfere.

[3] There can be no doubt that the transfer of Jugal Kishore got a decree for costs for a certain amount and the father of the respondent Bhagwat Sahae obtained in the same suit a decree for a higher amount. At the time of execution, therefore, R. 19, O. 21, Civil P. C., comes into play. This rule clearly lays down that the decree can be executed only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum and satisfaction for the smaller sum shall be entered upon the decree. It follows from the provision of this rule that the person having a decree for the smaller sum cannot execute his decree at all. In these circumstances no question of limitation ever arises in respect of a claim of set off under R. 19, O. 21, Civil P. C. To this extent the view of the lower appellate Court is incorrect, but the lower appellate Court is certainly right in holding that the execution application of Jugal Kishore is not maintainable. The appeal is accordingly dismissed with costs.

D.S./R.G.D *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 223 [C. N. 81]

MISRA AND KAUL JJ.

Sobhnath Singh and another—Plaintiffs—Appellants v. *Pirthipal Singh and others — Defendants—Respondents.*

Second Appeal No. 337 of 1941, Decided on 17-11-1947, against order of Civil Judge, Sultanpur, D/- 31-5-1941.

(a) Transfer of Property Act (1882), S. 123 — "Duly registered"—*A* executing gift deed in favour of *B* — Deed presented for registration — Sub-Registrar going through necessary formalities and provisions of Ss. 34, 35, 58 and 59, Registration Act, complied with — Document kept by Sub-Registrar for endorsing certificate under S. 60 — Sub-Registrar attacked by *C* and deed removed — Subsequent gift deed by *A* in favour of *C* duly registered — Former deed in *B*'s favour held must be deemed to be duly registered within meaning of S. 123, T. P. Act — Registration Act (1908), Ss. 60, 37.

One *A* executed a gift deed in respect of proprietary right in certain villages in favour of *B*, on 27th October and as he could not go to the registration officer the Sub-Registrar was invited to the village and the deed was presented to him on his arrival for registration. The deed was properly executed and attested and the necessary formalities of registration were gone through and the provisions of Ss. 34, 35, 58 and 59, Registration Act, were complied with. Thereafter the Sub-Registrar issued the usual receipt under S. 52, Registration Act, to the executant and kept the document for being copied in register No. 1 and for endorsing the final certificate of registration as required by S. 60 (1). It could not, however, be returned because directly afterwards one *C* came and attacked the Sub-Registrar and succeeded in taking away the document from him. The endorsement required by Ss. 60 and 61 could not, therefore, be completed. On 4th November, *A* executed another gift deed in respect of the same property in favour of *C* and this was registered in the ordinary way and *C* went into possession. On the death of *A*, *B* brought a suit for possession against *C*. The question was whether the deed executed on 27th October operated to effect the transfer of the properties covered by it :

Held that the compliance with the provisions of Ss. 34, 35, 58 and 59, Registration Act, constituted registration of the document and not the presence of the certificate under S. 60 of that Act. The subsequent formalities were mere ministerial acts and since, in this case, the Sub-Registrar had done all he could for carrying out the registration of the instrument up to the stage of writing the certificate, the want of subsequent formalities could be condoned, for in the events which happened the performance of those formalities was rendered physically impossible. The omission to perform the requisite acts must be regarded as omissions in something done by the Sub-Registrar in good faith while performing his duties under the Act within the meaning of S. 87, Registration Act, and the document must, therefore, be deemed to be duly registered within the meaning of S. 123, T. P. Act, notwithstanding the defects. [Paras 4, 5]

Annotation :— ('45-Com.) T. P. Act, S. 123, N. 6. ('45-Com.) Registration Act, S. 60, N. 6; S, 87, N. 2.

(b) Registration Act (1908), S. 60 — Certificate under S. 60 does not by itself effect registration — It is prima facie evidence but matters can be proved by other evidence — Compliance with provisions of Ss. 34, 35, 58 and 59, constitutes registration of document.

The certificate referred to in S. 60 though it may be indicative and afford proof of due registration, does not by itself effect registration. Sub-s. (2) only makes the endorsement of the certificate of registration prima facie evidence for the purposes of proving that the formalities were gone through. The provision does not preclude person from proving the same matters by other evidence, and the failure to comply with the requirements of Ss. 34, 35, 58 and 59 would in spite of the certificate result in the document being rejected as unregistered. It is thus the compliance with the provisions of Ss. 34, 35, 58 and 59 which constitutes registration of a document and not the presence of the certificate. The subsequent formalities are mere ministerial acts and defects occasioned therein by the acts or omission of the registrar or irregularities in carrying out the duties enjoined by Ss. 60 and 61 would merely constitute defects of procedure for which neither the donor nor the donee is responsible.

Annotation:—('45-Com.) Registration Act, S. 60, N. 6.

Case referred :—

1. (1897) 66 L. J. Q. B. 349 : (1897) 1 Q. B. 502 ; 76 L. T. 336 : 45 W. R. 400, Tate v. Lathom.

M. Wasim and P. N. Chaudhari—for Appellants.

H. Husain (for Nos. 2, 4 and 11) and Ali Hasan (for Nos. 3, 7 to 10)—for Respondents.

Judgment.—The facts of this case are somewhat unusual. The appeal arises out of a suit for possession of properties which belonged to one Jai Narain Singh. He died on 8-11-1938. A few days before his death, Jai Narain Singh executed two successive gift deeds in respect of the properties in suit. The first deed was executed on 27-10-1938 in favour of the plaintiffs Sobhnath Singh and Ram Narain Singh who are brothers, Jai Narain transferred thereby his superior proprietary rights in villages Keshopur, Ratapur, Chura and Gokla in Tahasil Amethi, District Sultanpur. Jai Narain Singh's wife had died some time before and he had no issue. He suffered from asthma and did not go to the registration office. On 26-10-1938 the Sub-Registrar of Amethi Mr. Ram Chandra Singh was asked by means of an application Ex. 15, to go to village Ghurha on the next day for purpose of registering the deed. He reached the place at 4 P. M. on 27th October, and Jai Narain Singh presented the document for registration. It was written out by one Lalman P. W. 1 on a stamp paper of the value of Rs. 27-8-0 and was attested by two witnesses. The necessary formalities of registration were gone through and the provisions of Ss 34, 35, 58 and 59, Registration Act, were complied with. Thereafter the Sub-Registrar issued the usual receipt under S. 52 of the Act to the executant and kept the document for being copied in register no. 1 and for endorsing the final certificate of registration as required by S. 60 (1). The receipt Ex. 1 has been produced by the plaintiffs and it shows that the deed was to be returned on the 28th October. It could not, however, be returned because directly afterwards a number of persons including the brothers and sons of some of the

defendants in whose favour the second deed of gift was executed on 4th November 1938 came and attacked the Sub-Registrar and succeeded in taking away the document from him. These persons were eventually convicted of offences under Ss. 147, 323 and 325 read with S. 149, Penal Code. The above facts have been established to the satisfaction of the Courts below. In view of the fact that the deed found its way into the hands of the assailants the document is not on record, and the endorsements as required by Ss. 60 and 61 could not be completed. The defendants claimed to be in possession of the properties in suit by virtue of the subsequent gift deed. That deed was registered in the ordinary way and its execution was admitted by Jai Narain Singh before the same Registration Officer at Amethi. The executant was taken there on a *palki* in spite of his illness.

[2] The parties to the suit were at issue on a number of points but the main question upon which the decision turned was whether the deed which was executed on 27th October operated to affect the transfer of the properties covered by it to the plaintiffs. If it did, the subsequent deed of 4th November 1938, even if it was otherwise valid must remain valueless. The trial Court upheld the plaintiff's gift and decreed their suit. The lower appellate Court holding that the transfer in favour of the plaintiffs failed because the first deed was not properly registered dismissed the suit. The plaintiffs have come up to this Court in appeal.

[3] The case was laid before Hon'ble the Chief Judge for hearing, and he referred it to a Bench under S. 14 (2), Oudh Courts Act by his order, dated 19th September 1947 in view of the importance of the legal contentions which were raised on behalf of the parties before him.

[4] Section 123, T. P. Act, prescribes that a gift of immovable property must be effected by a registered instrument, and the sole point that falls for determination is whether the document executed by Jai Narain Singh on 27th October 1938, can be regarded for the purposes of that section as "a registered instrument." According to S. 3 of the same Act the word "registered" means registered in British India under the law for the time being in force regulating the registration of documents. The learned Civil Judge who decided the defendants' appeal appears to have thought that a document cannot be deemed to have been properly registered uutil the registration is completed within the meaning of S. 61(2), Registration Act. The contention raised on behalf of the appellants was that since equity treated as done what ought to have been done if the law was allowed to have its course, the plaintiffs' title deed should be regarded as duly registered for the purposes of S. 123, T. P. Act. It was urged further that a Court of law would not allow the provisions of the Registration Act and T. P. Act, to be used for effectuating a fraud and defeating the purpose of the first conveyance. We have carefully considered the arguments and we are in general agreement with the principle advocated on appellants' behalf that a valid instrument which effectually conveys property cannot be allowed to lose its effect merely by reason of its fraudulent destruction and as such destruction is more or less the only impediment to the plaintiffs' title it ought not as far as possible be allowed to become unsurmountable. We prefer, however, to decide the case on the statutory provisions contained in the Registration Act, for they in our opinion are clear and render it unnecessary to take the aid of equitable doctrines invoked on appellants' behalf. We have already stated that after its execution and attestation once, the deed was presented to sub-registrar the provisions of Ss. 34, 35, 58 and 59 so far as they were applicable were complied with. Section 60 (1) lays down that:

"After such of the provisions of Ss. 34, 35, 58 and 59 as apply to any document presented for registration have been complied with the registering officer shall endorse thereon a certificate containing the word "registered" together with the number and page of the book in which the document has been copied."

Sub-s. (2) of S. 60 then provides that:

"Such certificate shall be signed, sealed and dated by the registering officer and shall then be admissible for the purpose of proving that the document has been duly registered in the manner provided by this Act and that the facts mentioned in the endorsement referred to in S. 59 have occurred as therein mentioned."

The certificate referred to above could not be endorsed, since the registering officer as we have already stated was compelled to surrender the deed to some unauthorised persons. In our opinion, however, the certificate though it may be indicative and afford proof of due registration does not by itself effect registration. Sub-section (2) only makes the endorsement of the certificate of registration *prima facie* evidence for the purposes of proving that the formalities were gone through. The provision does not preclude a person from proving the same matters by other evidence, and we conceive that the failure to comply with the requirements of Ss. 34, 35, 58 and 59 would in spite of the certificate result in the document being rejected as unregistered. It is thus the compliance with the provisions of S. 34. 35, 58 and 59 which constitutes registration of a document and not the presence of the certificate. The subsequent formalities are mere ministerial acts and defects occasioned therein by the acts or omissions of the registrar or irregularties in carrying out the duties enjoined by Ss. 60 and 61 would merely constitute defects of

procedure for which neither the donor nor the donee is responsible. The deed of 27-10-1938 suffered from such defects only and fortunately they are not fatal to its validity or enforcibility. Section 87 appears to us to provide the cure. The relevant portion of the section is as follows:

"Nothing done in good faith pursuant to this Act ..... by any registering officer shall be deemed invalid merely by reason of any defect in ..... procedure."

"Defect" according to (1897) 66 L. J. Q. B. 349[1] and Webster's as well as Oxford Dictionaries means want or absence of something essential to completeness.

[5] In the case before us, the Sub-Registrar had done all he could for carrying out the registration of the instrument up to the stage of writing the certificate. The want of subsequent formalities can, it would seem, be condoned, for in the events which happened the performance of those formalities was rendered physically impossible. The omission to perform the requisite acts must be regarded as omission in something done by the Sub-Registrar in good faith while performing his duties under the Act and the document must therefore, be deemed to be duly registered within the meaning of S. 123, T. P. Act, notwithstanding the defects. In this view it is obviously unnecessary to reconsider the further question (which was canvassed before us on respondents' behalf) regarding the bar imposed by S. 49 of the Act.

[6] We accordingly allow the appeal and set aside the decision of the lower appellate Court. We restore the decree of the Court of first instance and allow to the plaintiffs the costs of this Court and of the Court of first appeal.

S.C. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 225 *[C. N. 82.]*

CHANDIRAMANI J.

Thakurain Janki Kuar — Plaintiff — Applicant v. *Mt. Babni — Defendant — Opposite Party.*

Civil Revn. Appln. No. 46 of 1943, Decided on 23-1-1948, from order of Munsif, South Sultanapur, D/- 27-4-1943.

(a) Civil P. C. (1908), O. 9, R. 8 — Absence of plaintiff on date of hearing — Defendant admitting part of claim—Whole suit cannot be dismissed.

Where in a suit on a pronote, the defendant admits a part of the claim and the plaintiff does not appear when the suit is called on for hearing, the Court has no power under O. 9, R. 8 to dismiss the whole claim, but must pass a decree for the amount of the claim admitted by the defendant. [Para 2]

Annotation: — ('44-Com.) C. P. C., O. 9 R. 8 N. 7 Pt. 1.

(b) Civil P. C. (1908), O. 16 R. 20 — Scope — Plaintiff sought to be examined on commission as defence witness — Refusal to give evidence — Penalty under rule cannot be imposed.

The penalty provided by O. 16, R. 20 applies when the party required by the Court to give evidence is present before the Court and refuses to give evidence. A penalty under that rule is imposed on the party as such and not as a witness. Hence where a plaintiff who was sought to be examined on commission at the instance of the defendant refused to give evidence on oath, it was held that the penalty provided for in O. 16, R. 20 could not be imposed on the plaintiff as the plaintiff was in fact only a witness before the commissioner and was not required by the Court to give evidence. [Para 2]

Annotation: ('44-Com.) C. P. C., O. 16 R. 20 N. 1.

P. N. Chaudhri — for Applicant.
Ghulam Imam — for Opposite Party.

Order. — On 15th March 1943, the plaintiff filed a suit for recovery of Rs. 142 and interest thereon on the basis of a pronote dated 17th March 1940. The defendant in her written statement admitted execution of the pronote but said that it was in lieu of a previous pronote for Rs. 50, and that out of it Rs. 38-2-6 had already been realized by the plaintiff. In the course of proceedings, she further stated that the plaintiff, who was a *pardanashin* lady might be examined on commission and if she stated that Rs. 142 had been paid to her (defendant) in cash and she had not also realized Rs. 38-2-6 the suit might be decreed against her. The Court appointed a commissioner to record the statement of the plaintiff at her house on 26th April 1943 and directed that the case should come up for hearing on 27th April 1943. The commissioner went to the house of the plaintiff to record her statement, but the plaintiff refused to give a statement on oath. The report was submitted to the Court on 27th April 1943 and the order sheet of that date shows that the counsel for the defendant was present and the plaintiff was absent and proceedings were to continue ex parte against the plaintiff. The Court recorded the following proceedings:

"From the report of the commissioner it appears that the plaintiff refused to give her statement on oath. Suit dismissed with costs to the defendant. Order 16 R. 20/O. 9 R. 8, Civil P. C."

It would appear that later on the plaintiff applied for setting aside the order passed on 27th April 1943. The Court on 25th May 1943 ordered restoration on payment of Rs. 30 as costs by the plaintiff before 6th July 1943. On 6th July 1943 the plaintiff did not pay the costs and prayed that the application for restoration should be dismissed. The application was accordingly dismissed. On 26th July 1943 the present application in revision was filed against the decree of 27th April 1943, on the ground that the refusal of the plaintiff to take the oath did not justify the Court in throwing out the claim of the plaintiff.

[2] I have heard the learned counsel for the parties and am satisfied that the order passed by the Court below requires modification. It was urged on behalf of the opposite party that the

order of dismissal of the suit was passed both under O. 16, R. 20 and O. 9 R. 8, Civil P. C., and that in the circumstances no interference was called for. Rule 8 provides that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing the Court shall make an order that the suit be dismissed unless the defendant admits the claim or part thereof in which case the Court shall pass a decree against the defendant upon such admission and where only a part of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder. In this case clearly the defendant had admitted the claim of the plaintiff to the extent of Rs. 50 minus Rs. 38-2-6, that is. Rs. 11-13-6. The Court could not dismiss this claim. As regards the balance the matter cannot be reopened now as the applicant chose to apply for restoration and that application has been dismissed. The learned counsel for the opposite-party says that this part of the claim relating to Rs. 11-13-6 was also dismissed under R. 20, O. 16, Civil P. C. The trial Court has certainly made a reference to this rule, but it appears to me that it has not been rightly applied. The plaintiff refused to give evidence before the commissioner. She was not present in Court and her refusal did not take place before the Court. The learned connsel for the opposite-party said that under R. 17, O. 26, Civil P. C., the commissioner is to be deemed to be a Civil Court and therefore presence before the commissioner shall be deemed to be presence in Court. The commissioner is a Court only in respect of summoning, attendance and examination of witnesses and of their remuneration and in respect of the penalties to be imposed upon witnesses appearing before a commissioner. The plaintiff was in fact only a witness before the commissioner. The penalty provided by R. 20 applies when the party required by the Court to give evidence is present before the Court and refuses to give evidence. A penalty under R. 20, O. 16 is imposed on the party as such and not as a witness. Besides it was not the Court that required the plaintiff to give evidence but it was the defendant who apparently wanted the plaintiff to be examined as her witness. Rule 20, O. 16, Civil P. C., was not therefore correctly applied by the trial Court.

[3] The learned counsel for the opposite party urged that it was open to the applicant to appeal against the order under R. 20, O. 16, Civil P. C. It was open to the plaintiff either to appeal against that order or to appeal against the decree and she has chosen to appeal against the decree and there is nothing to prevent her from doing so. It follows that the dismissal of the plaintiff's claim in respect of the amount due to her on the admission of the defendant herself was contrary to law. Accordingly it is ordered that the plaintiff applicant shall get a decree for Rs. 11-13-6 from the defendant opposite party. She will get interest at 3 per cent on this amount from 27th April 1943. As the applicant has succeeded only in part the parties will bear their own costs in all the Courts. The decree of the lower Court is modified accordingly.

K.S. *Order accordingly.*

A. I. R. (35) 1948 Oudh 226 *[C. N. 83.]*

KAUL J.

Y. A. Dikshit — Defendant 2—Appellant v. *Radha Krishna Pratap Singh—Plaintiff — Respondent.*

Second Appeals Nos. 144 and 272 of 1942, Decided on 17-3-1948, from order of Addl. Civil Judge, Gonda, D/-13-4-1942.

(a) Tort — Defamation — Publication to third party is essential.

No action for slander can be maintained unless there has been publication of the slanderous words to some one other than the person slandered: (1894) 2. Q. B. 54, *Rel. on.* [Para 13]

(b) Tort — Defamation — Law of—Applicability of English law in India — Extent of, indicated.

There is no statutory law of defamation in India except what is contained in Chap. 21, Penal Code. As to civil liability for defamation, however, it has long been settled in this country that an action for damages would lie in proper cases. The basis on which Courts entertain suits for damages for libel or slander in India is the same as in England, viz., that every man has a right to have his name maintained unimpaired. A large number of artificial and technical rules have grown around this branch of the law in England. Courts in India are not bound by them. The dicta of English Judges or general rules based on such dicta may, however, be helpful if they can be applied to Indian cases as principles of justice, equity and good conscience: (1862) 8 Q. B. 491, *Ref.* [Para 14]

(c) Tort — Defamation — Privilege—Communication made from sense of duty is privileged — Penal Code (1860), S. 499.

A communication made from a sense of duty, legal, moral or social, must, if the circumstances of the case so justify, be treated as privileged. But for such a rule, considerable inconvenience and even hardship is likely to ensure.

The assistant manager of a taluqdari prepared certain representations for submission to the talukdar through the manager, taluqdar. In them, there were passages, containing veiled accusations against the taluqdar and his employees and remarks that the wife of the taluqdar was conspiring against the taluqdar; that the taluqdar was imbecile and was influenced by his wife in matters of administration and many other insinuations. The assistant manager took these representations to the manager who after going through them remarked that he was "a traitor and disloyal" to the taluqdar. There was no one present there. Not liking the remark, the assistant manager sent his resignation to the manager, along with a letter withdrawing the representations. In the letter of resignation the assistant manager had said, "as my immediate officer thinks I

have not been true to your honour, I think it unworthy of me to continue in service any more and beg to resign." When this resignation was put before the taluqdar, he questioned the manager what the assistant manager meant by his reference to his "immediate officer" and what he thought about him. The manager told the taluqdar what had transpired between him and the assistant manager. The defamation complained against was that the manager called the assistant manager "a traitor" before the taluqdar:

Held, that the communication made by the manager to the taluqdar concerning the assistant manager clearly fell under the above rule, and that even if the manager was wrong in his judgment the occasion was privileged: 1891 A. C. 73, *Rel. on.* [Para 14]

(d) Tort—Defamation—Justification — Employer while accepting resignation of employee using strong language — Conduct of employee justifying such strong language — Acceptance letter held not defamatory — Employee's superior officer handing over file containing this letter to his personal assistant in ordinary course of business — Held no justification for action for libel.

In the representation prepared for presentation to a Taluqdar (Maharaja) through the Manager, an employee (plaintiff) of the Maharaja not only made insinuations but actually impressed upon the Maharaja that the Maharani Sirkar was opposing his wishes. Certain paragraphs of his representation made exceedingly mischievous suggestions about the Maharani. The representations contained distortions of facts, half truths and untruths, jumbled together to suit his own purpose and fancies. The Maharaja was ridiculed as an imbecile and the Maharani Sirkar was accused of conspiracy against the Maharaja. Not liking a certain remark made by his superior officer on these representations the plaintiff resigned his services. The Maharaja accepted the plaintiff's resignation and passed an order containing amongst others the following remarks : "It is extremely wicked, ignoble and disloyal on the part of plaintiff to make even veiled insinuations against Maharani Saheba. The plaintiff has not been true to the Maharani Saheba and myself. I am definitely of opinion that he is unworthy of being retained in the service of my Raj any longer . . . ." The plaintiff complained that this letter contained defamatory expressions, and his superior officer published them to his personal assistant by handing over the file to him containing that order :

Held that the words used by the Maharaja could not be said to be inappropriate or untrue in describing the plaintiff's conduct. Publication of these words could not make his superior officer liable in damages for libel.

Held further that assuming that the order passed by the Maharaja, if published could form the basis for a suit for libel, the handing over of the file containing the order by his superior to his personal assistant was in the ordinary course of business, and no action for libel could be founded on such publication. [Para 16]

(e) Tort—Defamation— Justification—Attack on person's character— Answer to attack containing remarks against character of attacker—Communication of answer to those who heard the attack held justified.

Where an attack is made upon a man's character, he has a right to answer it and to communicate his answer to all concerned, particularly those who heard the attack.

The plaintiff in his representations to the employer referred the defendant, another employee, as one of the "intriguers and hypocrites who shed gallons of crocodile tears etc. etc." The defendant in answer called the plaintiff "intriguer and disloyal" :

Held that the defendant clearly had a right of self-defence. He had a right to convince those who had read the plaintiff's representation, of the falsity of the remarks, contained in them, by showing the orders passed by the employer, containing remarks against the conduct of the plaintiff. The defendant was further fully justified in calling the plaintiff "intriguer and disloyal" since the plaintiff had hatched a plot against him to injure him by the way he was referred to, in the representations. [Paras 19, 20]

Cases referred:—

1. (1894) 2 Q. B. D. 54, Hebditch v. Mac Ilwaine.
2. (1882) 8 Q. B. D. 491 : 51 L. J. Q. B. 380 : 46 L.T. 412 : 30 W. R. 541, Scott v. Sampson.
3. (1891) 1891 A. C. 73 : 60 L. J. P. C 11 : 63 L. T. 814 : 39 W. R. 388, Jenoure v. Delmege.

R. N. Shukla and Ali Hasan—for Appellant.

Hyder Husain—for Respondent.

Judgment. — These are two appeals arising out of the same judgment and may conveniently be disposed of together. The material facts are as follows :

[2] The Maharaja of Balrampur is the proprietor of a big taluqa in Gonda district, and owns extensive zamindari property. He naturally employs a large staff to manage the estate, and to look after the affairs of his Raj. Kunwar Radha Krishna Pratap Singh, appellant in appeal No. 272 of 1942, is the son of one Captain Adhya Pratap Singh who was in the service of the Balrampur Raj for about 20 years. Captain Adhya Pratap Singh was also related to the second wife of the late owner of the Raj-Maharaja Sir Drigbijai Singh Bahadur of Balrampur. Kunwar Radha Krishna Pratap Singh was educated in India and in England at the cost of Balrampur Raj. In 1935 he was appointed Superintendent of the Raja's Stables and gardens. On 1-10-1938, he was raised to the position of Assistant Manager of the Raj. Y. A. Dikshit, the appellant in the other appeal, (No. 144 of 1942), is also an employee of the Raj. He is the confidential adviser of the Maharani. The suit which has given rise to these appeals was brought in the Court of the Munsif Utraula by Kunwar Radha Krishna Pratap Singh for recovery of Rs. 2000 damages for defamation. Four persons were impleaded as defendants : (1) H. S. Bates, Esq., I. C. S., Manager of Balrampur Raj, (2) Y. A. Dikshit, Confidential Adviser to the Maharani Saheba, Balrampur Raj, (3) Virendra Vikram Singh, Private Secretary to the Maharaja, and (4) Maharaja Sir Pateshwari Prasad Singh Saheb of Balrampur.

[3] The plaint alleges that the plaintiff worked as Assistant Manager of Balrampur Raj till 1-3-1940, when his resignation was accepted by the Maharaja. The facts that led to his resignation were that on 9-2-1940, the plaintiff prepared a representation to be presented to the Maharaja through Mr. Bates, and personally took it to him. Mr. Bates, after glancing through the representation, returned it to him with the obser-

vation that he should not press it. On 26-2-1940, Mr. Bates asked the plaintiff to see him the next morning. Along with his reply to Mr. Bates' note, asking the plaintiff to meet him, he sent to Mr. Bates the unsigned representation which he had taken to him on 9th February and another amended representation which was signed by him. He requested Mr. Bates to deal with those representations. The next day the plaintiff went to Mr. Bates, who, after going through both the representations, called the plaintiff a "traitor to the Maharaja." This accusation was, according to the plaintiff, wholly unfounded. The plaintiff, however, returned to his house and sent a letter to Mr. Bates withdrawing the representation. He also submitted his resignation to him the same day.

[4] On 1-3-1940, the Maharaja accepted the plaintiff's resignation and passed an order containing amongst others the following remarks :

"It is extremely wicked, ignoble and disloyal on the part of Mr. Radha Krishna Pratap Singh to make even veiled insinuations against Maharani Saheba .... Mr. Radha Krishna Pratap Singh has not been true to the Maharani Saheba and myself. I am definitely of opinion that he is unworthy of being retained in the service of my Raj any longer ....."

The plaintiff alleged that these words, which were defamatory of him, were published to various persons by the defendants. The plaintiff further complained that defendants 1 to 3 had called him "an intriguer and disloyal." Paragraph 3 of the plaint ran as follows :

"That during the term of his service the plaintiff had to fight oppositions and face difficulties at every stage and prior to his resignation things were so manoeuvred by the defendants 1 to 3 who concerted together against the plaintiff, as to make it impossible for the plaintiff to remain serving in the estate except at the cost of losing his prestige and self-respect. In that very connection defendants 1 to 3 poisoned the ears of the Maharaja defendant 4 against the plaintiff by misrepresenting and distorting facts."

His resignation having been accepted, the plaintiff on 27-2-1941, instituted his suit for damages for defamation amounting to Rs. 2000. Originally no relief was claimed against the Maharaja (defendant 4) but subsequently a decree against him was also claimed. Defendant 1 Mr. Bates admitted that he had called the plaintiff "traitor to the Maharaja." He added, however, that this was done when no one else was present in the room except himself and Kunwar Radha Krishna Pratap Singh. He further claimed "qualified privilege." He denied any conspiracy against the plaintiff and challenged the assertion that he had called the plaintiff an intriguer and disloyal. Defendant 2 Y. A. Dikshit and defendant 3 Mr. Virendra Vikram Singh, denied the conspiracy and further challenged the assertion that they had called the plaintiff "intriguer and disloyal." The Maharaja denied that he was actuated by any malice in passing the order complained of. As the plaintiff's employer, he claimed a "master's privilege against his servant to comment on his servant's conduct."

[5] The following issues were framed by the trial Court :

"(1) Is Maharaja Pateshwar Prasad Singh's order dated 1-3-1940 accepting the resignation of the plaintiff in general and the words alleged in para 7 of the plaint in particular defamatory in the ordinary and natural meaning ?

2. Did defendants 1 to 3 call the plaintiff "intriguer and disloyal" ?

3. Are the words "traitor" uttered by Mr. Bates and "intriguer and disloyal" alleged to have been used by defendants 1 to 3 defamatory in their ordinary and natural meaning ?

4. Did defendants 1 to 3 publish the alleged defamatory statements concerning the plaintiff as given in issues (1) and (3)? If so, did they do so maliciously?

5. Were the defendants justified in making and publishing the alleged statements as covered in issues (1) and (3) ?

6. Did defendants 1 and 4 make the statements as given in issues (1) and (3) in their privileged position as alleged ?

7. Is the suit bad for multifariousness ?

8. Are the defendants entitled to special costs under S. 35A, Civil P. C. ?

9. To what relief and amount of damages is the plaintiff entitled ?"

[6] The learned Munsif in an elaborate and carefully written judgment held that the order passed by the Maharaja was not defamatory but was a fair comment on the plaintiff's action in submitting the two representations to which reference has been made. He was of opinion that in the case before him there could be no question of the ordinary and natural meaning of the words used, as the order must be read with reference to the representations made by the plaintiff, Exs. A2 and A3. He further held that it was proved that only Y. A. Dikshit had called the plaintiff "intriguer and disloyal." It was found by him that there was no malice on the part of any of the defendants. On the question of publication he held in favour of the plaintiff. He further held that the defendants were justified in using the expressions complained of and that all the four defendants could claim privilege. The suit was accordingly dismissed.

[7] Kunwar Radha Krishna Pratap Singh filed an appeal which was disposed of by the Additional Civil Judge of Gonda. He held that the expression "traitor to the Maharaja" used by Mr. Bates, as well as the expressions used in the order passed by the Maharaja, and the words "intriguer and disloyal" used by Y. A. Dikshit were defamatory. On the evidence before him he came to the conclusion that though Mr. Bates had originally called the plaintiff "traitor to the Maharaja" while no one else was present, subsequently he repeated these before the Maharaja

and another person Mukat Behari Lal. He was of opinion, however, that Mr. Bates was not actuated by any malice and that the occasions were privileged. He held that there was no proof of any conspiracy among the defendants, nor was it proved that Mr. Virendra Vikram Singh at any time used any defamatory words in relation to the plaintiff. He held that Y. A. Dikshit could not claim privilege and as the expressions used by him "intriguer and disloyal" were defamatory, he was liable to damages. As a result of these findings he dismissed the appeal of Radha Krishna Pratap Singh against Mr. Bates, Virendra Vikram Singh and the Maharaja. He allowed it against Mr. Dikshit and passed a decree for Rs. 2000 and cost in favour of the plaintiff. Two appeals before me are preferred against this decision: Appeal No. 144 by Mr. Y. A. Dikshit and Appeal No. 272 by Kunwar Radha Krishna Pratap Singh. Kunwar Radha Krishna Pratap Singh's appeal is directed against Mr. Bates alone. I will deal with this appeal first.

[8] In order to enable us to see the points which arise for consideration in their proper perspective, it is necessary to reproduce here in extenso the two representations submitted by the appellant, Kunwar Radha Krishna Pratap Singh, and the order passed by the Maharaja accepting his resignation. Exhibit A2 reads as follows:

"To

Sri Man Maharaja Sahib Bahadur, Balrampur Raj.

Through:

H. S. Bates, Esq, I. C. S.,

Manager, Balrampur Raj.

May it please your honour,

Most respectfully I beg to lay the following for your kind consideration:—

1. That though we have a Maharaja—with a majestic personality, wonderful memory, untiring energy, radient health—Free of all evils and under the influence of no one, Always eager to hear patiently the Riyaya of the Raj and redress their grievances. Touring in all the corners of the Raj at a good bit of inconvenience and personal discomfort—Of firm determination still ready to yield to reason — Always ready to learn and look into things still least interfering in the day-to-day administration of the various departments and exceedingly polite to services—the qualities that make you so dear to all and an ideal Maharaja for running the Estate on democratic lines.

2. That though we have a Maharani Sirkar "coming out of a family of administrators of high repute and calibre and known to be absolutely devoted to Maharaja Bahadur and like an ideal "Hindu Dharma-Patni" wanting nothing for herself and ready to take any risk and to any sacrifice for the "Pati."

3. That though we have Mr. Bates as Manager of the Raj who is a senior member of Civil Service, extremely kind and polite to his subordinates, always ready to yield to reason and loved alike by services and riyaya for his kind and sympathetic heart and saintly ways and highly loyal and faithful to Maharaja Bahadur and chiefly responsible for the release of the Raj from Court of Wards.

4. That though masses are solidly for Maharaja Bahadur whom they love and admire for his good qualities and for whom if the need be and they know of it they may do any sacrifice.

5. That though such a district as Bahraich where we have comparatively speaking less influence thought fit to praise the qualities of Maharaja Bahadur by presenting him various addresses.

6. That still it is a strong rumour that Maharaja Bahadur has to sit with Maharani Sirkar in Purdah to deal important papers which if true will undermine Maharaja Bahadur's prestige and position in public eye and may be resented by every faithful citizen and servant.

7. That still it appears to be a fact that everything is not so smooth running and plain sailing as it should be and there appears to be a sense of uncertainty and insecurity prevailing in services and certain amount of dissatisfaction all round.

8. That these fears have naturally risen due to successive retrenchments and other economic measures which were the outcome of the bogey of financial crisis raised by brainy people when Mr. Bates was out in England on leave and ended in hardship to certain bumble servants of the Raj and increase in deputation allowance of the author of the retrenchment scheme on top of annual graded promotion. What was the real motive of these brainy people has yet to be probed into.

9. That still one finds that a particular report written about Maharaja Bahadur which is said to be not very complimentary to Maharaja Bahadur is claimed to have been written with the help of one of Maharani Sirkar's trusted servants.

10. That still it is said that the period of Court of Wards was extended for the first time on account of opposition from a certain quarter not unknown to your goodself and even at the time of release taking advantage of these, certain demands it is said were pressed on behalf of Maharani Sirkar which created a deadlock and it is said that ultimately an English Officer had to remark that H. E. was fighting like that for Sirkar and who was to fight, for Maharaja and declined to agree with the request in its entirety.

11. That since your honour mentioned my name in connection with Private Secretary's appointment there has been a great intrigue against me and certain gross untruths and deliberate lies were told against me to Mr. Bates and to other respectable personalities which I regard as my duty to expose and fight.

12. That though Maharaja Bahadur is the constitutional head of the Balrampur administration still it is an open secret that he could not have a Secretary of his choice even when he gave an option as wide as to give him any English man and the news is all the more discomforting when one hears that even Maharani Sirkar opposed Maharaja Bahadur's wishes.

13. That there are a good few other rather unpleasant things which I do not want to mention here.

14. That these things are bound to cause a serious rupture in the house some day and I consider it my duty to struggle to stop it after carefully studying things and thinking out ways and means for doing so.

15. That this cannot be done and should not be done as long as I am in regular service and I have therefore decided to go on long leave.

16. I therefore beseech your goodself to grant me all my due leave and order immediate payment of my dues and to relieve me early so that I may:

Fight for your cause as an independent and faithful citizen and relation,

Struggle to remove the sense of insecurity and uncertainty from service.

Give Maharani Sirkar frank and correct advice if and when needed. Help your honour and Mr. Bates to establish constitutional rule in Balrampur. Enlighten the masses on their duty to your goodself and the Raj. Expose the intriguers and hypocrites who shed gallons of crocodile tear and profess tons of love to you and still talk lots of nonsense and indulge in undesirable propoganda against your honour. And thus do real service to the Raj which may be remembered long after I am dead and gone.

Thanking your goodself, Maharani Sirkar and Mr. Bates for all the kindness and special considerations shown to me.

I have the honour to be,
Sir,
Your most obedient servant,"

This representation bears no signature. Exhibit A3 is a copy of the same representation signed by Kunwar Radha Krishna Pratap Singh and differs from the former only in two particulars. The last two lines of para. 1 in this representation are as follows:

"An ideal Maharaja for running the estate on constitutional lines with the help and advice of his manager."

Paragraph 6 has also been slightly altered and runs as follows:

"That still it is a strong rumour that Maharaja Bahadur has to sit with a "body of administrators" in purdah to deal important papers which if true is not only wrong from legal and constitutional point of view but is bound to undermine Maharaja Bahadur's prestige and position in public eye and may be resented by every faithful citizen. In view of what I have said above there is no need at all of these "administrators" but in case any body feels that there is any need of a helper or helpers this privilege should go to the riyaya of the Raj who have an inherent and birth right to advise their Maharaja."

Accompanying these representations was a covering letter Ex. A4. This ran as follows:

Manager: In compliance to your above order I shall be at your service at 10. I am sorry I could not see you last time when you sent for me as I had gone out with your permission. As you said nothing about it at Lucknow, I thought there was no urgency and was waiting for the visiting day. Meanwhile you may kindly deal with the accompanying envelope. To be frank the more I learn now is to create a misunderstanding between us which I want to avoid at any cost.

27/2/40. (Sd.) R. K. Pratap Singh."

Kunwar Radha Krishna Pratap Singh's resignation is Ex. A6. It is addressed to the Maharaja and runs as follows:

To

Sriman Maharaja Saheb Bahadur,
Through H. S. Bates, Esq. I. C. S., Manager,
May it please your honour,

As my immediate officer thinks I have not been true to your honour I think it unworthy of me to continue in service any more and beg to resign.

I had the honour to be,
Your humble servant,
(Sd.) R. K. Pratap Singh."

The two Courts below have differed as to the purport and true meaning of the representations made by Kunwar Radha Krishna Pratap Singh. The learned Munsif on a careful analysis of the various paragraphs of the representations was led to the conclusion that the appellant was attacking the honour and prestige of the Maharaja. He further found in the representations "a veiled insinuation against the Maharani." He also records his opinion that Radha Krishna Pratap Singh called Y. A. Dikshit and Virendra Vikram Singh hypocrites and intriguers and that he wanted to prejudice the Maharaja against them. He accordingly held that the expressions used by the Maharaja in his order with reference to his Assistant Manager were justified.

[9] The learned Civil Judge in appeal took a different view. He recorded it as his opinion that the representations did not "merit such a strong and defamatory disapprobation on the part of the Maharaja or Mr. Bates." It is therefore necessary to examine the representations and consider what is their true import.

[10] Having given the representations my careful consideration and read them as a whole I have no doubt in my mind that these are most mischievous documents. Though in the beginning they purport to shower encomiums not only upon the Maharaja and Maharani, but also upon Mr. Bates, yet by insinuations and innuendoes, which at times are hardly veiled, the appellant not only criticises the administration of the Maharaja, but attempts to create bad blood between the Maharaja and the Maharani. He wants to impress it upon the Maharaja that the estate employees are hypocrites and intriguers and he alone is a faithful and true servant. He also indicates why he intended to go on long leave, that is: (1) To fight for the Maharaja's cause "as an independent and faithful citizen and relation," (2) struggle to remove the state of uncertainty from services, (3) give the Maharani Sirkar frank and correct advice, if and when needed, (4) help the Maharaja and Mr. Bates to establish constitutional rule in Balrampur, (5) enlighten the masses on their duty to the Maharaja, and (6) to expose the "intriguers and hypocrites . . . . and thus do real service to the Raj . . . . "

[11] Paragraphs 1 to 5 of this representation are devoted to bestowing praise and describing the good qualities of the Maharaja, the Maharani and their manager Mr. Bates, and assuring the Maharaja that the masses were solidly for him. With para. 6 begins the criticism of the Maharaja's administration and of his conduct in consulting his Maharani in matters of the Raj. In the unsigned representation Ex. A2 there is a direct reference to the Maharaja Bahadur "sitting with the Maharani Sirkar in parda" to deal with important papers. The writer does not take the responsibility for the averments. On the other hand it is cleverly stated that there is a strong rumour that the Maharaja does so. Then the appellant gives his opinion that if this is true,

it would undermine the Maharaja's prestige and position in the Raj and will be resented by every faithful citizen and servant. It is obvious that no weight can be attached to the opening words of this paragraph that there was a strong rumour to that effect. The appellant was the Assistant Manager of the estate. He was distantly related to the Maharaja. His father had been in the service of the estate for 20 years. Such a person could not pretend to be ignorant of how the Maharaja dealt with the affairs of the estate. The expression of opinion that the conduct of the Maharaja would be resented "by every faithful citizen and servant" is only an euphemism for saying that the appellant resents this. He was telling the Maharaja in effect and with undisguised contempt that the latter had no will of his own and was altogether led by the Maharani. Paragraph 7 tells the Maharaja that there was a sense of uncertainty prevailing in the services and a great deal of dissatisfaction all round. Paragraph 8 criticises the retrenchment measures adopted by the Maharaja on the advice of some of his officials. In Para. 9 there is a direct attack upon the Maharani Sirkar and her servants. Not improbably the reference is to Y. A. Dikshit. He tells the Maharaja that the Maharani and her servants were responsible for making a report which was not complimentary to the Maharaja Bahadur. Paragraph 10 is in the same strain. It accuses the Maharani Sirkar and seeks to impress upon the Maharaja that in her dealings with her husband the conduct of the Maharani and her servants was not what it should be. Paragraph 11 draws the Maharaja's attention to an alleged intrigue against the writer since his name was proposed by the Maharaja for the post of the private secretary and informs him that the appellant was determined to "expose and fight" the intrigue. Paragraph 12 also deals with the same subject. The writer points out to the Maharaja that though he is the "head of Balrampur administration" still he had been rendered so helpless by his Maharani that he could not appoint a private secretary of his own choice. Paragraph 13 is still more mischievous. It says "there are a good few other rather unpleasant things which I do not want to mention here." This may imply anything, and in the setting in which it is placed, it suggests that the unpleasant things which the writer did not consider proper to mention related to the Maharani. Paragraph 14 shows that these unpleasant and unmentionable things had reference to the Maharaja's family and his household. Paragraph 15 emphasises the grave nature of the things which the writer has left unmentioned. The matters referred to are, according to the writer, of such serious character that he cannot tolerate them and accordingly he decided to go on long leave.

[12] I have already mentioned earlier the alleged objects which the appellant had in view in applying for leave. Whatever be the form of expression chosen by the appellant, it is clear that one of the tasks he had set to himself while on leave was to see the establishment of "constitutional rule" in Balrampur and "to enlighten the masses on their duty to the Maharaja and the Raj." It is not difficult to see what the writer really implied. Obviously there is no question of any constitutional rule in Balrampur. The Maharaja is not the ruler of the residents of the estate. He is only a taluqdar. The reference to the establishment of a constitutional rule in Balrampur Raj leaves no doubt in my mind that there was an implied threat, held out to the estate authorities that the appellant intended to start a mass agitation in Balrampur. Even if the writer did not actually intend to do so, he could not legitimately complain if, from the language used by him, Mr. Bates inferred that Kunwar Radha Krishna Pratap Singh was much mortified at not being appointed private secretary of the Maharaja, and was so dissatisfied with the manner in which the estate administration was being carried on, that he wanted to start mass agitation to set things right. This agitation was expressly intended to the establishment of a constitutional rule in Balrampur, and the means to achieve that end were "enlightenment of the masses", which is another expression for "rousing the tenantry". The appellant cannot legitimately complain if Mr. Bates, having regard to all that the appellant owed to the estate considered his conduct "as disloyal to the Maharaja", and called him a traitor to his employer. At the present day when there is so much talk about the abolition of zamindari system, and relations between the zamindars and their tenants are subject of much acrimonious controversy between different political parties, to talk about the establishment of a constitutional rule by enlightenment of the masses cannot but be interpreted as disloyalty to the taluqdar. This would be considered as an unfriendly act on part of even a stranger, but certainly it was disloyalty to the Maharaja if done by one of his own servants who, and whose family were under great obligations to him. The imputations conveyed by the words "traitor to the Maharaja" cannot be called false. The conduct of the appellant fully justified the use of this epithet. Apart from others, on this ground alone the appellant's claim in respect of the use of this epithet, and its publication by Mr. Bates, must fail.

[13] Mr. Bates had called the appellant "a traitor to the Maharaja". This was done while he and the appellant were the only persons in his room. It is well settled that no action for slander can be maintained unless there has been publication of the slanderous words to some one other than the person slandered. As observed by Lord Esher M. R. in (1894) 2 Q.B.D. 54[1] at p. 58 "the material part of the cause of action in libel is not the writing, but the publication of the libel." This applies both to libel and slander. The appellant complains that Mr. Bates told the Maharaja that he had called him a traitor. This is not denied by Mr. Bates, but it was the appellant's own resignation, EX. A6 which made it necessary for Mr. Bates to tell the Maharaja of what had passed between him and the appellant in connection with his representations. He said in his resignation "as my immediate officer thinks I have not been true to your honour, I think it unworthy of me to continue in service any more and beg to resign". Naturally when this resignation was put before the Maharaja, he must have questioned Mr. Bates what the appellant meant by his reference to his 'immediate officer' and what he thought about him. In these circumstances Mr. Bates could not but tell the Maharaja what had transpired between him and the appellant.

[14] There is no statutory law of defamation in India except what is contained in Chap. XXI, Penal Code. As to civil liability for defamation, however, it has long been settled in this country that an action for damages would lie in proper cases. The basis on which Courts entertain suits for damages for libel or slander in India is the same as in England, viz., that every man has a right to have his name maintained unimpaired, i.e. "to have", as was said by Cave J. in (1882) 8 Q. B. D. 491[2] at p. 503 "the estimation in which he stands in the opinion of others unaffected by false statements to his discredit" A large number of artificial and technical rules have grown around this branch of the law in England. We in this country are not bound by them. The dicta of English Judges or general rules based on such dicta may, however, be helpful if they can be applied to Indian cases as principle of justice, equity and good conscience. In England if a person is asked as to the character of his former servant, there is a social duty upon him to tell the inquirer what he knows about him. In such a case, even if it turns out that the master was mistaken in some of his statements no action will lie against him at the instance of the servant. It was observed by Lord Macnaghten in 1891 A. C. 73[3] at p. 78 that

"there is no reason why greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social."

This statement contains a principle of wider application than in the country where it was made. A communication made from a sense of duty, legal, moral or social, must if the circumstances of the case so justify, be treated as privileged. But for such a rule considerable inconvenience and even hardship is likely to ensure. The communication made by Mr. Bates to the Maharaja concerning the appellant clearly falls under this rule, and even if Mr. Bates was wrong in his judgment about the appellant, the occasion would be privileged.

[15] The next point urged was that the order passed by the Maharaja on the appellant's resignation, an extract from which has been quoted earlier in this judgment, contained defamatory expressions, and Mr. Bates published them to his personal assistant Mukat Behari Lal by handing over the file to him containing that order. The first question to be considered in connection with this argument is whether the order passed by the Maharaja upon the appeallant's resignation could form the foundation for an action for damages for defamation. If what the Maharaja said about the appellant in his order was true, there is no question of defamation. It is true that the Maharaja used the words 'wicked, ignoble and disloyal' in relation to the appellant's conduct in making the insinuations against the Maharani. That he not only made insinuations but actually impressed upon the Maharaja that the Maharani Sirkar was opposing his wishes. Paragraphs 13 and 14 of his representation make exceedingly mischievous suggestions about the Maharani. The appellant made no attempt to explain, while he was in the witness box, what he meant by saying that there were 'other rather unpleasant things which he did not want to mention,' and that those things were bound to cause a serious rupture in the (Maharaja's) house some day. It is well known that more may at times be conveyed by suggestions than by express words. What was conveyed to the mind of the Maharaja by these two paragraphs is clear from the observations made by him in his order that it was impossible to condemn in restrained language

"Such behaviour and the *sinister* meaning he (the appellant) has sought to convey. I desire most emphatically to pronounce that the allegations contained in his (appellant's) application dated 26/27-12-1940, are distortions of facts, half truths, and untruths jumbled together to suit his own purpoe and fancies."

Paragraphs 13 and 14 apparently were meant to convey to the Maharaja, and did convey to him, more than some express vituperative epithets about the Maharani and himself would

have done. The appellant was only an assistant manager of the Maharaja. It was sheer impertinence on his part to presume to advise the Maharaja about matters which did not concern him. He had no business to assume to himself the role of the Maharaja's guardian and preceptor and to tell him what he should or should not do. I am unable to agree with the view taken by the learned Additional Civil Judge in appeal of the appellant's representation. The learned Judge observed :

"I cannot hold that the Maharaja is ridiculed in this representation as an imbecile or that the Maharani Sirkar is accused of conspiracy against the Maharaja or that the plaintiff held out a threat to raise the masses of the estate against the Maharaja. The representation is not a cry against the appointment of Mr. Singh as the private secretary to the Maharaja. The plaintiff never aspired for this post. The representation does seek to bring to the notice of the Maharaja and to the Maharani that all was not well in the estate and that Mr. Dikshit who would shed gallons of crocodile tears and profess tons of love for the Maharaja and the Maharani was an intriguer and hypocrite and that if he was allowed to work out his scheme of transference of power a serious rupture in the house of the Maharaja would be a matter of no surprise."

The learned Judge is an Indian and can well understand what is implied in the language used in para. 6 of the representation. If the appellant had said in express words that the Maharaja Bahadur cannot deal with important papers relating to the estate himself, and that he has to sit with the Maharani Sirkar in purda to deal with them, the paragraph would have been less offensive. The sting in this paragraph is clear. It tells the Maharaja in effect that he was an imbecile who had allowed his wife to thoroughly dominate over him and she was leading him by the nose. The sarcasm and contempt conveyed in the language used by the appellant does not require comment nor am I able to agree with the lower Court in its view that the representation was not 'a cry against the appointment of Mr. Singh as the private secretary of the Maharaja.' There is no warrant for the observation 'the plaintiff never aspired for this post.' May be that the appellant did not formally apply for the post. There is, however, express mention of this matter in paras. 11 and 12 of the representation. The learned Judge observed that the appellant wanted to bring to the notice of the Maharaja and the Maharani that 'all was not well in the estate.' There is nothing on the record to show that this was so, nor was any attempt made to prove that Mr. Dikshit was an intriguer and a hypocrite or that if he was allowed to work there would be a serious rupture in the family of the Maharaja.

[16] In dealing with the appellant's highly impertinent representation, the Maharaja acted with commendable restraint. The expressions 'wicked, ignoble and disloyal' are none too strong to condemn the appellant's conduct in sending such a representation to his employer. 'Wicked' is a strong term of general disapprobation. That the appellant was attempting to create ill-will between the Maharaja and the Maharani is obvious, and such conduct was certainly disloyal, ignoble and mean. I have no doubt that the words used by the Maharaja cannot be said to be inappropriate or untrue in describing the appellant's conduct. Publication of these words could not make Mr. Bates liable in damages for libel. Assuming, however, that the order passed by the Maharaja, if published could form the basis for a suit for libel, did the action taken by Mr. Bates with respect to it constitute publication? It has been found by the lower appellate Court that Mr. Bates placed the Maharaja's order on a file which he passed on to his personal assistant Mukat Behari Lal for being copied on a typewriter and sent to the applicant. It has further been found that Mukat Behari Lal saw the order. This part of the learned Judge's finding was challenged before me and my attention was not drawn to any evidence showing that the order was read by Mukat Beari Lal. But assuming that he read it, could this constitute publication of the libel by Mr. Bates? It was the duty of Mr. Bates to communicate to the appellant the order passed by the Maharaja on his representation, his handing over the file containing the order to his personal assistant Mukat Behari Lal was in the ordinary course of business, and no action for libel could be founded on such publication. In the circumstances of the case, it must be held to be an act done in the discharge of his duty.

[17] The communication of the order to Mr. Waugh, who was Adviser to the estate was also privileged. As pointed out by the trial Court, it was the duty of Mr. Bates to communicate the Maharaja's order on the appellant's representation submitted through him. I am clear that the appeal preferred by the plaintiff Kunwar Radha Krishna Pratap Singh is without substance. It is dismissed with costs.

[18] I will now turn to the other appeal by Y. A. Dikshit. The learned Additional Civil Judge held that Dikshit had published the order of the Maharaja to Suraj Narain Singh and to Adya Bakhsh Singh. He further held that Dikshit had called the plaintiff 'intriguer and disloyal.' He was of opinion that the occasions on which the libel was published could not be said to be privileged, and that the use of the expressions 'intriguer and disloyal' was not justified. He accordingly gave Kunwar Radha Krishna Pratap Singh a decree for Rs. 2000 and costs. I have already stated earlier in this judgment what I consider to be the true meaning and import of

the representations submitted by the plaintiff to Mr. Bates, and have further held that the strong expressions used by the Maharaja with reference to the plaintiff's action in making insinuations and levelling charges against the Maharani were fully justified. The action condemned as "extremely wicked, ignoble and disloyal" cannot be said to be inappropriately or incorrectly so-called. If indirectly this casts a reflection upon the appellant's character, it was not an undeserved reflection and cannot form the basis of an action for defamation.

[19] Apart from the fact that what was said of the appellant's action in the Maharaja's order was true, we should not forget that the plaintiff had attacked Dikshit. It has been found by the Court below that the plaintiff when talked in his representation of exposing "intriguers and hypocrites who shed gallons of crocodile tears etc. etc." referred to Diksbit. Thus he made a direct and vile attack upon him and Dikshit had clearly the right of self-defence. In addition to other cases in which privilege arises owing to the existence of a duty, moral, social or legal or of common interest, where an attack is made upon a man's character, he has the right to answer it and to communicate his answer to all concerned, particularly those who heard the attack. Adya Bakhsh Singh was the plaintiff's father, and Suraj Narain Singh a relation. The plaintiff's resignation, and the circumstances in which it was brought about, were known to them. Y. A. Dikshit was under the rule enunciated above fully entitled to show the Maharaja's order to both of them in order to convince them that the accusations made against him by the plaintiff were unfounded and had been strongly condemned by the Maharaja to whom the representation was addressed.

[20] He was further fully justified in calling Kunwar Radha Krishna Pratap Singh "intriguer and disloyal." The plaintiff had hatched a plot against Dikshit. "Intrigue" means the exertion of tortuous or under-hand influence to accomplish some purpose; underhand scheming. By sending the representation referred to above to the Maharaja, he clearly wanted to injure Dikshit. No attempt was made at the trial to justify the allegations made against Dikshit by the plaintiff in his representation, and Dikshit cannot be said to be unjustified in calling him an "intriguer;" nor can there be any doubt that Kunwar Radha Krishna Pratap Singh was disloyal to his employer the Maharaja. So the imputations made by Dikshit against the plaintiff, apart from being privileged, were true and no action for defamation could be brought for use of those epithets by him with reference to Kunwar Radha Krishna Pratap Singh.

[21] It was argued before us that the plea of justification was not expressly taken by Dikshit in his written statement, and such a ground of defence should not be considered. I see no merit in this contention. Whatever be the English law on this point of procedure, I am clear that under our Code of Civil Procedure, the pleading has to state facts, and it is for the Court to apply the law. An issue was framed on this point. This was issue 5:

"Were the defendants justified in making and publishing the alleged statements as covered in issues (1) and (3)?"

The matter was considered in both the Courts below, and it is now too late in second appeal to raise the contention that inasmuch as justification was not expressly pleaded as a defence by the defendants' written statement, this should not be considered.

[22] I am of opinion that the conclusion of the Additional Civil Judge in so far as he held Y. A. Dikshit liable for damages cannot be upheld. Appeal No. 144 of 1942 by Y. A. Dikshit is allowed. The decree of the lower appellate Court in so far as it made Y. A. Dikshit liable for damages is set aside and the entire suit of the plaintiff is dismissed with costs throughout.

R.G.D. *Order accordingly.*

A. I. R. (35) 1948 Oudh 234 *[C. N. 84.]*

WALFORD J.

Mirza Inayat Beg — Defendant — Applicant v. *Mirza Abdul Rauf Beg — Plaintiff —Opposite Party.*

Application No. 162 of 1942, Decided on 18-2-1947, from order of District Judge, Lucknow, D/- 14-9-1942.

Oudh Civil Rules, Chap. 7, R. 289, cl. 10 — *Vakalatnama* filed in original Court — Necessity of filing fresh *vakalatnama* for taxing fee of counsel.

Rule 289 means simply this that where a counsel, who appears either for the appellant or the respondent, has not filed either a *vakalatnama* or a slip, his fee would be taxed only to the extent of half of the amount to which he would be ordinarily entitled unless a *vakalatnama* or slip is filed at least a day before the hearing; but if there is already a *vakalatnama* on the file which had been filed in the earlier stages of the case and it still validly subsists, no fresh *vakalatnama* or a slip would be necessary for purposes of taxing the fee of the counsel. [Para 3]

Mohd. Ayub — for Applicant.

Habib Ali Khan — for Opposite Party.

Order. — The facts in this case are that the plaintiff opposite party instituted a suit for recovery of arrears of rent in respect of some property in Lucknow against the defendant-applicant. The suit was partially decreed in the Court of first instance. The plaintiff carried the matter in appeal to the District Judge, Lucknow, who dismissed it with costs. At the time of the taxation of costs, the defendant-

applicant was allowed half the fee certified by his counsel. The matter was agitated under S. 152, Civil P. C., before the learned District Judge, who in a short order rejected the claim for full fee. He held that the provisions of R. 289, chap. 7, cl. 10, Oudh Civil Rules were not complied with in order to entitle the defendant to full counsel's fee being taxed as the slip of appearance or a *vakalatnama* was not filed by him in the Court of appeal a day before the hearing of the appeal as required by the rule. It seems that the counsel for the defendant-applicant had filed a *vakalatnama* in the original Court, and it is not in controversy that that *vakalatnama* was valid in the Court of appeal. According to the interpretation of the rule by the learned Judge, it was necessary, notwithstanding the *vakalatnama* which existed in favour of the counsel for the applicant, who appeared in appeal he should have filed a fresh *vakalatnama* or slip in terms of cl. 10 of R. 289, Oudh Civil Rules, in order to entitle the defendant-applicant to taxation of full fee for counsel.

[2] To me it is clear that the rule has been misinterpreted. Paragraph 1 of cl. 10 of R. 289 runs as follows :

"In calculating costs of appeals, if the memorandum of appeal was not signed by a legal practitioner, only one-half of the ordinary fee will be allowed on account of the legal practitioner of the appellant; similarly, only one-half of the ordinary fee will be allowed on account of the legal practitioner of the respondent, unless in the case a legal practitioner has filed either his *vakalatnama* or a slip in the form appended to this paragraph after the filing of the appeal and before the first date fixed for hearing the case."

[3] Upon a reasonable construction the rule means simply this that where a counsel, who appears either for the appellant or the respondent, has not filed either a *vakalatnama* or a slip, his fee would be taxed only to the extent of half of the amount to which he would be ordinarily entitled unless a *vakalatnama* or slip is filed at least a day before the hearing but if there is already a *vakalatnama* on the file which had been filed in the earlier stages of the case and it still validly subsists, no fresh *vakalatnama* or a slip would be necessary. It is contended on behalf of the plaintiff opposite party that notwithstanding the existence of a *vakalatnama* it is still necessary to file either a fresh *vakalatnama* or a slip to entitle a counsel to have his full fee taxed; for, he contends that the existence of any previous *vakalatnama* though valid for the purposes of hearings is not valid for the purposes of taxation of the fees. I cannot bring myself to accept the reasoning advanced by the learned counsel. To me it is clear that where a *vakalatnama* already exists no further necessity arises for filing either a fresh *vakalatnama* or a slip for the purposes of taxing the fee of the counsel. If the interpretation of the rule by the Court below is accepted the result would be that except in the case of a counsel, who has signed the memorandum of appeal in that case, either two slips or two *vakalatnamas* will be required, one for appearance and one for taxation of fee, which is obviously absurd. In my judgment the Court below has misinterpreted the rules and the application must therefore be allowed with costs. I order that full fees of the counsel for the defendant-applicant be taxed in the Court below.

D.S. *Application allowed.*

A. I. R. (35) 1948 Oudh 235 [*C. N. 85.*]

CHANDIRAMANI J.

Ram Pearey — Decree-holder—Appellant v. *Ram Manorath — Judgment-debtor—Respondent.*

Exn. of Decree Appeal No. 8 of 1943, Decided on 5-2-1948, from order of Civil Judge, Bahraich, D/-1-10-1942.

(a) U. P. Temporary Postponement of Execution of Decrees Act (10 [X] of 1937), S. 5 (2) — Applicability — Sub-s. (2) does not apply unless judgment-debtor is agriculturist within the meaning of the Act.

The Act itself, as the preamble shows, is meant only for the benefit of agriculturists within the meaning of the Act and the benefit of sub-s. (2) of S. 5 can only be taken by a decree-holder whose judgment-debtor is an agriculturist within the meaning of the Act at the date of passing of the Act: 32 A. I. R. 1945 All. 117 (F. B.), *Disting* [Para 5]

(b) Civil P. C. (1908), S. 11 — Execution proceedings — Interlocutory orders in same execution proceedings — Objection as to limitation in execution proceedings dismissed on judgment-debtor's prayer — Judgment-debtor is precluded from raising same objection in subsequent stage of same proceedings.

Where the judgment-debtor at an earlier stage in the same execution proceedings prayed for dismissal of his objection regarding limitation, and his objection was accordingly dismissed:

Held, that the objection raised was of such a nature that had it succeeded there would have been no further proceedings in execution and if the judgment-debtor chose not to get the objection decided on merits it was his own fault and it was no longer open to him to raise the objection in a subsequent stage of the same proceedings: 13 A. I. R. 1926 Oudh 291, *Rel. on.* [Para 7]

Annotation:—('44-Com.), Civil P. C., S. 11 N. 22, 23.

Cases referred:—

1. ('45) I. L. R. (1945) All. 438 : 32 A. I. R. 1945 All. 117 (F. B.), Behari Lal v. Ganga Prasad.
2. ('26) 1 Luck. 171 : 13 A. I. R. 1926 Oudh 291 : 93 I. C. 833, Raghubar Singh v. Gokaran.

H. K. Ghose — for Appellant.

Hyder Hussain and Kalbe Mustafa — for Respondent.

Judgment. — This is an appeal of the decree-holder against the order of Mr. Hasan Irahed, Civil Judge of Bahraich, dated 1-10-1942.

[2] Sant Ram, father of Ram Pearey, appellant, obtained on 11-2-1927 a decree for Rs. 267-15-6 in a suit for accounts of partnership. Eventually the Chief Court granted the appellant's father a decree on 26-7-1928 for Rs. 846 5-6 with interest at 6 per cent. from 11-2 1927 till realisation and proportionate costs. The first execution application by Sant Ram was made on 19-12-1929. It was consigned to records on 11-10-1930. On 23-9-1933 he gave a second application which was consigned to records on 21-10-1933. On 13-10-1936 he gave a third application which was consigned to records on 2-2 1937. A fourth execution application was apparently given on 9-9-1936 by Ram Pearey appellant. It was consigned to records on 12-12-1938. On 2-1-1941 the appellant gave another application for execution. The judgment-debtor objected against the execution under S. 47, Civil P. C., and under Ss. 8 to 10, Debt Redemption Act, alleging that the interest charged was not in accordance with the provisions of the Debt Redemption Act and that the application for execution was time barred. Some other objections were also taken. On 26-4-1941 the judgment-debtor prayed that his objection be dismissed and they were dismissed. Proceedings in execution were then taken on 2-5-1941 and the property of the judgment-debtor was attached. On 13-9-1941 the judgment-debtor filed his objection saying that the application for execution was time barred. The decree-holder said that the judgment-debtor was an agriculturist and so he was entitled to exclude the time during which the U. P. Act 10 [X] of 1937, (The Temporary Postponement of Execution of Decrees Act) was in force. The judgment-debtor denied that he was an agriculturist. The executing Court held that the judgment debtor was paying at the time the Temporary Postponement of Execution of Decrees Act came into force a rent of Rs. 1040 and odd and so he was not an agriculturist and that in the circumstances the decree-holder was not entitled to exclude the period of three years during which that Act remained in force. It also held that the judgment-debtor by reason of previous dismissal of objection regarding limitation was not estopped from raising the same ground again because in the earlier proceedings the question of limitation had not been decided on merits. The application for execution was accordingly dismissed. The decree-holder went up in appeal and the learned appellate Court has held that the judgment-debtor was not estopped from raising the ground of limitation again because his previous objection on the point had not been decided on merits and also because his previous objection was in effect an application for amendment of the decree under the provisions of the Debt Redemption Act and the question of limitation was unnecessary for decision in such a case. The Court also held that the judgment-debtor is not an agriculturist within the meaning of the Temporary Postponement of Execution of Decrees Act and so the decree-holder could not exclude the time during which the Temporary Postponement of Execution of Decrees Act was in force.

[3] It has been urged that the judgment-debtor is an agriculturist within the meaning of the Temporary Postponement of Execution of Decrees Act as he was paying less than Rs. 1000 as rent, that the finding of the Court to the contrary was based on inadmissible evidence, that even if the judgment-debtor was not an agriculturist S. 5, Temporary Postponment of Execution of Decrees Act applied to all kinds of decrees and that the judgment-debtor was estopped from raising the question of limitation.

[4] I have heard the learned counsel for the parties and see no reason to interfere. It appears that certain extracts from *khitaunis* were filed for the year 1345 Fasli to show that the judgment-debtor was paying more than Rs. 1000 as rent. It was said that Exs. 13 and 14, which showed a rent of Rs. 384 in respect of certain khatas were not admissible because full details of the khatas were not given. The learned lower appellate Court has rightly pointed out that the patwari was examined and he explained the entries recorded in Exs. 13 and 14 and gave the details of all the plots and the finding of the lower appellate Court is based on that evidence. The learned counsel for the appellant is therefore in effect trying to challenge only a finding of fact, which is no longer open to him.

[5] As to the question of limitation in this case it is admitted that if the benefit of the Temporary Postponement of Execution of Decrees Act is not given the application for execution is clearly time barred under the provisions of S. 48, Civil P. C. The learned counsel for the appellant says that although the judgment-debtor is not an agriculturist within the meaning of the Temporary Postponement of Execution of Decress Act, he is nevertheless entitled to the benefit of the Act as sub-s. (2) of S. 5 of the Act says that in computing the period of twelve years prescribed by S. 48, Civil P. C., the period during which this Act shall remain in force shall be excluded. The learned counsel for the appellant has misunderstood the meaning of sub-s. (2) of S. 5. It will be seen that cl. (b) of sub-s. (1) of S. 5 allows in execution of decrees exclusion of the time during which the Act remains in force only in respect of decrees of the kind referred to in S. 3, and not covered by S. 6 and here the decree is not covered by S. 6 and S. 3 refers only to decrees for money or for fore-

closure or sale in enforcement of a mortgage passed by a civil Court on the basis of a liability incurred before the passing of the Act against a judgment-debtor who is an agriculturist, at the date of passing of the Act. If such a period is to be excluded for the purposes of making an execution application it is only natural that the Legislature should provide also for excluding the same period for the purposes of S. 48, Civil P. C. The Act itself, as the preamble shows, is meant only for the benefit of agriculturists within the meaning of the Act and the benefit of sub-s. (2) of S. 5, Temporary Postponement of Execution of Decrees Act, can only be taken by a decree-holder whose judgment-debtor is an agriculturist within the meaning of the Act at the date of passing of the Act.

[6] The learned counsel for the appellant wanted to rely on I.L.R. (1945) ALL. 438[1] for the proposition that S. 5, U. P. Temporary Postponement of Execution of Decrees Act, applies to all decrees and not only to those against agriculturists. This authority does not support the appellant at all. The headnote is as follows:

"Section 5, U. P. Temporary Postponement of Execution of Decrees Act, is independent of, and is not subject to, the provisions of S. 3, and it is controlled by that section only to this extent that its application is restricted to the decree referred to in S. 3. Once it is found that the decree is of the character contemplated by S. 3, it will attract the application of S. 5, irrespective of the fact whether an application for stay has or has not been filed by the judgment-debtor in pursuance of the provisions of sub-s. (2) of S. 3."

In that case there was no doubt whatever that the judgment-debtor was an agriculturist paying more than Rs. 250 but less than Rs. 1000 as land revenue and the judgment-debtor was therefore an agriculturist within the meaning of the Act. Their Lordships in that case were considering the effect of sub-s. (1) of S. 5 and not of sub-s. (2) of S. 5. There is not the least doubt that sub-s. (2) of s. 5 has no application whatever unless the judgment-debtor is an agriculturist within the meaning of Act 10 [X] of 1937 (Temporary Postponement of Execution of Decrees Act). The execution application in the circumstances is clearly time barred.

[7] It was also urged that the objection as to limitation could not be raised by the judgment-debtor as his previous objection on the same point had been dismissed in the course of the same proceedings earlier. This contention has considerable force. It is a fact that the judgment-debtor at an earlier stage in the same execution proceedings prayed for dismissal of his objection regarding limitation, and his objection was accordingly dismissed. Both the Courts below have held that as the objection was not decided on merits it will not operate as *res judicata*. This view of the Courts below seems to me to be erroneous. The objection raised was of such a nature that had it succeeded there would have been no further proceedings in execution and if the judgment-debtor chose not to get the objection decided on merits it was his own fault and it is no longer open to him to raise the objection in a subsequent stage of the same proceedings. In 1 Luck. 171[2] it was held that :

"An interlocutory order passed in execution proceedings is final not only in respect of a matter decided by it if such matter is raised again in subsequent execution proceedings, but has also the effect of finality attached to it, if it is passed in continuation of the same proceedings."

In that case a decree was made absolute on 16-3-1920. The first application for execution of the decree was made on 24-4-1923 alleging a payment of Rs. 20 on 16-6-1922. After service of notice on the judgment-debtor the Court passed an order on 29-11-1923 allowing execution to proceed by transferring the decree to the Collector. It was held that the judgment-debtor not having chosen to oppose the application for execution, there was an implied adjudication against him so far as the question of limitation was concerned. In this view of the matter, the judgment-debtor had no right to raise the question of limitation again.

[8] The learned lower appellate Court has looked at this question of the previous objection of the judgment-debtor from another point of view. It has treated that objection as merely an application for amendment of decree. In my opinion the view which the learned lower appellate Court has taken on this point is not correct considering the application itself. There the judgment-debtor styled his application as objections under S. 47 and Ss. 8 to 10, Debt Redemption Act. Even the executing Court, which had the application before it, did not treat the objections as merely application of the judgment-debtor for amendment of the decree. However, the mere fact that it was not open to the judgment-debtor to raise the question of limitation does not prevent this Court from giving effect to the plea of limitation. It is apparent on the face of the record itself that the application for execution has been made more than 12 years after the passing of the decree. The execution is thus time barred and the decree-holder cannot seek assistance of the Court.

[9] The result is that the decision of the lower Court is correct and the appeal is accordingly dismissed with costs.

V.B B. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 238 *[C. N. 86.]*

KAUL AND KIDWAI JJ.

Pt. Prayag Narain Trivedi and others — *Appellents* v. *Mohammad Ebrahim and another* — *Respondents.*

Second Appeal No. 132 of 1943, Decided on 18-2-1947, from order of Dist. Judge, Barabanki, D/- 17-11-1942.

(a) Civil P. C. (1908), O. 34, R. 8 — Usufructuary mortgage — Order absolute for sale under old S. 93, T. P. Act, not executed within limitation — Effect — Possession of mortgagee, if adverse.

An order absolute for sale under the old S. 93, T. P. Act, if not executed within time limited by law, cannot operate as a decree for foreclosure. In the case of a usufructuary mortgage, on the passing of an order absolute for sale, the ownership of the mortgagor is relieved of the encumbrance, that is to say, the right of the usufructuary mortgagee to remain in possession, which right is only given to secure the repayment of the loan comes to end. The mortgagor's title cannot be extinguished merely by the lapse of 3 years without execution of the decree though it can be extinguished by adverse possession for 12 years by a person not entitled to hold the property : 25 Mad, 244 (F. B.), *Rel. on*; *Case law reviewed.* [Paras 13 and 16]

In order to claim title by adverse possession, the mortgagee has to show (1) that the possession changed its nature from permissive possession to adverse possession or (2) that it has been proved by clear and unequivocal evidence that the mortgagee's possession was hostile to the real owner and amounted to a denial of his title: 22 A. I. R. 1935 P. C. 53, *Foll.* [Para 26]

Where a usufructuary mortgagee continued in possession of the property even after obtaining an order absolute for sale in 1897, it was held that the possession of the mortgagee must be deemed to be permissive and not adverse to the mortgagor till the year 1918 when their Lordships of the Privy Council finally settled the law by their decision in 5 A. I. R. 1918 P. C. 34 by holding that the effect of the passing of an order absolute for sale was the immediate extinguishment of the security. Previous to that case the view had been that the security lasts till a sale actually takes place in execution of the order absolute for sale : *Case law distinguished.* [Paras 26, 27 and 30]

(b) Precedent—Value of—How to be applied.

A case is only authority for what it actually decides and it is not a legitimate method of applying a precedent to detach from the context, remarks in the judgment, not necessary for the decision of the case and to apply them to an entirely different set of circumstances. [Para 17]

Annotation : ('44-Com.) C. P. C. Pre N. 15 pt. 9 and 10.

(c) U. P. Encumbered Estates Act (25 of 1934), S. 11 — Scope of enquiry.

The enquiry in proceedings under S. 11, is only directed to ascertain whether the property mentioned in the notice in the Gazette or any part of it is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. Where there is a finding that the title of landlords applicants continues it must be held that it is so liable and that is an end of the matter. The question whether there is any mortgage in existence will only arise at the stage of the enquiry under S. 14, of the Act. The question whether objectors have acquired mortgagee rights by adverse possession will be open to enquiry in proceedings under S. 14 but not under S. 11 of the Act. [Para 38]

(d) Civil P. C. (1908), Ss. 11 and 47 — Suit for redemption — Preliminary decree—Order absolute under S. 93, T. P. Act (prior to its repeal in 1908) — Order not executed within limitation — Application by mortgagor under S. 4, U. P. Encumbered Estates Act — Proceedings, if barred by S. 11 and 47, Civil P. C.

In 1897 in a suit for redemption of a usufructuary mortgage a preliminary decree for redemption on payment of a certain sum was passed. Thereafter the mortgagee applied for and obtained an order absolute for sale under S. 93, T. P. Act (as it stood prior to its repeal in 1908). The order absolute for sale remained unexecuted and the mortgagee continued to be in possession and continued to be recorded in revenue papers as mortgagee and the mortgagor as mortgagor. In 1936 the mortgagor presented an application under S. 4, U. P. Encumbered Estates Act, asking for liquidation of debts. The mortgagee filed objections under S. 11 of that Act and pleaded that the proceedings were barred under Ss. 11 and 47, Civil P. C.

Held that if the proceedings were treated as a suit for redemption, then obviously S. 47, Civil P. C., had no application because it did not relate to the execution of any previous decree. Even if it was not treated as a suit for redemption S. 47 was irrelevant because what the landlords applicants claimed by those proceedings was an assertion of their title. In the redemption suit of 1897 that title was not in dispute at all and the decree did not relate to it. Moreover these being proceedings under the Encumbered Estates Act even decreed claim must be proved. By the force of S. 18, and other sections of the Act even decrees can only be executed in the manner and to the extent prescribed in the Act. Quite apart therefore from the question of limitation, action under the Encumbered Estates Act in no way militated against the provisions of S. 47, Civil P. C. 21 A.I.R. 1934 P. C. 205, *Applied.* [Para 41]

Held further that the proceedings were not barred by res judicata as the question whether the right to redeem was barred or not did not arise and was not decided in previous case. Moreover, in the present proceedings which arose under S. 11, Encumberred Estates Act, the question raised was of the title of the landlord applicant to the property in dispute. In the redemption case this question did not arise because in that case it was admitted that the title lay with the mortgagor. 21 A. I. R. 1934 P. C. 205, *Foll.* [Para 42]

Annotation : ('44-Com.) Civil P. C., S. 11, N. 40 and 116.

Cases referred :—

1. ('13) 36 Mad. 32 : 12 I. C. 432, Govinda Taragan v. Veeran.
2. ('26) 13 A. I. R. 1926 Mad. 816 : 49 Mad. 691 : 96 I. C. 607, Ellarayan v. Rangaswami Aiyar.
3. ('02) 25 Mad. 244 (F. B.), Mallikarjunadu Setti v. Lingamurti Pantulu.
4. ('94) 21 Cal. 818, Ajudhia Pershad v. Baldeo Singh.
5. ('95) 22 Cal. 931, Tara Prosad v. Bhobodeb Roy.
6. ('83) 7 Bom. 467, Gan Savant Bal Savant v. Narayan Dhond Savant.
7. ('89) 13 Bom. 567, Maloji v. Sagaji.
8. ('45) 32 A. I. R. 1945 Bom. 307, Maruti Babaji v. Manohar.
9. ('19) 43 Bom. 703 : 6 A. I. R. 1919 Bom. 34 : 52 I. C. 466, Dinu Yesu v. Shripad Baji.
10. ('89) 11 All. 386, Muhammad Sami-ud-din v. Munnu Lal.
11. ('99) 21 All. 251, Dondh Bahadur Rai v. Tek Harain Rai.
12. ('02) 24 All. 44 (F. B.), Sita Ram v. Madho Lal.
13. ('22) 44 All. 730 : 9 A. I. R. 1922 All. 377 : 69 I. C. 167, Hari Ram v. Indraj.

14. ('35) 1935 O. W. N. 178 : 22 A. I. R. 1935 P. C. 53 : 154 I. C. 27 (P. C.), Ejaz Ali v. Court of Wards, Balrampur Estate.
15. ('18) 45 I. A. 130 : 5 A. I. R. 1918 P. C. 34 : 40 All. 407 : 45 I. C. 798 (P. C.), Het Ram v. Shadi Ram.
16. ('04) 31 Cal. 863, Bibijan Bibi v. Sachi Bewah.
17. ('06) 28 All. 778, Shyam Lal v. Bashir-ud-din.
18. ('06) 29 Mad. 37, Vanamikalinga Mudali v. Chidambara Chetty.
19. ('22) 48 I. A. 465 : 9 A. I. R. 1922 P. C. 11 : 43 All. 469 : 65 I. C. 151 (P. C.), Mt. Sukhi v. Ghulam Safdar Khan.
20. ('20) 7 A. I. R. 1920 All. 92 : 42 All. 575 : 56 I. C. 986 (F. B.), Anup Singh v. Fateh Chand.
21. ('35) 22 A. I. R. 1935 All. 174 : 153 I. C. 73, Shiam Lal v. Mohammad Ali Asghar Husain.
22. ('28) 15 A. I. R. 1928 P. C. 165 : 109 I. C. 818 (P. C.), Kesho Prasad Singh v. Madho Prasad Singh.
23. ('19) 6 A. I. R. 1919 P. C. 62 : 43 Mad. 253 : 46 I. A. 204 : 53 I. C. 288 (P. C.), Arunachallam Chetty v. Venkatachalapathi.
24. ('20) 7 O. L. J. 282 : 7 A. I. R. 1920 Oudh 7 : 56 I. C. 759, Nadir Singh v. Mt. Anpurna Kunwar.
25. ('31) 18 A. I. R. 1931 Oudh 69 : 127 I. C. 252, Humayun Qadar v. Suraiya Begam.
26. ('26) 13 A. I. R. 1926 All. 62 : 48 All. 145 : 92 I. C. 414, Mt. Ram Kuer v. Govind Ram.
27. ('14) 1 A. I. R. 1914 All. 242 : 25 I. C. 611, Mt. Zaibunnissa v. Parichhat.
28. ('22) 9 A. I. R. 1922 Mad. 407 : 70 I. C. 33, Omayurupagam Mutt v. Sivasooria Thevan.
29. ('05) 8 O. C. 33, Makhan v. Bhagirath Pershad.
30. ('33) 20 A. I. R. 1933 Oudh 13 : 140 I. C. 189, Ram Bakhsh Singh v. Gangapal Singh.
31. ('25) 12 A. I. R. 1925 Lah. 616 : 88 I. C. 476, Khushala v. Bistan Das.
32. ('86) 10 Bom. 461 : 13 I. A. 66 : 4 Sar. 719 (P. C.) Hari Ravji v. Shapurji Hormasji.
33. ('84) 7 Mad. 423, Periandi v. Angappa.
34. ('34) 61 I. A. 362 : 21 A. I. R. 1934 P. C. 205 : 56 All. 561 : 151 I. C. 37 (P. C.), Raghunath Singh v. Mt. Hansraj Kunwar.

B. K. Dhaon & Manoharlal Devedi—for Appellants.

Faiyaz Ali & Ali Hasan—for Respondents 1 and 2.

Judgment. — This appeal arises out of proceedings under the Encumbered Estates Act. It is admitted that one Ghulam Abbas was the owner of a 4 annas 10 pies 6 kirants 2 jau share in village Kithori district Barabanki. On 3-3-1888, he mortgaged this share to Nand Kishore to secure a debt of Rs. 8,500. Under the terms of the mortgage deed (Ex. 9) the mortgagee was entitled to enter into possession of the property if the principal and interest was not paid within 3 years. A default occurred and, in 1891, Nand Kishore took possession of the property.

[2] Ghulam Abbas and Nand Kishore thereafter died and three of the five sons of Ghulam Abbas, namely, Muhammad Ibrahim, Muhammad Shafi and Muhammad Ilias sued Prag Narain and Ganga Sagar, the sons of Nand Kishore, then minors under the guardianship of their mother Mohan Dei, for redemption. At a subsequent stage, on the objection of the defendants, Muhammad Ismail and Muhammad Ishaq, the other two sons of Ghulam Abbas were also impleaded as defendants. On 18-12-1897, a preliminary decree for redemption on payment of Rs. 15,551-13-0 was passed. Thereafter the mortgagee's heirs applied for an order absolute for sale under S. 93, T. P. Act, (Ex. 1, the application wrongly mentions S. 89) and the order was passed for sale of the whole of the mortgaged property, Ex. 2. The money was to be paid into Court to satisfy the mortgage debt and the balance, if any, was to be paid to the heirs of the mortgagor.

[3] Execution of this decree was taken out but subsequently on 8-6-1900, Mt. Mohan Dei applied that for certain reasons she desired the application to be consigned to the records with liberty to apply again, Ex. A7. This prayer was granted and the execution proceedings terminated, vide Exs. A-8 and A-9. No further execution was taken out but the heirs of the mortgagee continued in possession of the mortgaged property and they all along continued to be entered in the revenue papers as mortgagees while the heirs of Ghulam Abbas continued to be recorded as mortgagors.

[4] In 1915 the village was partitioned at the instance of Janki Prasad Ex. A10. In this application both the heirs of Ghulam Abbas and those of Nand Kishore were impleaded, the former being shown as mortgagors and the latter as mortgagees. The partition took place with all these parties on the record and in the partition papers, including the khewat Ex. A14 the heirs of the mortgagor were entered as mortgagors and the heirs of the mortgagees as mortgagees. The original share of Ghulam Abbas was constituted into a separate mahal named after Prag Narain. This state of affairs has continued ever since.

[5] on 8-2-1936, Muhammad Ibrahim and Muhammad Shafi instituted a suit in the Court of the Munsif Ramsanehighat, Barabanki, under S. 33, Agriculturists' Relief Act, claiming an account of the transaction (Ex. A18 is the plaint). Prag Narain appellant 1 resisted this suit on various grounds (Ex. A19) and it was dismissed on 29-10-1936, the date on which the landlords filed their application under S. 4, Encumbered Estates Act, on the ground that the plaintiffs who represented the mortgagor were no more debtors as there is no recoverable debt subsisting and also on the ground that, since some of the representatives of the original mortgagor had applied under S. 4, Encumbered Estates Act, no other proceedings could continue in respect of the same debt: vide Ex. 13. On appeal the District Judge of Barabanki upheld the decision of the Munsif but he decided the second only of the points mentioned above : vide Ex. A29. Thereafter a second appeal to this Court

was dismissed on the ground that no second appeal lay: vide EX. A30,

[6] On 29-10-1936, Muhammad Ibrahim and Muhammad Shafi presented an application under S. 4, Encumbered Estates Act, asking that action should be taken under that Act for liquidation of their debts. With their application they filed a list of debts and also gave particulars of their property. The only debt shown in the mortgage of 1888 by Ghulam Abbas to Nand Kishore, whose son and grandsons are shown as the sole creditors (lists A and E). The only property shown is a 7/20th share in superior proprietary mahal Prag Narain in village Kithori (see list C). The manner in which this share was arrived at is shown in the reply filed on 3-3-1938, by the landlords-applicants to the claim put forward by Prag Narain and his nephews and there is no dispute as to its extent.

[7] On 3-1-1938, Prag Narain, a son of Nand Kishore, and Onkar Nath and Somnath, the sons of Ganga Sagar, the second son of Nand Kishor, who had all been shown by the landlords-applicants as creditors, filed an objection under S. 11, Encumbered Estates Act. They pleaded the previous suit for redemption and the fact that an order absolute had been passed under S. 93, T. P. Act, in that suit. They then pleaded :

"That prior to the passing of the order under S. 93, T. P. Act, the heirs of the mortgagee were mortgagee in possession of the mortgaged property. After the passing of the said order the objector No. 1 and the father of objector Nos. 2 and 3 remained in adverse and proprietary possession for more than 12 years as against the heirs and representatives of Ghulam Abbas and are in possession up to this time. Hence the objectors are full owners of the property mentioned in para. 1 and the applicants have no right of any sort in respect of the said property."

No other objection was taken. No other plea was taken either in the written or in the oral pleadings. The landlords applicants in their written reply alleged that the representatives of the mortgagee had always continued in possession on the basis of the mortgage of 1888 and the order absolute under S. 93, did not adversely affect the rights of the mortgagor's representatives; that the representatives of the mortgagee had behaved fraudulently in not executing the decree of 1899 and were estopped from setting up that decree; that owing to the non-execution of the decree, the legal rights of the parties continued to be exactly the same as they were before the decree; that the applicants were treated as having a subsisting right in the property at the partition of 1915-1920 and so the objectors could not deny the title of the landlords by reason of S. 233 (k), U. P. Land Revenue Act, that the objectors' possession was not adverse and that the landlords-applicants had become owners of the property in suit by adverse possession. In replication filed on 30-7-1938, the appellants traversed all the allegations of the landlords-applicants but raised no new plea. The Special Judge, 2nd grade, Barabanki, framed 5 issues of which the last related to relief and only the first two are material for the purposes of this appeal. They read as follows :

"1(a) Are the claimants the owners of the property in suit by virtue of S. 93, T. P. Act and have they become owners thereof by adverse possession as alleged? If so, is the same not liable to attachment, sale or mortgage in lieu of the applicants' debts as claimed? If so, to what effect?

(b) Are the claimants in possession of the property only as mortgagees as pleaded? Its effect"?

(2) Are the applicants still the owners of the property in question and have they also acquired title to the equity of redemption by adverse possession as pleaded in paras 13 and 19 of the written reply? Its effect?"

[8] On these issues the learned Special Judge found:

(1) That the order absolute under S. 93, T. P. Act did not have the effect of divesting the mortgagors of title and vesting it in the mortgagees (issue 1 (a)).

(2) That the mortgagee's heirs had not become owners of the property by adverse possession (issue 1(a)).

(3) That by reason of the fact that the mortgage of 1888 merged in the decree of 1899 the possession of the claimants can no longer be regarded as that of mortgagees (issue 1 (b)).

4. That the landlords-applicants are still owners of the property (issue 2).

5. That it is not necessary to decide whether the landlords-applicants have become owners by adverse possession.

He accordingly disallowed the objection. The claimants appealed. Their grounds of appeal indicated that they challenged the judgment of the Special Judge on the ground that they had become full owners "at the expiry of the statutory period after the decree under S. 93, T. P. Act"; that they had perfected their title by adverse possession; and that the respondents were not owners of the property since their rights, if any, had become extinguished.

[9] By his judgment, dated 7th November 1942, the learned District Judge of Barabanki held :

"(1) That the landlords-applicants were still owners of the mortgaged property.

(2) That the claimants had not completed their title as full owners by adverse possession.

(3) That, in spite of the merger of the mortgage in the decree, the claimants had perfected their rights as mortgagees by adverse possession."

[10] He accordingly dismissed the appeal making it clear that the landlords-applicants were still the owners of the property subject to the mortgagee rights of the claimants. The claimants have now come up to this Court in second appeal and their learned counsel contends:

(1) That the decree of 29th April 1899 put an end to the mortgagor's right to redeem and since this was

the only right which he possessed in the mortgaged property he ceased to have any right in that property after the date of the decree.

(2) That, in any case, the mortgagee was no longer entitled to continue in possession of the mortgaged property after the date of the decree and that his possession thereafter was without title and adverse to the owner.

(3) That the present proceedings being in their essence for redemption of the mortgage, are barred by the rule of *res judicata* in view of the fact that this very matter has been the subject of a previous decision which adjudicated the rights of the parties in 1898 and 1899.

(4) That the matter raised in this case relates to the discharge of a decree and this cannot, by reason of S. 47, Civil P. C. be done by way of suit.

(5) That, at any rate, the District Judge was not justified in holding that the appellants had become mortgagees by adverse possession since the appellants had not claimed this."

At one time he also contended that the question in issue as to proprietary title had also been in issue in proceedings under the Agriculturists' Relief Act and that the finding given in those proceedings that the landlords-applicants were debtors was *res judicata*. On our pointing out to him that he had never raised this plea in either of the two lower Courts and that in any case, the suit under the Agriculturists' Relief Act had been dismissed as being incompetent, he withdrew this plea and only the four points stated above call for decision.

[11] On the first point the learned counsel for the appellant urges that if a decree for sale is not executed within the time limited by law for this purpose it operates virtually as a decree for foreclosure. This really means that a decree-holder can improve his position and acquire a title which he does not otherwise possess by failing to execute his decree. The learned counsel realising the weakness of such an argument contended that the true position was that the mortgagor himself was a decree-holder in a case to which old S. 92, T. P. Act applied and could execute that decree by getting the mortgaged property sold. He contends that it is not by reason of any default by the mortgagee that the mortgagor suffers but he suffers by reason of his own failure to execute the decree.

[12] This contention of the learned counsel finds support from some decisions of the Madras High Court: *vide* 36 Mad. 32,[1] A. I. R. 1926 Mad. 816[2] and 25 Mad. 244.[3] It is not, however, necessary for us to consider the correctness of this view which did not find favour with the Calcutta High Court: *vide* 21 Cal. 818[4] and 22 Cal. 931[5] because the point does not really arise.

[13] There is nothing in the wording of the unamended S. 93, or any other section of the Transfer of Property Act to lead to an inference that a decree for sale if not executed within the time allowed, operates as a decree for foreclosure. Indeed the language used clearly differentiates between sale and foreclosure and directs that in the case of a usufructuary mortgage, a decree for foreclosure is not to be passed. It is, however, contended that, because the unamended S. 93 provided that, on the passing of an order under that section, the right to redeem is extinguished the only right left to the mortgagor, in such an eventuality, is to get the property sold. If this is not done and limitation bars the execution of the decree, even this right goes and the mortgagor has no right at all left in the property. This contention ignores the provision that it is not only the right to redeem that is extinguished but also the security: that is to say, the mortgagor is transformed into a decree-holder and the only right which he has is to get his decree executed. The learned counsel conceded that in the case of a simple mortgage, the failure to execute the decree for sale results in depriving the mortgagee of all rights and in freeing the property from all encumbrances but he contends that, in the case of a usufructuary mortgage, the mortgagee, being in possession must continue in possession. We cannot accede to this argument.

[14] Unlike the English law, the Indian law does not contemplate the absolute transfer of the property to the mortgagee in every form of mortgage. Under S. 58, T. P. Act, it is only an interest in specific immovable property that is transferred. The interest transferred may be more or less e. g., in the case of an "English mortgage" the whole property is transferred absolutely subject to a condition and similarly in the case of a mortgage by conditional sale: *vide* cls. (c) and (e) of S. 58. In the case of simple and usufructuary mortgages the proprietary title is not transferred: *vide* cls. (b) and (d) of S. 58. That is why old S. 93, T. P. Act makes a distinction and in the case of mortgages by conditional sale and "English mortgages", permits the passing of an order absolute for foreclosure. The effect of such an order is not to pass title that is already vested in the mortgagee—but to debar the mortgagor from enforcing the provisions of the deed giving him the right to get back the property. On the other hand, in the case of simple and usufructuary mortgages, in which title continues to remain with the mortgagor, something more is required to be done to deprive the mortgagor of his title and vest it in some one. That is why a decree for sale is passed, and it is only on a sale actually taking place that the title of the mortgagor ceases. Until the sale takes place the title remains in the mortgagor: if the property is sold it is his property that is sold and even after the passing of the order absolute for sale he has all the rights which the Code of Civil Procedure gives to a judgment-debtor to pay off the decre-

tral money and save the property from sale or get the sale set aside. If he had no title left in the property, obviously this would not be possible. Here we may usefully refer to some observations made in a Full Bench decision of the Madras High Court. In 25 Mad. 244,[3] Benson J., in dealing with a case under old S. 89, T. P. Act, remarked at p. 267:

"Section 89 provided that when an order absolute for sale was passed the right to redeem was thereupon extinguished and the security was also extinguished, but (as pointed out by Mr. Macpherson, 'Law of Mortgage in British India,' Edn. 7, p. 697) until the sale was effected the mortgagor had the right as a debtor to discharge the decree-debt and thus obviate the necessity for a sale. In that case the property being freed from the incumbrance, reverted to the mortgagor in full ownership."

[15] Another learned Judge, Bhashyam Ayyangar J., at p. 281, also quotes at length from the same author in support of the same view. The following extract is very apposite the present discussion:

". . . . . As on the passing of an order absolute for sale, the security is extinguished the mortgagee's interest in the property must then also come to an end. The effect of this must, it is submitted, be that the entire ownership of the property reverts to the mortgagor, for after the mortgagee's interest in the property is extinguished there is nothing to limit the full ownership which is vested in the mortgagor. In the event, therefore, of the mortgagor paying off his debt after such an order as above suggested, no retransfer of the property by the judgment-creditor to the judgment-debtor would appear to be necessary inasmuch as the full ownership of the property reverted to the judgment-debtor when the order absolute for sale was made."

After giving the above quotation the learned Judge proceeds to express his own opinion in the following words:

". . . There is no need for a reconveyance by the mortgagee, inasmuch as, on the passing of an order absolute for sale under S. 89, the mortgage security was extinguished and the ownership reverted to the mortgagor by operation of law."

[16] Thus, on this view, which we consider to be the correct view, on the passing of the order absolute for sale on 1-6-1899 (Ex. 2), the ownership of the heirs of Ghulam Abbas was relieved of the encumbrance; that is to say the right of Prag Narain and his father to remain in possession, which right was only given to secure the repayment of the loan, came to end. This right could not be extinguished merely by the lapse of three years without execution of the decree though it could be extinguished by adverse possession for 12 years by a person not entitled to hold the property.

[17] In order to support his contention on this point, the learned counsel for the appellant sought to rely upon remarks made in the course of the judgment in some cases. It is, however, a well-established principle that a case is only authority for what it actually decides and it is not a legitimate method of applying a precedent to detach from the context, remarks in the judgment, not necessary for the decision of the case and to apply them to an entirely different set of circumstances. A consideration of the cases upon which the learned counsel relied will show that none of them are applicable to the facts of the present case.

[18] In 7 Bom. 467[6] the learned Judges followed some decisions of the Allahabad High Court on the application of the rule of *res judicata*. In the judgment of Kemball, J., the following remarks occur:

"By reason of the default in payment of the money declared to be due within the time prescribed by law for the execution of decrees (no time having been fixed in the decree), the order for redemption must be taken to have operated as a judgment of foreclosure."

This was a case to which the Transfer of Property Act had no application and the judgment of the Court does not indicate what the result of non-payment by the mortgagor was to be, i. e., whether it was to be sale or foreclosure. If the latter, no second decree or order being at that time required in the case, failure to pay the money within the time fixed would quite rightly result in foreclosure. We have no reason to suppose in view of the remarks of the learned Judge that that was not so. Moreover in that case the decision was based on the application of the rule of *res judicata* to the second suit.

[19] In 13 Bom. 567[7] the learned Judges followed 7 Bom. 467.[6] That was also not a case under the Transfer of Property Act. Further the quotation from the judgment of the Assistant Judge given at p. 568 indicates that that was a case in which direction for foreclosure should have followed the default clause. In the course of his judgment Birdwood J. remarked:

"The decree made in the defendants' suit was practically a foreclosure decree, if not executed in three years and therfore, effectually determined the rights under the mortgage both of the mortgagee and the mortgagors."

Thus the Court was only interpreting the decree in a case in which foreclosure should have followed default in payment of the money fixed for redemption.

[20] The decision in A. I. R. 1945 Bom. 307[8] proceeded on an interpretation of the decree which had been passed on the basis of a compromise and was governed by the Dekkhan Agriculturists' Relief Act and not under the Transfer of Property Act—a fact to which the learned Judges particularly refer.

[21] In 43 Bom. 703[9] the decree expressly provided that if the mortgagor failed to pay the money "his right to redeem shall be for ever barred." It was held that failure to redeem the property by payment of the money due under the decree within the time allowed prevented a second suit being filed on the ground that the

non-execution of the decree resulted in foreclosure. The learned Judges in this case based their decision on the express language of the decree and they clearly stated that the case was not governed by the Transfer of Property Act.

[22] Thus none of these cases can support the appellants' contention that the non-execution of a decree for sale of the mortgaged property if not executed within time, operates as a decree for foreclosure. On the other hand, in 11 ALL. 386,[10] 21 ALL. 251,[11] 24 ALL. 44[13] and 44 ALL. 730[13] the non-execution of a decree for redemption was held not to have the effect of foreclosure. These cases are also not applicable to the present case because in all of them the decree directed that, on the failure of the mortgagor to pay the money the suit was to be considered dismissed or the decree was to be treated as non-existent.

[23] The result is that the failure to execute the decree of 18-12 1897, and the order absolute of 1-6-1899, within the time allowed did not divest the mortgagor of his title to the property mortgaged.

[24] This brings us to a consideration of the question of adverse possession. At the outset we must state that the plea of limitation, as distinct from adverse possession was not raised at any stage of the case. It is, therefore, not necessary for us to consider whether Art. 143 of Sch. 1, Limitation Act applies or Art. 144 : it is only pleaded that the mortgagee's heirs have acquired title to the property by adverse possession.

[25] There are numerous authorities dealing with what requires to be proved to establish adverse possession and it is not necessary for us to consider them all. We may, however, usefully refer to a comparatively recent decision of their Lordships of the Judicial Committee in 1935 O. W. N. 178.[14] In that case Wazir Ali the taluqdar whose name came subsequently to be entered in the lists prepared under S. 8, Oudh Estates Act of 1869 died in 1863 leaving an infant son, Hashmat Ali and two brothers Amir Ali and Samsam Ali. Navazish Ali first cousin of Wazir Ali, however, obtained possession of the property and was entered in the revenue records as owner. This, their Lordships found, was due to a family custom by which the senior member of the family was recorded as owner and managed the property on behalf of the whole family. During the course of Nawazish Ali's possession, while Hashmat Ali was still alive the operations of the first regular settlement took place and decrees by the settlement Courts were passed in favour of Nawazish Ali. Hashmat Ali died issueless in 1882 and, on his death, his uncle and next heir Samsam Ali entered into joint possession with Nawazish Ali. This state of affairs continued till 1892 when Nawazish Ali died and Samsam Ali came to be recorded in the revenue records as sole owner. In the course of mutation proceedings Muzaffar Ali the only son of Nawazish Ali stated that according to the family custom, Samsam Ali as the senior member of the family was entitled to succeed. On Samsam Ali's death in 1901, his son Asghar Ali succeeded and both he and Muzaffar Ali made the same statement as to family custom as had been made by the latter on the death of his father. In order to determine whether the estate was governed by the Oudh Estates Act or not the Courts had to consider whether, Muzaffar Ali had become owner by adverse possession or not. All the Courts held that he had not. Their Lordships of the Judicial Committee say, at p. 183 of the report :

"There can be little doubt that he obtained possession with the consent of all the persons interested in the estate, and his possession was at its inception, merely permissive. It is not suggested that there was any subsequent change which converted it into adverse possession. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his *possession was hostile to the real owner and amounted to a denial of his title* to the property claimed. This onus the appellants have failed to discharge. Neither the entry of Nawazish Ali's name in the revenue records as the owner of the taluqa nor his possession thereof could in the circumstances of the case, affect the title of the person or persons who had the right to inherit it."

[26] If the case is judged, as it must be judged, in accordance with the above principle the appellants had to prove

"(1) that the possession changed its nature from permissive possession to adverse possession or

(2) that it has been proved by clear and unequivocal evidence that the mortgagee's possession was hostile to the real owner and amounted to a denial of his title."

[27] Before considering the evidence bearing on the question of adverse possession it will be as well to state the position as it must have appeared to the parties in 1899, when the order absolute was passed. At that time Prag Narain and Ganga Sagar were in possession of the property claiming title as mortgagees from the respondents, that is to say, possession was permissive and it was to secure the repayment of the loan advanced and would in ordinary course, continue until the debt was repaid. The effect, however, of the passing of the order absolute under unamended S. 93, T. P. Act, was the immediate extinguishment of the security. This position only came to be understood in 1918 when their Lordships of the Judicial Committee construed the words used in the statute in this sense in 45 I. A. 130=A. I. R. 1918 P. C. 34.[15] Previous to that case the view had been that the security lasts till a sale actually takes place in execution of the order absolute or of the decree under S. 92.

[28] In 31 Cal. 863[16] in which the question of the construction of the identical words contained

in unamended S. 89, T. P. Act, was involved, the learned Chief Justice at p. 868 said :

"The Legislature can scarcely have intended that the security was to be extinguished on the mere making of the order for sale, and before the mortgagee had been paid out of the proceeds of sale. The mortgagee continues to be the owner of the property subject to the payment of the debt, until the sale is completed, and then the ownership passes to the auction-purchaser."

The other learned Judges expressed their agreement with this view. The High Courts of Allahabad and Madras also accepted this view: *vide* 28 ALL. 778[17] and 29 Mad. 37[18] and in 48 I. A. 465 = A. I. R 1922 P. C. 11[19] their Lordships of the Judicial Committee themselves felt the force of the difficulties pointed out in 29 Mad. 37[18] in accepting the construction adopted in A. I. R. 1918 P. C. 34.[15]

[29] Even as late as 1926, one of the learned Judges of the Allahabad High Court considered that the decision of the Judicial Committee in A.I.R. 1922 P. C. 11[19] doubted the correctness of the decision in A.I.R. 1918 P. C. 34[15] and that, therefore, the view which had prevailed before 5 A I.R. 1918 P. C. 34[15] should be accepted. The other learned Judge did not accept this view and we also think that the law laid down in A. I. R. 1918 P. C. 34[15] still stands, but the judgment of the learned Judge shows the great measure of doubt that has existed as to the construction of the words of unamended Ss. 89 and 93, T. P. Act, directing that both the right to redeem and the mortgage security shall be extinguished on the passing of any order under those sections.

[30] A consideration of the above authorities shows that it cannot be assumed that in 1899, the mortgagor and mortgagee were aware that the security had come to an end and that the mortgagor was entitled to get back the property. Rather it may reasonably be inferred that the passing of the order absolute for sale, as distinguished from an order for foreclosure, left the position unaltered and that the mortgagor's successors continued in possession as before, i. e. that, even after the passing of the order absolute they were in permissive possession under the mortgage. A consideration of the evidence available in the present case will show that this is in fact the true position and that both the parties to the mortgage accepted it. (After conisdering the evidence their Lordships proceeded.)

[31] On this evidence it must be held that neither of the two alternatives which it was necessary for the appellants to make out in order to establish a case of adverse possession has been made out. The learned counsel for the appellants referred to certain cases for the proposition that possession of a mortgagee entering into possession without title is adverse. These decisions are not applicable to the present case because here the mortgagee did not enter into possession without title but the only question is whether the nature of his possession changed. This is a question which depends upon the evidence and we have already shown that the evidence established that it did not change. A.I.R. 1920 ALL. 92,[20] A. I. R. 1935 ALL. 174[21] A. I. R. 1928 P. C. 165,[22] A.I.R. 1919 P. C. 62[23] and 7 O. L. J. 282[24] have no bearing on the question before us. In A. I. R. 1931 Oudh 69[25] the mortgagees entered into possession of the property after a decree for sale under S. 88, T. P. Act, had been passed It was held that as the mortgagee was not entitled to possession either under the terms of the mortgage or of the decree, his possession was adverse. In that case the entering into possession was without any title at all and was consequently from its inception adverse.

[32] In A. I. R. 1926 ALL. 62[26] the whole of the money due under mortgage had been paid off and thus the debt itself had been extinguished. Further the person who was in possession of the property was not the heir of the original mortgagee but his widow who had no title to succeed in the presence of his sons. In these circumstances it was held that the widow's possession, not being based on any title was adverse. The position here is very greatly different.

[33] In A. I. R. 1914 ALL. 242[27] the mortgagee had issued a notice of foreclosure under S. 8 Bengal Regulation, 17 of 1806. Thereupon the money was deposited but the mortgagee refused to accept it and sued for foreclosure and possession of the property since, he alleged that possession over only a part had been delivered. The Court found that the money deposited was sufficient for redemption and dismissed the suit for foreclosure and possession. The mortgagee, however, continued in possession and about 25 years later the mortgagor sued to recover possession of the property. It was held that a decree of Court having declared that the mortgage had been redeemed, the continued possession by the mortgagee was not of mortgagee rights but as indicated by his claim to foreclose and recover possession, of proprietary rights and was in the circumstances of the case, adverse. The learned Judges distinguished those cases in which there was only a decree for sale from those in which the decree declared the mortgage either redeemed or otherwise terminated. The facts in the present case indicate an entirely different state of affairs : the mortgagee never signified his intention to foreclose or recover proprietary possession which makes a very great difference as to the nature of his possession. The mortgagee's acts in the case under consideration clearly indicated that he had changed the nature of his position.

[34] In A.I.R. 1922 Mad. 407[28] the mortgage itself was invalid and in a proceeding relating to it the mortgagee asserted that it was invalid and set up a different title in himself. The Court declared the mortgage to be ineffective and it followed that the relation of mortgagor and mortgagee had never existed. It was in these circumstances that the continued possession of the mortgagee after the date of the decree was held to be adverse.

[35] In 8 O. C. 33[29] a mortgagee obtained a decree under unamended S. 86, T. P. Act. Time was allowed up to 20-1-1888, for payment of the mortgage money. The money was not paid and an extension for four months was granted. The mortgagee, however, stipulated that he should be put into possession of the mortgaged property and promised to return it on payment being made. In that case the mortgagee was not entitled to possession under the terms of the mortgage or of the decree and consequently he never entered into mortgagee possession at all and it was in these circumstances that his possession was held to be adverse.

[36] In A.I.R. 1933 Oudh 13[30] a learned Judge of this Court held that

"the question whether possession of a mortgagee after the mortgage debt has been satisfied is adverse to the mortgagor or not is always a question of animus or intention."

In that case the mortgagor paid off the mortgage money and the deed of mortgage was returned to him. The Court held that the intention was clearly to put an end to the mortgage and the continued possession of the mortgagee was not under the mortgage. In the present case we have held that the intention of the parties was that mortgagee possession shall continue as before and the mortgage debt still remained to be paid.

[36] In A. I. R. 1925 Lah. 616[31] it was definitely held that the nature of possession had changed by reason of various transfers and that possession was without any title and so adverse.

[37] Thus none of these cases supports the proposition which the learned counsel for the appellants placed before us for our acceptance. We must, therefore, hold that the appellants have not perfected their proprietary title in the property in suit by adverse possession. The property thus remains liable for attachment, sale or mortgage in satisfaction of the debts of the landlord applicant and the Courts below are quite right in having so held. The lower appellate Court has, however, proceeded further and has held that, though the claimants have failed to prove that they have become proprietors by adverse possession, it has nevertheless been established that they have become mortgagees by adverse possession. The respondents against whom this finding appears to have been given have not challenged it either by filing an appeal for a cross-objection but the learned counsel for the appellant himself contends that the finding is uncalled for at this stage. We agree with this contention.

[38] The enquiry in proceedings under S. 11, Encumbered Estates Act, is only directed to ascertain whether the property mentioned in the notice in the Gazette or any part of it is liable to attachment, sale or mortgage in satisfaction of debts of the applicant. On the finding that the title of the landlords applicants continues it must be held that it is so liable and that is an end of the matter. The question whether there is any mortgage in existence will only arise at the stage of the enquiry under S. 14 of the Act. The finding that the appellants have acquired mortgagee rights by adverse possession must, therefore, be set aside and the question will be open to enquiry in proceedings under S. 14 of the Act.

[39] On the question of *res judicata* and the bar of S. 47, Civil P. C., there has been considerable divergence of opinion between various High Courts and two of them, Allahabad and Madras, have changed their opinion on the first question. The learned counsel for the parties have taken us at considerable length through a large number of decisions of the various High Courts and we have taken time to consider them. In view of the very great divergence of opinion, it would have been necessary for us to consider the matter afresh but we are relieved of the necessity of doing so because, though in their earliest decision in 10 Bom. 461[32] their Lordships of the Judicial Committee assumed, without deciding on the strength of the then Madras view, *vide* 7 Mad. 423,[33] that the rule of *res judicata* did not bar the second suit, in their latest pronouncement they have expounded the law in very clear terms. In 61 I. A. 362 = A. I. R. 1934 P. C. 205,[34] a decree was passed on 26-9-1896 on the basis of a mortgage by conditional sale. Under it the plaintiff (the mortgagor) was entitled to possession by redemption on payment of Rs. 4208-3-0 by 15-11-1896 but if he made default the suit was to stand dismissed. The money ordered to be paid was not paid and the mortgagee who was in possession, continued in possession. Subsequently, the heirs of the mortgagor instituted a second suit for redemption alleging that the mortgage had been paid off out of the profit and that they were entitled to possession of the property. The suit was decreed on payment of Rs. 5243 13-0 to the mortgagees. On appeal the High Court upheld the decree but altered the amount payable. The successors of the mortgagees took the case up in appeal to His Majesty-

in-Council and before their Lordships of the Judicial Committee it was contended :

"(1) That the suit, though in form a redemption suit, was in reality an application to enforce the old decree of 25-9-1896, that such a suit could not be maintained and that execution of the old decree was barred by limitation;

(2) that the decision in the former suit operated as res judicata and that therefore S. 11, Civil P. C. prohibited the Courts from trying the present suit; and

(3) that no payment having been made under the old decree the former suit stood dismissed on 15th November 1896 with the result that the mortgagor's right to redeem became extinguished under S. 60, T. P. Act, 1882."

[40] In deciding these three points their Lordships say :

"In regard to the first point it can only arise for consideration if the appellants fail to establish their third point and their Lordships feel a difficulty in appreciating how it could then prevail; because if a second suit for redemption is, in the circumstances of the present case, properly maintainable, then the simple answer to the first point is that the present suit is a redemption suit and is not an application to enforce the old decree. In regard to the second point their Lordships are of opinion that no relevant question of res judicata here arises. The issues decided in former suit were (1) whether the mortgagors were then entitled to redeem; and (2) the amount then to be paid if redemption then took place. The issues in the present suit are (1) whether the right to redeem now exists, and (2) the amount now to be paid if redemption now takes place. If it could be said that the old decree involved a decision that the mortgagor's right to redeem was extinguished, that matter would indeed be res judicata, but this very question of the meaning and effect of the old decree arises for consideration of the third point."

Their Lordships then proceed to a consideration of the third point.

[41] This decision of their Lordships is fully applicable to the facts of the present case and clearly negatives the arguments of the appellants' learned counsel on both the points. If this is treated as a suit for redemption as the appellants contend, then obviously S. 47, Civil P. C., has no application because it does not relate to the execution of any previous decree. Even if it is not treated as a suit for redemption, S. 47 is irrelevant because what the landlords applicants claim by those proceedings is an assertion of their title. In the litigation of 1898 that title was not in dispute at all and the decree did not relate to it. Further it is to be noticed that these are proceedings under the Encumbered Estates Act and even decreed claim must be proved. By the force of S. 18, and other sections of the Act even decrees can only be executed in the manner and to the extent prescribed in the Act. Quite apart therefore from the question of limitation action under the Encumbered Estates Act in no way militates against the provisions of S. 47, Civil P. C.

[42] On the question of *res judicata* also the decision of their Lordships mentioned above is fully applicable. As pointed out by their Lordships the question whether the right to redeem is barred or not did not arise and was not decided in previous case. Moreover in the present proceedings which arise under S. 11, Encumbered Estates Act, the question raised is of the title of the landlord applicant to the property in dispute. In the redemption case this question did not arise because in that case it was admitted that the title lay with the mortgagor. This is an additional ground for holding that these proceedings ars not barred by the rule of *res judicata.*

[43] The result is that the decision of the learned District Judge of Barabanki, except in so far as it varied the decision of the Special Judge, must be maintained. On the question of acquisition of mortgagee rights by adverse possession the decision is set aside and the matter is left open for enquiry at the proper stage. With this modification the appeal is dismissed. The appellants will pay the costs of respondents in this appeal and the order of the District Judge as to costs will stand. The stay order dated 18-2-1944 is vacated.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 246 *[C. N. 87]*

CHANDIRAMANI J.

Debi Dayal and another—Accused—Applicants v. *Gur Sahai—Complainant—Opposite Party.*

Criminal Revn. No. 130 of 1947, Decided on 3-3-1948, from order of Sessions Judge, Unao, D/-10-9-1947.

Criminal P. C. (1898), S. 522—There must be use of force or show of force—Breaking open lock and taking possession without opposition is not use or show of force—Order directing delivery of possession to complainant is illegal.

It is the use of force or show of force against a person which entitles the Magistrate or Court to pass an order regarding delivery of possession under S. 522. Where there was no occasion for the use of any force or show of force on the part of the accused when they took possession of the property by breaking open the lock as the complainant was absent and no one on behalf of the complainant appeared to prevent the accused from committing the offences (viz. S. 448, Penal Code), the order restoring possession to complainant could not be passed under S. 522: 21 A. I. R. 1934 Oudh 185, *Rel. on*; 25 A. I. R. 1938 Lah. 839, *held overruled by* 27 A. I. R. 1940 Lah 460. [Para 2]

Annotation:—('46 Com) Cr. P. C., S. 522, N. 3, Pts. 8 & 10.

Cases referred:—

1. ('34) 21 A. I. R. 1934 Oudh 185 : 148 I. C. 790 : 35 Cr. L. J. 788, Zamin Husain v. Emperor.
2. ('38) 25 A. I. R. 1938 Lah. 839 : 180 I. C. 501 : 40 Cr. L. J. 380, Roda v. Autar Singh.
3. ('40) 27 A. I. R. 1940 Lah. 460 : I. L. R. (1941) Lah. 512 : 191 I. C. 373 : 42 Cr. L. J. 160, Narain Singh v. Pannalal.

K. P. Misra—for Applicants.

Gaya Prasad—for Opposite Party.

Order.—One Gur Sahai filed a complaint under S. 452, Penal Code, against the applicants Debi Dayal and his son Ram Chandra and four other persons alleging that on 2nd April 1946, between 4 and 5 P. M. in the absence of the complainant these persons broke open the lock of a temple known as Ramshala in village Kanderpur, District Unao of which he was in possession and took possession. The charge was denied. The two applicants alone were convicted by a second class Magistrate under S. 448, Penal Code, and the trial Court also ordered delivery of possession to the complainant Gur Sahai. The applicants went up in appeal, but their appeal was dismissed. Then they went up in revision to the learned Sessions Judge, Unao and among other things challenged the propriety of the order under S. 522, Criminal P. C., regarding delivery of possession. The learned Sessions Judge quoted the evidence of P. W. 5 Raj Kishore and came to the conclusion that from his evidence it appeared that there was a show of force in taking possession and in the circumstances he refused to interfere with the order under S. 522, Criminal P. C.

[2] The only point now urged before this Court is that the order under S. 522, Criminal P. C., was illegal as the dispossession of the complainant was not accompanied by use of criminal force or by show of force. There cannot be the least doubt that this contention is correct. P. W. 5 Raj Kishore, on whose evidence the learned Sessions Judge relied is to the following effect:

"There is a Ramshala in Kanderpur. Gur Sahai is Pujari. He is also the manager of the property which appertains to it. Five or six months ago, at about 4 P. M. I saw from my shivala, which is also close by, accused Nos. 1 and 2 breaking open the lock of Ramshala. The other accused were also standing there. After breaking open the lock all of them went in. I asked them why they were breaking open the lock and they replied that they would perform worship, take possession of it and would manage it. I had never seen them performing the worship or managing the property."

It will be noticed that there is not a word in this evidence of the use of any criminal force or show of force to any person and it is the use of force or show of force against a person which entitles the Magistrate or Court to pass an order regarding delivery of possession under S. 522, Criminal P. C. Raj Kishore never said that he asked the applicants not to go there. He simply asked them what they were doing. It has been held in A. I. R. 1934 Oudh 185[1] that where there was no occasion for the use of any force or show of force on the part of the accused when they took possession of the property, as the complainant was absent and no one on behalf of the complainant appeared to prevent the accused from committing the offences of which they had been convicted, the order restoring possession to complainant could not be passed under S. 522.

[3] This is the view which has been adopted by practically all the High Courts now. The learned counsel for the opposite party tried to rely on A. I. R. 1938 Lah. 839[2] wherein it was held that:

"When an accused takes possession of a house by breaking the lock in the absence of a person in possession of the house he uses criminal force to the lock which he breaks, criminal because it involves the crime of mischief and an order under S. 522, Criminal P. C., is therefore competent."

This has been expressly overruled by a Bench of the same High Court in A. I. R. 1940 Lah. 460[3] and it has been held that:

"The only force that is contemplated by S. 522, is force as applied to a human body—the use of force as maintained in Ss. 349 and 350, Penal Code. Hence where the complainant was dispossessed of his house in his absence no criminal force can be said to have been used to any person. No order can therefore be made under S. 522."

[4] The order under S. 522, Criminal P. C., is in these circumstances illegal and must be set aside. Accordingly the order directing delivery of possession to Gur Sahai is set aside and if possession has been delivered to him under this illegal order the possession shall be restored to the applicants. It is open to Gur Sahai to take proper legal steps to recover possession of the property if he is so advised.

R.G.D. *Revision allowed.*

A. I. R. (35) 1948 Oudh 247 *[C. N. 88.]*

KIDWAI AND CHANDIRAMANI JJ.

Basdeo Gir — Defendant — Appellant v. *Jugraj Prasad and another — Plaintiffs— Respondents.*

First Appeal No. 124 of 1942, Decided on 25-2-1948, from decree of Civil Judge, Sitapur, D/- 30-9-1942.

(a) Grant — Ancient grant — Dedication — Evidence — Actings or statements of grantee or his successor and treatment on administrative records may be considered.

The question was whether a certain property was part of the endowment for the upkeep of a temple. The temple being an ancient one and its origin lost in antiquity, there was no evidence to show whether it had any endowment attached to it when it was founded:

Held that the actings or statements of the grantee or his successor might be relevantly taken into account as to their interpretation of the original grant; while the method in which the property had been treated on the administrative records may also throw light on the same problem. These things are not conclusive, but are circumstances worthy of consideration: 11 A. I. R. 1924 P. C. 109, *Foll.* [Para 13]

(b) Wajib-ul-arz — Tradition recorded in—Evidentiary value.

In the absence of any defects of anachronism and more reliable evidence to the contrary, the general accuracy of the tradition recorded in a wajib-ul-arz of a village must be accepted: 7 A. I. R. 1920 Oudh 258, *Foll*; 12 O. C. 236 and 32 I. A. 113 (P. C.), *Ref.* [Para 15]

Further, even if the tradition set out in the wajib-ul-arz is not strictly accurate, it affords valuable proof of what the dictators of the wajib-ul-arz conceived the nature of the property to be : that is to say, it affords valuable proof of how the property was treated by all concerned. [Para 16]

(c) Hindu law — Religious endowment—Dedication — Evidence — Property in possession of lay holder and subject to ordinary law of inheritance—Fact that income of property was devoted to upkeep of temple does not prove dedication.

Where property is found in the possession of a lay holder and has been subject to the ordinary law of inheritance, transfer and bequest, the mere fact that a part, or even the whole, of the income has been devoted to the upkeep of a religious institution does not lead to the conclusion that the property was dedicated for the upkeep of that institution : *Case law discussed.* [Para 24]

(d) Hindu law — Religious endowment—Dedication—Evidence—Mere fact that property descended from guru to chela for several generations is not sufficient to prove dedication.

Under the Hindu law, even the undedicated property in the possession of an ascetic, who has severed himself from the world, does not descend to his blood relations but to his spirtual relations, his disciples, his preceptors and so on. Thus, if nothing else were proved than that property had come into the possession of an ascetic by descent from his gurus for several generations, this would be quite inconclusive to determine the nature of the property, i. e. whether it was the personal property of the ascetic or was endowed property appertaining to the institution over which he presided. [Para 26]

(e) Civil P. C. (1908), O. 41, R. 1 — Plaintiffs cannot be permitted to depart from their pleadings and raise a new question of fact in appeal. [Para 28]

Annotation : ('44-Com.) Civil P. C., O. 41, R. 1, N. 12.

(f) Hindu law — Religious endowment — Math or Asthan — Requirements of, stated.

An asthan commonly known in Northern India as a math, is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets, and the observance of its rites. The followers of the cult and disciples in the institution are known as chelas; the chelas are of two classes — celibate and non-celibate. The mahant must, by the custom of the math, be a bairagi or religious chela. The mahant is the head of the institution. He sits upon the gaddi; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself. Upon his death or abdication he is succeeded by one of the bairagi chelas: 3 A. I. R. 1916 P. C. 256, *Foll.* [Para 29]

Even if the mahant for the time being neglected his duties in giving instruction to his chelas it would not mean that the institution which fulfils all the other requirements of a math is not a math. [Para 30]

(g) Hindu law — Religious endowment—Mahant — Property granted to individual who was head of math, held not personal property of mahant.

Held that village Gayabar which formed part of the property granted as muafi to an individual who was head of a math, was part of the endowed property and was not the personal property of the Mahant: 14 A. I. R. 1927 Oudh 113, *Foll*; 5 A. I. R 1918 Oudh 345 and 8 A. I. R. 1921 P. C. 126, *Ref.*; 11 A. I. R. 1924 P. C. 109 *Disting.* [Paras 33, 36]

(h) Hindu Law—Religious institution — Mahant — Powers of — Alienation of endowment property without legal necessity is not binding on endowment.

The manager of an endowment can alienate or charge it in the same manner and to the same extent as the manager holding on behalf of an infant heir: 2 Cal. 341 (P. C.), *Foll.* [Para 36]

Where there is no legal necessity to justify the mortgage of the endowed property, the mortgage is not binding on the trust estate. [Para 37]

(i) T. P. Act (1882), S. 41—"Ostensible owner" — Religious endowment — Mahant is not ostensible owner of math property—S. 41 does not apply.

Section 41 only applies to cases in which a person is the ostensible owner "with the consent, express or implied, of the persons interested in immovable property." In the case of a mortgage of a religious endowment by a Mahant the "person interested" is the deity or institution on whose behalf the "ostensible owner" was in possession as manager. The so-called ostensible owner is entitled to be in such possession and to exercise the powers of a Mahant, which includes the power of alienating it for legal necessity, over the property. The fact, therefore, that he is allowed to be in possession and to deal with it as Mahant will not constitute him as an "ostensible owner" within the meaning of S. 41 nor can it be said that the deity or the institution, which cannot express itself except through him, allowed him, either expressly or impliedly, to hold himself out to be the owner. Thus S. 41, T. P. Act has no application to such a case. [Para 38]

Annotation:— ('45-Com.) T. P. Act, S. 41 N. 8 Pt. 6.

Cases referred:—

1. ('24) 51 I. A. 192 : 11 A. I. R. 1924 P. C. 109 : 21 N. L. R. 1 : 51 Cal. 446 : 80 I. C. 645 (P. C.), Mahomed Raza v. Yadgar Hussain.
2. ('20) 23 O. C. 303 : 7 A. I. R. 1920 Oudh 258 : 60 I. C. 440, Rampat v. Durga Bharati.
3. ('09) 12 O. C. 236 : 3 I. C. 549, Sri Dhar v. Mahant Dharam Das.
4. ('05) 32 I. A. 113 : 8 O. C. 155 : 27 All. 271 : 8 Sar. 772 (P. C.), Lal Achal Ram v. Raja Kazim Husain Khan.
5. ('77) 2 Cal. 341 : 4 I. A. 52 : 3 Sar. 681 (P. C.), Konwar Doorganath Roy v. Ramchunder Sen.
6. ('13) 16 O. C. 76 : 17 I. C. 303, Abdul Ghafur v. Shiam Sunder Das.
7. ('15) 2 O. L. J. 259 : 2 A. I. R. 1915 Oudh 181 : 30 I. C. 240, Parmeshri Das v. Girdhari Lal.
8. First Civil Appeal No. 114 of 1937, Decided on 11 March 1940 (Oudh), Shah Iftikhar Ahmad v. Moinuddin Ahmad.
9. ('38) 65 I. A. 252 : 1938 O. W. N. 693 : 25 A. I. R. 1938 P. C. 195 : I. L. R. (1938) Lah. 453 : 32 S. L. R. 821 : 175 I. C. 459 (P. C.), Parma Nand v. Nihal Chand.
10. ('39) 1939 O. W. N. 634 : 26 A. I. R. 1939 P. C. 201 : I. L. R. (1939) Kar. P. C. 350 : 182 I. C. 753, (P. C.), Kartar Singh Bedi v. Dayal Das.
11. ('28) 50 All. 485 : 15 A. I. R. 1928 All. 257 : 107 I. C. 252, Sheo Ghulam Puri v. Shiam Lal Bhagat.
12. ('16) 43 I. A. 73 : 3 A. I. R. 1916 P. C. 256 : 43 Cal. 707 : 33 I. C. 583 (P. C.), Ram Parkash Das v. Anand Das.
13. ('27) 2 Luck. 109 : 14 A. I. R. 1927 Oudh 113 : 100 I. C. 241, Shah Mahomed Naim Ata v. Mahomed Shamsuddin.
14. ('18) 5 O. L. J. 38 : 5 A. I. R. 1918 Oudh 345 : 45 I. C. 292, Basdeo Ban v. Ram Saran.
15. ('20) 23 O. C. 171 : 8 A. I. R. 1921 P. C. 126 : 58 I. C. 900 (P. C.), Mt. Kamla Lachhmi v. Basdeo Prasad.

Naimatullah, S. C. Das, Naimullah, Inayatullah and Sunder Lal Srivastava—for Appellant.

K. P. Misra, B. P. Misra, Ali Hasan and K. P. Trivedi—for Respondents 1 and 2.

Judgment. — In the town of Misrikh, in district Sitapur, on the banks of a sacred tank, in which pilgrims, who visit the locality on the occasion of the Parikarma, bathe, there stands an ancient temple ascribed by tradition, to one Raja Dudhich, a Rishi of great repute. In this temple an idol, known as Dudhich Nathji, is installed and there is no serious controversy about the fact that there is also a Mahanti Gaddi in existence, the Mahant of which is charged with the administration of the temple.

[2] On 30-6-1925, the then Mahant Bijai Gir, mortgaged a village Gayabar, to Mahraj Bal Krishan, to secure a loan of Rs. 6000 which he had taken. The mortgage was for a period of 10 years and was without possession. Interest at 12 per cent. per annum, compoundable yearly was stipulated. The mortgagor described the property as his zemindari haquiat, which he owned and possessed and it was stated that the money was required "to meet the expenses of Naga Sadhus etc."

[3] Mahraj Bal Krishan died in 1927 and the respondents succeeded to his mortgagee rights. Mahant Bijai Gir died in November 1935, after the mortgage money had fallen due, and Mahant Basdeo Gir, appellant, succeeded him.

[4] On 2-7-1941, the respondents commenced the suit out of which this appeal arises, for recovery of Rs. 13,500 on the foot of the mortgage by sale of the mortgaged property. It was stated that a larger sum was due but the claim was confined to Rs. 13,500. It was also stated in the plaint that village Gayabar was the personal property of Bijai Gir, but that, even if it belonged to an endowment, the money was borrowed for a legal necessity and created a valid charge.

[5] The defendant did not admit the mortgage in his written statement but later admitted the genuineness of the document and no issue was framed on this point. He also pleaded that village Gayabar, along with other villages had, from very ancient times, stood endowed for the expenses of the temple and the Sadhus and Sanyasis visiting it, and that, consequently, Bijai Gir had no authority to charge it with the debt in question which was not incurred for legal necessity but for immoral purposes.

[6] The plaintiffs filed a replication giving detailed reasons for their case that Gayabar was the personal property of the Mahant and did not belong to any endowment. They also developed their case as to legal necessity by adding to the original object mentioned in the deed the necessity for extensive repairs to the buildings involving an expenditure of Rs. 3000. It was also claimed that the mortgagee was entitled to the benefit of S. 41, T. P. Act, since he had taken the mortgage from an ostensible owner. Finally it was pleaded that Mahant Bijai Gir owned property which he had himself acquired and that, in any case, the plaintiffs were entitled to recover this money from that property.

[7] Upon these pleadings the trial Court framed the following issues :

"(1) Whether the property is waqf property ? (2) If so, was the money advanced for legal necessity ? (3) To what amount is the plaintiff entitled ? (4) To what relief is the plaintiff entitled ? (5) Whether Mahant Bijai Gir was the ostensible owner of the property ? If so, its effect ?

[8] It will be seen that no issue was framed on the point raised in the replication that, in any case, a decree should be passed executable against the personal property of Mahant Bijai Gir because the right of the plaintiffs to obtain such a decree was not disputed in the written statement.

[9] The parties adduced a considerable amount of evidence, both oral and documentary, and the learned Civil Judge, on a consideration of this evidence, found : (1) That village Gayabar was the personal property of the Mahant and was not part of any endowment. (2) That no legal necessity for the loan was established. (3) That a sum of more than Rs. 13,500 was due and a decree for that sum should be passed.

[10] In view of his decision that Mahant Bijai Gir was the owner of village Gayabar the learned Civil Judge did not feel himself called upon to decide whether the plaintiffs were entitled to the benefit of S. 41, T. P. Act.

[11] The suit was accordingly decreed for recovery of Rs. 13,500 by sale of village Gayabar. The defendant, being dissatisfied with this decision, has come up in appeal and, in this Court, his learned Advocate has contended that the evidence on the record substantiates his plea that village Gayabar is not the personal property of the Mahant but is part of an endowment for the upkeep of the temple of Dudhich Nath. On the other hand, the respondents' learned counsel has not only sought to support the finding of the trial Court that village Gayabar belonged to Mahant Bijai Gir personally but has also urged that legal necessity for the loan is made out.

[12] The first point which we proceed to consider is whether Gayabar is endowed property or is the personal property of the Mahant for the time being.

[13] As we have already stated the temple is an ancient one and its origin is lost in antiquity. There is thus no evidence to show whether it had any endowment attached to it when it was

founded. Further no document of title, earlier than the annexation of Avadh by the British is forthcoming, although EX. A-46 shows that, according to the statement of the Kanoongo, a "sanad" from the Emperors of Delhi did exist and was filed at the time of the first summary settlement after the annexation of Avadh. The "sanad" together with most of the papers relating to the first summary settlement, seem to have been destroyed during the troubles of 1856-57, and it was not available even at the time of the first regular settlement. In the present case, therefore,

"the actings or statements of the grantee or his successor may be relevantly taken into account as to their interpretation of the original grant; while the method in which the property has been treated on the administrative records may also throw light on the same problem. These things are not conclusive, but are circumstances worthy of consideration: *vide* 51 I. A. 192.[1]

[14] The first document relating to village Gayabar, which we have on the record, is the decree passed by the officer engaged in making the first regular settlement of the Province. This is Ex. 3, and is a decree for proprietary rights in favour of Mahant Ganesh Gir, the predecessor of Mahant Bijai Gir, and his co-sharers. The decree was so framed in pursuance of the orders contained in Circular NO. 46 of 1864 dated 29th September 1864 (*see* Bannerji's Settlement circulars, p. 154), and it indicates that the decree was not intended to confer a new title upon Mahant Ganesh Gir but that all rights which had existed before the annexation and which had been confiscated by Lord Canning's proclamation were restored. Words, therefore, which seemingly confer a absolute proprietary right on Mahant Ganesh Gir, would not terminate the rights of any other person or institution which had any right in the property before the annexation. We have then to determine what was the nature of village Gayabar before the annexation.

[15] The principal evidence on the question whether Gayabar was a part of an endowment or not is furnished by EX. A-1 and EX. A-2. Exhibit A-1 is a pedigree filed, as was then the practice, to assist in the preparation of the khewat of village Gayabar. It also contains important statements by the mahant and the various disciples of the preceding mahants then in existence, as to the manner in which the income of the village was being spent. Exhibit A-2 is the wajib-ul-arz of village Gayabar. Paragraph 1 of this wajib-ul-arz gives a short history of the village. It is true that this is nothing but tradition, yet "in the absence of any defects of anachronism and more reliable evidence to the contrary, the general accuracy of the tradition must be accepted": *vide* 23 O. C. 303[2] at p. 307. *See also* 12 O. C. 236.[3] In 32 I. A. 113,[4] their Lordships of the Judicial Committee even relied upon a tradition recorded in a wajib-ul-arz about an ancient adoption as furnishing evidence of the adoption. Thus the history contained in the wajib-ul-arz provides valuable evidence in this case.

[16] Further, even if the tradition set out in the wajib-ul-arz is not strictly accurate, it affords valuable proof of what the dictators of the wajib-ul-arz conceived the nature of the property to be: that is to say it affords valuable proof of how the property was treated by all concerned.

[17] Before, however, proceeding to consider the evidence, it is necessary for us to review the numerous authorities that have been placed before us by the learned advocates for both the parties to assist us in arriving at a correct conclusion as to whether village Gayabar is endowed property or not. Of course the facts of none of the cases are identical with those of the present case but, in so far as certain principles are enunciated in them, they are of great assistance.

[18] The first principle, for which the learned counsel for the respondents contended, is that, if a person in possession of particular property utilises its profits towards the upkeep of a mosque, or temple or shrine, that does not by itself constitute the property wakf property. In support of this proposition he relied upon 2 Cal. 341,[5] 16 O. C. 76,[6] 2 O. L. J. 259[7] and the unreported decision of this Court in First Civil Appeal No. 114 of 1937.[8]

[19] In 2 Cal. 341,[5] a document endowing the property was set up but this was not accepted and the only proof of endowment was that the rents and profits of a mahal, which was ancestral family property, had been devoted to the upkeep of the idol. The family owned other properties also and there were other deities which were maintained. Their Lordships of the Judicial Committee say that the evidence was vague and indefinite and could not be held to be sufficient to discharge the burden which rested upon the person setting up the endowment. In coming to this conclusion their Lordships relied upon, (a) the absence of any books of account to show that the rents of the mahal were separately collected and kept merely to be applied to the worship of the idol; and (b) proof of the fact that the mahal was dealt with as property belonging to the family and was the subject of inheritance by various members of the family in the same way as the rest of the property and the person in possession did not object to a partition on the ground that it was endowed property and as such not divisible.

[20] Their Lordships then say, at p. 350:

"Therefore, there is not only weakness of proof on the part of the plaintiff, but a very strong presumption,

arising from the conduct of the parties in the suit in question, that this was not debutter property. . . . "

[21] In 16 O. C. 76,[6] the learned Judicial Commissioners followed the decision in 2 Cal. 341,[5] and held that proof of the fact that income of certain property was spent upon the upkeep of a mosque was not by itself sufficient to prove that property was endowed property. It was, however, not merely upon the above-mentioned fact that reliance was placed but, as, in the Privy Council case, other circumstances were also relied upon to lead to this conclusion.

[22] In 2 O. L. J. 259,[7] the facts clearly indicated that no endowment existed. In that case property, belonging to one Jogi Mal, was left by him to his sister and her husband, Gattu Mal, for their absolute use. Gattu Mal built a Thakurdwara in 1875 and formally installed an idol. On the facts the learned Judicial Commissioners found that the Thakurdwara was a public temple. They then proceeded to consider whether village Pahia Asampur, which was purchased in 1876, a year after the foundation of the temple by Gattu Mal in his own name, had been endowed for the upkeep of the temple. It was shown that the income of the village was about Rs. 1,300 a year and that it was deposited in a common account with the income from the other properties of Gattu Mal, while a sum of Rs. 300 only was spent annually on the upkeep of the temple. No deed of endowment was executed by Gattu Mal or by any one else and, on the death of Gattu Mal, his widow, a minor whom he had married on the death of his first wife, succeeded. On mutation being made in her favour the following entry—the origin of which was not ascertained — was made in the column of remarks: "Ba shart sarf Thakurdwara Thakur Dwarka Dhish." This entry continued in the records even when Kalka Das, a cousin of Gattu Mal, succeeded to the property in 1888. Kalka Das bequeathed the property to his sister-in-law for her life and thereafter to his nephew, Girdhari Lal. The will provided that out of the income of the village, Rs. 526 were to be spent on the upkeep of the expenses of the Thakurdwara. These facts clearly disclosed that there was no endowment and it was in those circumstances that the learned Judicial Commissioners remarked, following 2 Cal. 341,[5] that

"the mere fact that Gattu Mal was spending a portion of his income on the upkeep of the temple was insufficient to show that the corpus of the property was dedicated to its use."

[23] In First Civil Appeal No. 114 of 1937,[8] which was decided by a Division Bench of this Court on 11th March 1940, the question was whether a 12 anna share of village Serai Pir was endowed for the upkeep of a Dargah and the expenses of an "urs" at Rudauli in the district of Bara Banki. It was proved, from the recital contained in the wajib-ul-arz, that originally some land had been granted to the ancestors of the then holders as "madad maash." It was also proved that, in British times, the grant was confirmed by a muafi sanad which laid down the conditions, namely that the Dargah would be properly lighted and repaired and that visitors to the shrine should be fed for one day each year at the annual fair. The evidence further established that the property had been subject to the ordinary law of inheritance, the shares of all the heirs of the original grantee being specified. The Court came to the conclusion that those facts did not establish a waqf.

[24] Thus the proposition has been too broadly stated by the respondents' learned counsel and all that can be deduced from these authorities is that, if property is found in the possession of a lay holder and has been subject to the ordinary law of inheritance, transfer and bequest, the mere fact that a part, or even the whole, of the income has been devoted to the upkeep of a religious institution does not lead to the conclusion that the property was dedicated for the upkeep of that institution.

[25] The next contention of the respondents' learned counsel was that the mere fact that property in the possession of an ascetic had descended for several generations from guru to chela is not proof of the fact that the property was endowed for the upkeep of the institution over which the ascetic presides. In support of this proposition he relied upon 65 I. A. 252=1938 O. W. N. 693,[9] 1939 O. W. N. 634[10] and 50 ALL. 485.[11]

[26] This contention cannot be seriously disputed because it is clear that, under the Hindu law, even the undedicated property in the possession of an ascetic, who has severed himself from the world, does not descend to his blood relations but to his spiritual relations—his disciples, his preceptors and so on. Thus if nothing else were proved but that property which was proved to have come into the possession of an ascetic by descent from his gurus for several generations, this would be quite inconclusive to determine the nature of the property, i. e. whether it was the personal property of the ascetic or was endowed property appertaining to the institution over which he presided. It must be noticed, however, that in all the cases to which reference has been made there was evidence to show that the property was acquired by the original holders out of their private funds, was treated by successive holders as private property and there was no evidence of any endowment having been created.

[27] On the basis of these decisions the respondents' learned counsel contended that even if it

is proved that the property had descended for a considerable length of time from guru to chela and that its income had been devoted to the upkeep of a religious institution, it could not be said that it was endowed property. He did not, however, confine his argument to this aspect of the matter, he proceeded further and contended that, in the present case, there is in existence no religious institution of such a character as to be able to hold property. He urged that although there is in existence a building which is called a temple, it is not in fact a temple according to Hindu law and that the so-called "math" or "asthan" does not satisfy the requirements of a "math" as laid down by their Lordships of the Judicial Committee in 43 I. A. 73[12] at p. 76.

[28] The first contention is based upon the statement made in the written statement that in the temple there is an idol of Dadhich installed. The argument proceeds that Dadhich was not a deity but only a Rishi: *vide* Sitapur Gazetteer, p. 192, and as such could not be an object of worship. This may be the strict religious theory but there have been many developments and there can be no doubt that the building, in which the idol of Dadhich is installed, has long been considered to be a temple which is the object of a visit by pilgrims on the occasion of a Parikarma fair. It is not necessary for us to go into this question at any great length because, in the present case, the plaintiffs in their replication admitted the existence of a temple as such: *vide* paras. 11 and 22, and the whole case was dealt with in the trial Court on this footing. The plaintiffs cannot, therefore, be permitted to depart from their pleadings and raise a new question of fact in appeal.

[29] Further, whether there is a temple strictly so called in existence or not, there can be no doubt that there is in existence an "asthan" or "math." In 43 I. A. 73[12] a "math" is described at pp. 75 and 76 in the following words:

"An asthan, commonly known in Northern India as a math, is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets, and the observance of its rites. The followers of the cult and disciples in the institution are known as chelas; the chelas are of two classes—celibate and non-celibate .... The Mahant must, by the custom of the math, be a bairagi or religious chela. The mahant is the head of the institution. He sits upon the gaddi; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself. Upon his death or abdication he is succeeded by one of the bairagi chelas."

[30] In the present case all these requirements are fulfilled except that it is contended that there is no evidence to indicate that any instructions are given as to the tenets of the institution. Even if the mahant for the time being neglected his duties in this respect, it would not mean that an institution which fulfils all the other requirements of a math is not a math. Moreover this plea also was not taken in the trial Court and the defendant was not called upon to prove whether religious instruction was imparted at the institution or not. Further Ex. A-1 a pedigree, filed during the course of the First Regular Settlement contains a note by the Mahant, verified by the remaining inmates of the institution, that there was an asthan in existence. Thus it cannot be said that there is no institution in existence which may hold endowed property.

[31] We then come to a consideration of the question whether the evidence in this case satisfactorily proves that village Gayabar is in fact endowed property or not. In doing so we must not lose sight of the fact that, while we may not be able to arrive at a particular conclusion on proof of one or more facts, the conclusion becomes irresistible when several facts all tending in the same direction are established. In the present case the facts which are established from Ex. A-1, the pedigree, and the notes appended to it, filed by the then Mahant to assist in the preparation of the khewat, and Ex. A-2 the wajibul-arz of the village, are as follows: (1) That a mahanti gaddi was established by one Gayanath about 1000 years ago. (2) That so long ago as the reign of the Emperor Shah Jehan i.e. about 300 years ago a considerable property, including village Gayabar, was granted to one Soroman Nath, a successor of Gyan Nath, as a muafi. (3) That this property descended from one mahant to another without diminution of a considerable period of time during which, on many occasions, there were disorders and disturbances in the course of which properties very often changed hands and passed out of the possession of their real owners. (4) That when Nawab Saadat Ali Khan made an enquiry into muafis—an enquiry which was of a very searching character and which the Nawab himself supervised touring his dominions for the purpose—he maintained the grant, except to this extent that he assessed revenue on three of the villages, one of which passed out of the possession of the mahant. (5) That, thereafter, for about 50 years, till the annexation of Avadh by the British, the entire property again continued to be held undiminished by the mahant during a period when most holders of property suffered from vicissitudes of fortunes, owing to the weakness of the administration.

[32] It is further established that, at the time of the regular settlement, when titles to all landed property in Avadh were being enquired into the muafi grants were upheld and sanads were issued stating that since they had been held

"under the former Government for the support of a shrine" they would be maintained "so long as the shrine is kept up." It is true that the revenue paying villages are not covered by these sanads but Exs. A-1 and A-2 clearly indicate that, during the Moghal rule, as well as during the Nawabi, they had been held on exactly the same tenure and their income was even then being utilised for the same purpose. Sanads were only issued for taluqdari estates and muafis and consequently the conditions can only be gathered from the decree passed by the Settlement Court and from the village administration papers. As we have already stated, the decree, Ex. 3, is inconclusive but Exs. A-1 and A-2 indicate the object of the grant with reasonable certainty.

[33] It is also true that Ex. A-2 shows that the original grant was to an individual, Soroman Nath, but that individual was the head of a religious institution and any grant meant for the institution would also be made to him as representing that institution. The case in 2 Luck. 109[13] is a very analogous case. In that case also the decree was in favour of an individual and the muafi sanad was granted to him, the object being the upkeep of the buildings of a "khanqah" and the maintenance of a school. It was held that this was a wakf and the property did not belong to the Sajjadanashin personally. In this case also the main facts are similar and it must be held that Gayabar is part of the endowed property and is not the personal property of the Mahant. *See* also 5 O. L. J. 38[14] and 23 O. C. 117.[15]

[34] We are aware that in 51 I. A. 192[1] a grant made to a Hakim "for the Imambara of Pir Hussain" was held not to create a wakf but only to make a grant to the Hakim subject to the condition of maintaining the Imambara. This case was cited before the learned Judges in 2 Luck. 109[13] and they say that it was decided on its own facts. Indeed there is a great point of distinction between the two cases because the grant was not made to the head of any religious institution but to a private individual to whom the grantor was under an obligation. Moreover the point which weighed very greatly was that succession to it had been according to the personal law of the grantee and not to a single mutawalli.

[35] It may also be noted that the witnesses produced by the plaintiffs themselves speak of a "math" and refer to the property as dedicated property. Those witnesses, except Mahesh Datt, P. W. 5, can of course, have no personal knowledge of any dedication. Nevertheless their evidence is valuable as showing how the property was dealt with. Mahesh Datt was for a long time the general agent in charge of the affairs of the institution and he seeks to make a distinction between 10 mauzas dedicated to the gaddi and 5 mauzas not dedicated but he is unable to point out what was the distinction in the manner in which the income of the two was utilised.

[36] Thus Gayabar must be held to be endowed property belonging to the institution and not to Mahant Bijai Gir. That does not, however, end the matter because, it is agreed that the manager of an endowment can alienate or charge it in the same manner and to the same extent as the manager holding on behalf of an infant heir: *vide* 2 Cal. 341[5] at pp. 345 and 352. We have, therefore, to see whether there was any legal necessity to justify the mortgage.

[37] The alleged grounds of necessity are that money was required for making extensive repairs to the buildings of the institution and for feeding a large number of Nahang Sadhus about 400 who had suddenly arrived for a prolonged stay and whose arrival at that juncture was of advantage to the institution because it was being attacked by a rival group who desired to take possession of it. If either of these two objects is proved to have existed, the mortgage would be for legal necessity. [Their Lordships discussed the evidence and held that neither of the alleged grounds of necessity were established, and the transaction of loan is not binding on the trust estate. Their Lordships proceeded.]

[38] The plea that the mortgagee was entitled to the benefit of S. 41, T. P. Act, was not decided by the trial Court but the plea is wholly untenable. That section only applies to cases in which a person is the ostensible owner "with the consent, express or implied, of the persons interested in immoveable property." In the present case the "person interested" was the deity or institution on whose behalf the "ostensible owner" was in possession as manager. The so-called ostensible owner was entitled to be in such possession and to exercise the powers of a mahant, which included the power of alienating it for legal necessity over the property. The fact, therefore, that he was allowed to be in possession and to deal with it as mahant would not constitute him as an "ostensible owner" within the meaning of S. 41, nor could it be said that the deity or the institution, which could not express itself except through him, allowed him, either expressly or impliedly, to hold himself out to be the owner. Thus S. 41, T. P. Act, has no application to the case.

[39] The plaintiffs, however, claimed a personal decree against the defendant as the personal representative of Mahant Bijai Gir, in case a mortgage decree could not be passed. This was not objected to by the defendant and such a decree must be passed.

[40] The result is that the appeal is allowed. The decree of the trial Court is set aside and a simple money decree is passed against the defendant as the successor of Mahant Bijai Gir to the extent of the assets of Mahant Bijai Gir, if any, in his hands.

[41] The appellant will get his costs of this appeal and of the suit from the respondents but the respondents will get their costs both of the suit and of the appeal from the assets of Mahant Bijai Gir, if any, in the hands of the appellant.

V.B.B. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 254 *[C. N. 89.]*

CHANDIRAMANI J.

Dargahi Lal — Plaintiff—Appellant v. *Manna and another—Defendants—Respondents.*

Second Appeal No. 425 of 1942, Decided on 5-12-1947, against order of Dist. Judge, Unao, D/- 31-7-1942.

(a) U. P. Tenancy Act (17 [XVII] of 1939 as amended in 1940), S. 288—S. 288 is retrospective.

Section 288 lays down only the law of procedure and such law is retrospective in the sense that it applies to proceedings pending at the time: 20 A. I. R. 1933 Oudh 274, *Ref.* [Para 3]

(b) Landlord and tenant — Relinquishment — Notice of relinquishment given by tenant not in actual possession — Landlord executing patta in favour of another person — This indicates that tenant gave up possession.

It is true that mere notice of surrender is not enough to terminate the relationship of landlord and tenant. Relinquishment of possession is also necessary. It is however not necessary that actual physical possession should be delivered in every case. All that is necessary is that the tenant who has given notice of relinquishment should give up his own possession. Where a notice of relinquishment is sent by a tenant who is not in actual possession and the landlord after receipt of notice of relinquishment executes a patta in favour of another person, these facts are sufficient to indicate that the tenant gave up possession. [Para 3]

Case referred :—

1. ('33) 8 Luck. 504 : 20 A. I. R. 1933 Oudh 274 : 145 I. C. 363, Naqi Ahmad v. Sheo Shankar Lal.

P. N. Chaudhri—for Appellant.

Judgment.—Dargahi Lal, the plaintiff appellant, sued in the civil Court for recovery of possession of plot No. 2623 in village Kusumbhi, district Unao, and for Rs. 25 as damages. He alleged that one Mt. Subeda was the tenant-in-chief of the plot but she relinquished that plot in favour of the landlord Biswas Bakhsh Singh, respondent 2, and that he in turn gave him a patta of the plot on 1st July 1939. He alleged that Manna, respondent 1, was a sub-tenant of Mt. Subeda and that as Mt. Subeda had surrendered her rights of tenancy he too ceased to have any rights and he was in possession as a trespasser. He, therefore, sought to eject Manna and obtain possession for himself. The landlord did not contest the plaintiff's case. Manna denied any relinquishment by Mt. Subeda and also denied the execution of the patta by the landlord in favour of the plaintiff. Parties led evidence and the evidence was closed on 13th December 1939. 22nd December 1939 was fixed for judgment, but somehow it was postponed and the judgment was delivered on 2nd January 1940. In the meantime, the U. P. Tenancy Act of 1939 came into operation on 1st January 1940. The trial Court held the relinquishment to be proved and the patta to be genuine and effective, and decreed the plaintiff's suit. On appeal, the decree of the trial Court was set aside and it was directed that the question of tenancy should be disposed of by referring the matter to a competent revenue Court and then the case would be disposed of. This was done and on 15th January 1941, the trial Court accepted the finding of the revenue Court that although there had been a notice of relinquishment no relinquishment had actually taken place and that in these circumstances the patta was ineffective and the suit was dismissed. On appeal the decree of the trial Court was confirmed.

[2] In appeal it has now been urged that S. 288, Tenancy Act was not applicable and therefore any reference to the revenue Court was erroneous and that in any case, accepting the findings of the Courts below, there is no doubt that there was a relinquishment of the tenancy by Mt. Subeda.

[3] Nobody appears on behalf of the respondents. I have heard the learned counsel for the appellant and am satisfied that the appeal must be allowed. There was no provision like that contained in sub-s. (1) of S. 288, Tenancy Act of 1940 before that Act came into force. As the language of the sub-section itself shows, it will be applicable only to suits which come before the civil Courts after the coming into force of the Tenancy Act of 1940. Such suits may be those either pending at the time the Act came into force or those instituted after coming into force of the Act. Section 288 lays down only the law of procedure and such law is retrospective in the sense that it applies to proceedings pending at the time (*see* 8 Luck. 504[1]). In this case the suit was pending when the Tenancy Act of 1940 came into force. The procedure therefore adopted in sending the case to the revenue Court for decision on the issue of tenancy was correct.

[4] The learned lower appellate Court has found that as required by S. 20, Avadh Rent Act, notice of relinquishment was duly served by Mt. Subeda, the tenant in-chief. It has found also as a fact that no actual delivery of possession was made to the landlord because in July 1941 it was the sub-tenant who remained actually

in possession. In this particular case the tenant-in-chief was in constructive possession through her sub-tenant. The interest of the sub-tenant ceases with the tenant and, if the sub-tenant retains possession, his position is only that of a trespasser, as has been held in several decisions by the Board of Revenue. It is true that mere notice of surrender is not enough to terminate the relationship of a landlord and tenant. Relinquishment of possession is also necessary. It is, however, not necessary that actual physical possession should be delivered in every case. All that is necessary is that the tenant who has given notice of relinquishment should give up his own possession. Mt. Subeda is admittedly not in actual possession herself. The landlord, on the other hand, after the receipt of the notice of relinquishment executed a patta in favour of the plaintiff. In my opinion, these facts are sufficient to indicate that Mt. Subeda gave up possession of the land.

[5] In this view of the matter, Manna is merely a trespasser in possession and the plaintiff is entitled to possession as tenant and also damages. The plaintiff and defendant 1, Manna, had agreed in the trial Court that in case the suit was decreed the plaintiff would be entitled to Rs. 12-8-0 only as damages. Accordingly I allow the appeal, set aside the decree of the lower appellate Court and decree the plaintiff's suit for possession and Rs. 12-8-0 as damages. The plaintiff appellant will get his proportionate costs in all the Courts against defendant 1, Manna, only.

D. S. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 255 *[C. N. 90.]*

KAUL AND KIDWAI JJ.

Mt. Saraswáti — Defendant-Appellant v. *Raja Ram and others — Plaintiffs-Respondents.*

First Appeal No. 109 of 1942, Decided on 17-2-1948, against decree of Civil Judge, Unao, D/- 12-8-1942.

Civil P. C. (1908), S. 92 — Outsiders and designing persons should not be allowed to institute suit in order to put pressure upon trustee to give up possession of trust property to them.

It is true that a trustee of a public trust of a religious and charitable nature is liable to render accounts of the income of the trust property. Care should, however, be taken not to permit outsiders and designing persons to abuse the process of law. Where it is found that a suit under S. 92 is brought, not with the purpose of advancing the objects for which the trust was created but with sinister designs, to put pressure upon the trustee to give up possession of the trust property to the plaintiffs the Court should not lend its support to such men. While giving sanction to institute a suit under S. 92, it would be useful if the Advocate-General would go into the question not only of the conditions of the trust deed but also into the question of the *bona fides* of the would-be plaintiffs and of their capacity to represent the public, on whose behalf they are purporting to act: 31 A. I. R. 1944 All. 231, *Ref.* [Para 7]

Annotation : — ('44-Com.), Civil P. C., S. 92, N. 8 & N. 33.

Case referred :—

1. ('44) 1944 O. W. N. H.C. 129: 31 A. I. R. 1944 All. 231: 217 I.C. 329, Jugal Kishore v. Shiam Lal.

K. P. Misra, and Anand Madhava — for Appellant.
N. Banerji — for Respondents 1 and 2.

Judgment. — This is a defendant's appeal in a suit brought under S. 92, Civil P. C. One Mahasukh, Brahman of village Salempur, began constructing two temples; but before they were completed he died, some time before the year 1890. The temples were completed by the widow Mt. Mithana and in one of them she installed the idol of Lord Shiva and as appears from a trust deed executed by her, the images of Radha Krishnaji were installed in the other. By a trust deed dated 6-9-1890 she endowed the temples and dedicated the properties mentioned in the deed for religious and charitable purposes specified therein. She appointed herself as the first trustee. By this deed of trust as well as by a subsequent will executed by Mt. Mithana, she nominated her brother's wife along with her own guru as joint trustees who were to administer the endowment after her death. Mithana (Mahasukh's widow) died in 1919 and as her guru had predeceased her the administration of the trust devolved upon the other Mithana. She managed the properties dedicated to the temples till her death in 1930. Shortly before her death she executed a will by which she appointed her daughter the present appellant Saraswati as the next trustee. The management of the temples and of the endowed properties has accordingly been carried on by her since her mother's death.

[2] In 1940 five persons, Raja Ram, Rameshwar, Narpat Singh, Sheo Ram Singh and Mohabat Singh made an application under S. 3 of Act 14 [XIV] of 1920 in the Court of the District Judge of Unao alleging that Mt. Saraswati who was in possession of the trust property was mismanaging it. They prayed that she be instructed to furnish accounts of the trust property which should be audited. The application was contested on behalf of Mt. Saraswati. The learned Judge dismissed the application as he held that the trust in question was not proved to be a public trust to which Act 14 [XIV] of 1920 could apply. After that application was dismissed, Raja Ram, Rameshwar, Narpat Singh and Mohabat Singh instituted the suit which has given rise to this appeal. It was a suit under S. 92, Civil P. C., instituted with the sanction of the Advocate-General. The plaintiffs alleged that there was a public religious and charitable trust created by Mt. Mithana widow of Mahasukh with the object and purpose of maintaining two temples, and the

phulwari attached to them. The trustee was required to engage pujaris for the two temples and for the celebration of religious festivals such as Ram Navmi, Janma Ashtami, Sheo Ratri etc. According to the plaint allegations, it was also the duty of the trustee to feed sadhus and other pilgrims who might come to the village to visit the temples. They complained that Mt. Saraswati was guilty of a breach of trust inasmuch as she did not furnish a correct and accurate account of the income of the trust, did not manage the trust property and had allowed the phulwari, the temples as also the dharamshala attached to the temples to fall into a state of disrepair. They also charged her with not observing the usual religious festivals in the temples. It was alleged that the daily worship was not regularly performed nor was any money spent on the bhog of the idols. It was further alleged that pilgrims and sadhus were not regularly fed as was provided by the trust deed. They prayed for the following reliefs:

"(a) Removal of the defendant from the office of trustee;

(b) appointment of new trustees and vesting the trust property in them;

(c) directing the defendant to furnish accounts and to hand over the balance found due in her hands to the new trustees and

(d) directing the new trustees to apply the income of the trust properties to the objects of the trust. It was prayed in the alternative that a scheme for the proper administration of the trust be drawn up."

The claim was contested by Mt. Saraswati.

[3] On the pleadings of the parties the learned Civil Judge of Unao before whom the matter came up for consideration, framed the following issues:

"1. Is the trust in question a public trust?

2. Is the sanction of the Advocate-General obtained by the plaintiffs invalid as alleged?

3. Is the defendant guilty of any breach of trust as alleged?

4. To what relief, if any, are the plaintiffs entitled against the defendant?

5. Is the building in front of Shiva's temple a Dharamshala and was it built by Mithana and forms a part of the trust property?

6. Are the plaintiffs not entitled to sue on account of their alleged opposition to the trust as alleged in paras 12 and 13 of the defendant's written statement?"

Issue 1 was answered in the affirmative. Issue 2 was found in the negative. As regards issue 3, the learned Judge held that there was no evidence to show that the temples or the phulwari or the well or the alleged dharamshala had been allowed to fall into a state of disrepair. He further found that there was no evidence to prove that religious festivals were not observed or that the daily worship was not performed or that no money was spent in the bhog of the idols; nor was it proved that the sadhus and pilgrims were not fed. He could not on the evidence before him come to a finding that any portion of the trust funds had been misappropriated by Mt. Saraswati. Issues 5 and 6 were also found against the plaintiffs. The learned Judge was, however, of opinion that in order to ascertain if the defendant had misappropriated any of the trust funds it was necessary "that a regular accounting should be made." He accordingly decreed the plaintiff's suit for rendition of account against the defendant and passed a preliminary decree for accounts under O. 20, R. 13, Civil P. C. The decree further provided that in case the defendant was found to be guilty of any mismanagement or mis-appropriation of the trust funds, she would be liable to removal. The learned Judge, however, considered it unnecessary, in view of what was provided in the trust deed to draw up a scheme for the management of the trust. Dissatisfied with the decree Mt. Saraswati has come up in appeal.

[4] As Rameshwar (plaintiff 2 in the trial) died before the present appeal was filed, his name does not appear in the array of parties.

[5] It was contended by the learned counsel for the appellant that in view of the findings arrived at by the learned Judge that there was no evidence to show that the temples or the phulwari or the dharamshala had been allowed to fall into a state of disrepair, nor had the plaintiff succeeded in showing that religious festivals were not observed or the daily worship not performed nor was it proved that the appellant did not spend money on the bhog of the idols or on feeding pilgrims and sadhus the suit should have been dismissed. It was pointed out that the suit was not a bona fide one. That Rameshwar (plaintiff 2 in the trial Court) had in 1930 executed a sale-deed in favour of respondent 3 Mohabat Singh and certain other persons in respect of a portion of the trust property in order to raise funds to challenge the validity of the trust. That Mohabat Singh and other plaintiffs were persons who were the enemies of Mahasukh and had instituted this suit in order to harass his relations.

[6] Before proceeding further, we may mention that the appellant's counsel did not dispute the finding of the learned Judge that the trust created by Mithana's deed of 1890 was a public trust of a religious and charitable nature.

[7] We will now address ourselves to a consideration of the question whether the suit instituted by the respondents and Rameshwar since deceased, was or was not a bona fide suit. Paragraph 4 of the plaint reads as follows:

"That the defendant is guilty of a breach of trust. She does not give a correct and accurate account of the income of trust. She does not manage the trust property properly. The temples, the *phulwari* and the well and the *dharamshala* have been allowed to fall into a

state of disrepairs. Religious festivals are not observed. No *puja* is regularly made at the temples nor is any amount spent in the *bhog* of idols. Pilgrims and sadhus are not fed."

This contained all the allegations which, according to the plaintiffs, constituted a breach of trust. The finding of the learned Judge on all these points is against the respondents. Evidence was led on behalf of the respondents to show that some land had been given by Mt. Saraswati for cultivation to her own relations. With regard to this the learned Judge observed that the giving of a small fraction of land by the defendant to her relations "cannot by itself be enough to disentitle her from remaining a trustee any more." It further appears from the evidence that accounts of the trust property are maintained; though possibly they are not so fully as would be kept by a qualified accountant. The defendant was, under the trust deed, entitled to an annuity of Rs. 300, but she had all along contented herself with taking Rs. 100 only per year. The appellant's allegation that Rameshwar who was the chief person behind this litigation had sold away a portion of the mortgaged property to which he laid claim as a reversioner of Mahasukh in order to raise funds to have the deed of trust set aside (*see* EX. A-2) is not without foundation. (Their Lordships after considering evidence on the point, proceeded.) We are satisfied, therefore, that the suit brought by the respondents was not a bona fide one. In these circumstances, as the allegations of a breach of trust were not substantiated the suit should in our opinion have been dismissed. It is true that a trustee of a public trust of a religious and charitable nature is liable to render accounts of the income of the trust property. Care should, however, be taken not to permit outsiders and designing persons to abuse the process of law. Where it is found, as is the case in the present instance, that a suit under S. 92, Civil P. C, is brought, not with the purpose of advancing the objects for which the trust was created but with sinister designs, to put pressure upon the trustee to give up possession of the trust property to the plaintiffs the Court should not lend its support to such men. The suggestion made by Allsop and Malik JJ. in 1914 O. W. N. H. C. 129[1] that it would be useful in cases under S. 92, Civil P. C. if the Advocate General would go into the question not only of the conditions of the trust deed but also into the question of the bona fides of the would-be plaintiffs and of their capacity to represent the public, on whose behalf they are purporting to act, was not kept in view when sanction for bringing the suit which has given rise to this appeal was accorded.

[8] Having given the matter our best consideration, we are of opinion that the learned Judge in the Court below should on the facts found by him, instead of passing a preliminary decree for accounts, have dismissed the suit. We accordingly allow the appeal, set aside the decree of the trial Court and dismiss the suit. The appellant shall get her costs from the respondents in both the Courts.

R.G.D. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 257 *[C. N. 91.]*

GHULAM HASAN C. J.

Sheo Prasad and others — Plaintiffs — Appellants v. *Rama Kant and others — Defendants — Respondents.*

Second Appeal No. 370 of 1942, Decided on 4-2-1948, from order of Civil Judge, Saltanpur, D/- 17-7-1942.

Limitation Act (1908), S. 19 — Entry in khewat mentioning defendant's predecessors as mortgagors and plaintiff's predecessors as mortgagees — Entry signed and attested by mortgagees and varified by Settlement Officer — Entry operates as valid acknowledgment.

Entries in a settlement khewat mentioning the predecessors of the defendants as mortgagors and the plaintiffs' predecessors as mortgagees and signed and attested by the mortgagees and verified by the Settlement Officer, are conscious acknowledgment of the existence of the liability in respect of the mortgage within the meaning of S. 19: 14 A. I. R. 1927 Oudh 457, *Approved*; 30 A. I. R. 1943 Oudh 425 and 10 I. C. 215 (All.), *Ref*; 10 I. C. 238 (All.). *Disting.*; 1880 P. R. No. 32, 1888 P. R. 63; 1891 P. R. 116 and 1910 P. R. 39, *Not foll.* [Para 6]

Annotation : ('42-Com.) Lim. Act, S. 19 N. 49 Pt. 1.

Cases referred:—

1. ('43) 1943 O. W. N. 302 : 30 A. I. R. 1943 Oudh 425 : 209 I. C. 604, Nanak Prasad v. Raja Suraj Baksh.
2. ('11) 10 I. C. 215 (All.), Maharaj Singh v. Shankar Lal.
3. ('11) 10 I. C. 238 (All.).
4. ('80) 1880 P. R. 32, Lalamal v. Gulam Mohammad.
5. ('88) 1888 P. R. 63, Maksud Ali v. Salar Bakhsh.
6. ('91) 1891 P. R. 116, Jawala Singh v. Sher Singh.
7. ('10) 1910 P. R. 39 : 5 I. C. 992, Gangaram v. Pokhar Das.
8. ('27) 14 A. I. R. 1927 Oudh 457 : 105 I. C. 93, Suraj Bakhsh v. Ganga Bakhsh.

H. Hussain — for Appellants.
B. K. Dhaon — for Respondents.

Judgment.—This second appeal arises out of a suit for a declaration by the appellants, which has been dismissed by both the Courts below concurrently.

[2] The only question that arises for determination is whether the view of the Courts below that the entries in the khewat of the second settlement evidencing an acknowledgment on the part of the predecessors of the appellants of their status as a mortgagee *vis a vis* the predecessors in interest of the respondents as mortgagors constituted a valid acknowledgment within the meaning of S. 19, Limitation Act, is correct. It is not disputed that two mortgages were executed

in 1850 and 1854 A. D. by the predecessors of the defendants in favour of the predecessors of the plaintiffs. The plaintiffs came to Court asking for a declaration that the mortgages had become irredeemable and they should be declared the owners of the property covered by the mortgages. The defendants pleaded that the mortgages were still subsisting inasmuch as the mortgagees had acknowledged them by means of certain entries in the khewats of the first and the second settlement. The entries in the former are admittedly of no help and the only question is whether EX. A-3, which is a copy of the khewat of the second settlement, contains a valid acknowledgment as contended for on behalf of the respondents.

[3] Exhibit A-8 is a settlement khewat. The first two entries in this khewat refer to the proprietary interest of the co-sharers. The remaining entries refer to mortgagee rights. One of them mentions the predecessors of the defendants as mortgagors and the plaintiffs' predecessors as mortgagees. The mortgagees have signed and attested the accuracy of the entries at the foot of the document and the settlement officer has recorded the fact of verification. Section 32 (c), Land Revenue Act, read with the explanation, requires that the record of rights shall also contain a register of mortgagees with possession. Section 54 lays down that all undisputed entries in the record of rights shall be attested by the parties interested .... and by force of S. 57 all entries in the record of rights prepared in accordance with the provisions of Chap. IV, which relates to the revision of records at settlement, shall be presumed to be true until the contrary is proved. There can be no doubt, therefore, that the entry of mortgage must be accepted as correct. Indeed it is conceded on behalf of the appellants that the accuracy of the entry is not disputed. What is contended, however, is that there is nothing to show that the attestation of the mortgagees is referable necessarily to the mortgage and not to their proprietary interest alone. There is no force in this contention. The entries in the khewat must be taken as a whole. There is no reason to think that these entries must refer to one portion and not to the other. There is also no good reason to think that entries about the mortgage were not brought home to the mortgagees and that their attestation was other than a conscious acknowledgment of the liability. The signatures of the mortgagees were verified by the Settlement Officer, and it is obvious that this could not have been done without the mortgagees being conscious of the fact that the entry of the mortgage was being made in the khewat within their knowledge. The criterion laid down in 1943 O.W.N. 302[1] that for an acknowledgment to operate as a valid acknowledgment, it must be a conscious acknowledgment of the existing liability is fully satisfied in the case.

[4] In 10 I.C. 215[2] a mortgagee was recorded as such in a khewat and the entry was duly attested by him through the pen of an agent in his presence and apparently with his sanction. It was held that the entry in the khewat was a valid acknowledgment under S. 19, Limitation Act. The case of *Chunni* v. *Hukum Singh*[3] at p. 238 of the same volume does not help the appellants. There the wajib-ul-arz which referred to a khewat recording certain persons as mortgagees and others as mortgagors was signed by one of the mortgagees only and it was, therefore, rightly held that it could not be considered to be an acknowledgment of the mortgage.

[5] Learned counsel has referred to the decisions in 1880 P. R. 32,[4] 1888 P. R. 63,[5] 1891 P. R. 116[6] and 1910 P. R. 39.[7] It would be sufficient to remark in respect of these cases that they took a somewhat rigid view of the provisions of S. 19, Limitation Act, and I am unable to follow the view taken on those cases. On the other hand, a Bench of this Court in A.I.R. 1927 Oudh 457[8] has held that evidence of a statement mentioning the mortgage in a pedigree of the co-sharers of a village which was the subject of mortgage signed by the mortgagees, and of an entry signed by them in the village wajib-ul-arz, duly verified before a Settlement Officer, the pedigree and wajib-ul-arz both forming part of the settlement record, satisfies all the essentials of a valid acknowledgment required by S. 19.

[6] I accept the soundness of the view taken in the aforesaid case and hold that the entries in the khewat of the second settlement were a conscious acknowledgment of the existence of the liability. I see no reason to differ from the view taken by the Courts below.

[7] Accordingly I dismiss the appeal with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 258 *[C. N. 92.]*

KAUL J.

Ram Dat Ram—Appellant v. *Lalta Prasad and others—Respondents.*

Second Appeal No. 7 of 1943, Decided on 28-1-1948, from order of Civil Judge, Bahraich, D/- 2-10-1942.

Evidence Act (1872), S. 68—"Document required by law to be attested" — Bond does not require attestation — S. 68 does not apply — Party contending to contrary must show that it requires attestation—Fact that it is in fact attested is irrelevant — Stamp Act (1899), S. 2 (5) — Limitation Act (1908), S. 2 (3).

The question whether a bond is a document required to be attested by law or not within the meaning of S. 68, Evidence Act, is a question to be determined

with reference to the law. The fact that a document purports to be attested has no bearing on the question. Accordingly it is for the party who contends that S. 68 applied to the case to refer to the law under which a bond is required to be attested. [Para 4]

A bond is not a document required by law to be attested. The definitions of that term as contained in S. 2 (5), Stamp Act and S. 2 (3), Limitation Act are not exhaustive and are meant only for the purposes of those Acts and cannot be taken to apply generally to the term 'bond'. Moreover those definitions do not make any reference to attestation. Hence S. 68, Evidence Act has no application to a bond. [Para 5]

Annotation.—('46-Man) Evidence Act, S. 68 N 2.

Cases referred :—

1. ('25) 6 Lah. 276: 12 A. I. R. 1925 Lah. 415: 86 I. C. 844, Wadhawa Mal v. Karim Baksh.
2. ('82) 8 Cal. 284, Gisborne & Co. v. Subal Bowri.

R. B. Lal—for Appellant.

J. S. Trivedi for S. C. Das—for Respondents 1 & 2.

Judgment. — This is a defendant's second appeal in a suit brought to enforce a bond.

[2] The material facts lie within a short compass. On 2-7-1933 a bond was executed by Baba Ram Dat Ram, appellant, in favour of Bachchu Lal who was defendant 2 in the trial Court. On 9-1-1942 Bachchu Lal purported to transfer the bond to Lalta Parshad and Tribhuwan Dutta. On 12-7-1942 the persons above-named instituted a suit out of which the present appeal has arisen to recover Rs. 600 due in respect of eight instalments payable under the bond and Rs. 148-8-0, interest. A number of pleas were taken in defence by the appellant Baba Ram Dut Ram but only one of these now survives. In order to prove the bond, the plaintiffs examined Bachchu Lal. They did not call any of the two witnesses Bindra Prasbad and Ram Narain by whom the bond purports to be attested. The evidence of Bachchu Lal in proof of the bond was accepted by the Munsif. It was contended before him that in view of the definition of the term "bond" given in S. 2 (5), Stamp Act, and the provisions of S. 68, Evidence Act, it should be held that the bond was not proved as required by law. The learned Munsif repelled this contention and decreed the claim in part. Dissatisfied with this decision, Baba Ram Dat Ram preferred an appeal which was disposed of by the learned Civil Judge of Bahraich. The learned Judge in the appellate Court pointed out that S. 68 was applicable only to documents which were required by law to be attested and that S. 2 (5), Stamp Act, nowhere laid down that a bond must be attested. Accordingly he dismissed the appeal. Baba Ram Dat Ram who with a pertinacity worthy of a better cause has come in second appeal. I have heard a learned argument addressed by the learned counsel for the appellant but am clear that the appeal is wholly without substance. I entertain serious doubt if this was a case in which the learned counsel who filed the appeal was justified in giving a certificate that the grounds mentioned in the memorandum of the grounds of appeal were good grounds for a second appeal.

[3] Mr. Ram Bharosey Lal referred to 6 Lah. 276[1] and 8 Cal. 284.[2] None of these cases to my mind has any bearing on the point which was placed before me for consideration in this appeal. So far as I could follow the learned counsel the only point for consideration was whether S. 68, Evidence Act, was applicable to this case. In none of the cases to which reference has been made this point came up for consideration. I would, therefore, refrain from saying anything further about those cases.

[4] The next point urged was that the document in question purports to be attested by two witnesses hence unless the other side showed that it was not required by law to be attested it must be taken that it was required to be attested. I frankly confess that I am unable to follow the line of reasoning which formed the basis of this contention. The question whether a bond is a document required to be attested by law or not is a question to be determined with reference to the law. The fact that a document purports to be attested has no bearing on that question. Accordingly it is for the party who contends that S. 68, Evidence Act, applied to the case to refer to the law under which a bond is required to be attested.

[5] Reference was made by the learned counsel for the appellant to the definition of that term as contained in the Stamp Act and the Limitation Act. As pointed out by the learned Judge in the Court below, none of these definitions are exhaustive. The definitions of these Acts are meant only for the purposes of those Acts and cannot be taken to apply generally to the term 'bond'. The definition in the Stamp Act opens with the words. "Bond includes . . . . . " The definition in cl. (3) of S. 2, Limitation Act, reads as follows:

> "'Bond' includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be."

It does not make any reference to attestation. I am clear that the appeal is wholly without substance. It is dismissed with costs.

[6] The order for stay of execution of decree dated 7-9-1944 is vacated.

K.S. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 260 *[C. N. 93.]*

CHANDIRAMANI J.

Bhagwat Sahai—Decree-holder—Appellant v. *Jagannath and another — Judgment-debtors—Respondents.*

Execution of Decree Appeal No. 94 of 1943, Decided on 16-12-1947, against order of District Judge, Lucknow, D/- 26-8-1943.

U. P. Temporary Postponement of Execution of Decrees Act (10 [X] of 1937), S. 3 — Decree for costs is decree for money — Act applies to such decree.

The Act applies to all kinds of money decrees based on any liability incurred before the passing of the Act. The words "any decree for money on the basis of a liability" are of the widest import and do not suggest a money decree on the basis of a loan only. Hence a decree for costs passed before the Act came into force is a decree for money and the Act applies to such a decree. This being so, in computing the limitation for an application to execute such a decree, the period during which the decree could not be executed by reason of the Act, should be excluded: 27 A. I. R. 1940 All. 326 (F. B.), *Rel. on.* [Para 3]

Case referred :—

1. (40) 27 A. I. R. 1940 All. 326 : I. L. R. (1940) All. 517 : 189 I. C. 848 (F. B.), Har Narain Lal v. Mathura Prasad.

Sri Ram and T. N. Srivastava—for Appellant.

P. N. Asthana — for Respondents 1 & 2.

Judgment. — Jagannath and Balbhaddar, Halwais, respondents, filed suit No. 55/87 of 1934 for partition against Jagannath Prasad, Kayasth, father of Bhagwat Sahai appellant, and some others. The suit was dismissed. In the decree there were two orders for costs. The appellant's father Jagannath Prasad was given Rs. 226 as costs against the plaintiffs while Rs. 208-6-0 were allowed as costs to the plaintiffs. The plaintiffs went up in appeal and their appeal was dismissed on 22 5 1936. Rupees 100 were awarded as costs to the appellant's father. The plaintiffs went up in second appeal to the Chief Court and that appeal was also dismissed summarily under O. 41, R. 11, Civil P. C., on 23-11-1936. On 12-1-1939 the present respondents-plaintiffs in the partition suit transferred their decree for costs to one Jugal Kishore. On 17 9-1942 the present appellant Bhagwat Sahai applied for execution of his decree for Rs. 117-10 0 after allowing a set off amounting to Rs. 208-6-0 the costs awarded in the partition suit to the respondents. Certain objections were raised and the principal one was that the application for execution was time-barred having been made more than three years after the passing of the decree. It was held that limitation should be counted from the date of passing of the Chief Court's decree, that is 23-11-1936. It was also held that from 1-1-1938 to 31-12-1940 the Temporary Postponement of Execution of Decrees Act 10 [X] of 1937 was in force and as the present respondents were agriculturists, the decree could not have been executed during that period of three years and so in computing the period of limitation this period must be excluded and if that is done the decree is clearly within time. The benefit of this period of three years was given to the appellant and the decree was held to be within time. The respondents went up in appeal to the learned District Judge and he held that the Temporary Postponement of Execution of Decrees Act, 10 [X] of 1937, did not apply to a decree for costs and accordingly held that the application for execution was time-barred and dismissed the application for execution.

[2] The only point now urged in appeal is that the Temporary Postponement of Execution of Decrees Act, 10 [X] of 1937, does apply to a decree for costs which is a decree for money and therefore the application for execution was not time-barred. I have heard the learned counsel for the parties and am satisfied that the appeal must be allowed.

[3] Sub-section (1) of S. 3, Temporary Postponement of Execution of Decrees Act, 10 [X] of 1937, lays down that all proceedings in execution of any decree for money passed by a civil Court on the basis of a liability incurred before the passing of the Act, in which the judgment-debtor or any one of the judgment-debtors is, at the date of the passing of this Act, an agriculturist shall be stayed during the period this Act shall remain in force, if such judgment-debtor does not pay more than Rs. 250 as land revenue or rent, or more than Rs. 30 as local rate for revenue-free land or if, the total of the revenue rent and ten times the local rate payable by him or any two of them does not exceed Rs. 250. On the terms of the sub-section the appellant is entitled to succeed. It was urged for the respondents that the liability contemplated in this section is the liability on the basis of a loan. This contention has no force. No such words have been used in the section. The Act applies to all kinds of money decrees based on any liability incurred before passing of the Act. The words "any decree for money on the basis of a liability" are of the widest import and do not suggest a money decree on the basis of a loan only. This section has been interpreted by a Full Bench of the Allahabad High Court in A. I. R. 1940 ALL. 326.[1] At p. 328, column 3, Thom C. J., while delivering the judgment of the Full Bench said :

"It was urged that S. 3 applied only to decrees for money passed by a Civil Court on the basis of a liability incurred before the passing of the Act and that a decree for costs was not a decree on the basis of such liability. There is no force in this argument. The decree for costs was passed precisely because there was a liability. The plaintiff, judgment-debtor, came into Court with a false claim against the decree-holder. His

claim was dismissed and he had incurred a liability to indemnify the defendant in respect of the costs of the defendant in the litigation. In passing the decree for costs the Court did not as was contended for the judgment-debtor, create the liability. The decree was passed because there was the liability to pay the successful defendant in the suit his costs. The decree for costs was passed before the Temporary Postponement of Execution of Decrees Act came into force. It was passed upon a liability which had been incurred before the passing of the Act."

In the present case the decree was admittedly passed before the Temporary Postponement of Execution of Decrees Act, 10 [X] of 1937, came into force. The decree was, therefore, passed upon a liability which had been incurred before the passing of the Act. The view of the Court below was erroneous and the appeal must, therefore, be allowed.

[4] In the result the appeal is allowed with costs of this Court and the lower appellate Court and the order of the lower appellate Court is set aside and the application for execution shall be deemed to be within time and shall be disposed of according to law.

D. S. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 261 *[C. N. 94.]*

GHULAM HASAN C. J. AND KAUL J.

Tahawar Khan and others — Appellants

v. *Radhey Lal and others — Respondents.*

First Appeals Nos. 65, 67, 69 and 70 of 1947, Decided on 29-7-1947, against decree of Special Judge, 1st grade, Bahraich, D/- 29-3-1947.

(a) Oudh Chief Court Rules, Chap. XII, R. 2—Appeal under S. 45, U. P. Encumbered Estates Act against order of Special Judge under S. 11 — Copy of judgment cannot be dispensed with—Civil P. C. (1908), O. 41, R. 1.

Where an appeal is filed under S. 45, U. P. Encumbered Estates Act against an order of Special Judge under S. 11 of that Act the case is covered by R. 2 of Chap. 12 of Oudh Chief Court Rules framed under S. 223, Government of India Act. That rule is peremptory in its terms and leaves no discretion whatever with a Court to dispense with a copy of judgment. The appellate Court cannot therefore dispense with the copy of the judgment. Order 41, R. 1, Civil P. C. has no application to such a case as the order passed by Special Judge under S. 11, U. P. Encumbered Estates Act, strictly speaking, is not a decree but is only deemed to be a decree. [Para 2]

(b) Limitation Act (1908), S. 5—Sufficient cause.

Where in an appeal under S. 45, U. P. Encumbered Estates Act the appellant being under a misapprehension in good faith files one single copy of the judgment in two appeals, the delay may be condoned and the appellant may be granted time to file the other copy as there is sufficient cause for condoning the delay. [Para 3]

N. Banerji —for Applicants.

Judgment.—Four first civil appeals are filed under S. 45, Encumbered Estates Act by two sets of parties. Two appeals are filed by Mohammad Zahir Uddin Khan and two by Tahawar Khan and others. Application No. 26 of 1936 was filed by Tahawar Khan and others while application No. 32 of 1936 was filed by Ranjit Khan under S. 4, Encumbered Estates Act. Zahir Uddin Khan's paternal grandfather Ranjit Khan had two brothers Najib Khan and Naurang Khan. Ranjit Khan set up exclusive right in the property which was the subject-matter of his application while his opponents, namely the representatives of his two brothers, set up joint rights in the same property. There was also a question whether the gift of seven villages made by Ranjit Khan to one Ghulam Mohiuddin Khan was fictitious and fraudulent. Objections under S. 11 were filed by both parties and related to the property in suit as also to the property covered by the deed of gift. Application No. 32 was made the leading case and all evidence was produced in that case but it was agreed between the parties that the same evidence would be read in application No. 26 in which, therefore, no evidence was produced. The Special Judge decided these claims by one common judgment. This covers 36 typed pages. The judgment was given on 29th March 1947. Mohammad Zahir Uddin Khan, as we have already said, filed two appeals, one against the decree in application No. 32 in which he filed both the copy of the judgment and the decree and one against the decree in application No. 26, in which he contented himself with filing a copy of the decree only. Tahawar Khan and others followed the same line of action.

[2] The question arising before us is whether the copy of the judgment should be dispensed with in two appeals as, if this is not permissible by law, then the parties may be allowed to file a copy of the judgment within a time to be fixed by this Court. Both the parties have filed an application under S. 5, Limitation Act as two of the appeals will admittedly be beyond time if it is held that the filing of the copy of the judgment was indispensable. Order 41, R. 1, Civil P. C., upon which great reliance is placed for the appellants has no application. That rule does empower the appellate Court to dispense with the copy of the judgment but it applies only to appeals from original decrees. Strictly speaking, the order passed by the Special Judge under S. 11 is not a decree but by force of sub s. (4) of that section it is to be deemed to be a decree of a civil Court of competent jurisdiction. Under S. 122, Civil P. C. this Court has the power to make rules from time to time regulating its procedure and the procedure of civil Courts subject to its superintendence, and may by such rules annul, alter, or add to all or any of the rules in Sch. 1. There can be no doubt that this Court has the power therefore to alter R. 1 of O. 41. We may also refer to S. 223, Government of India Act which confers upon High Courts wide powers including

the power to make rules of Court. Under this rule-making power this Court has framed R. 2 which appears in Chap. 12 of the Rules of the Chief Court of Oudh. It runs thus :

"No memorandum of appeal from appellate decree or from an order shall be presented unless it be accompanied by a copy of the decree or order appealed against and a copy of the judgment upon which such decree or order is founded....."

While R. 1 of O. 41, Civil P. C., refers to appeals from original decrees, this rule clearly refers to an appeal from an appellate decree or from an order which may be either original or appellate. The appellate decrees and orders are not covered by R. 1 of O. 41. The case, therefore, is covered by R. 2 quoted above as these appeals are against an order of the Special Judge which is appealable under S. 45, Encumbered Estates Act. It is no doubt to be regarded as a decree of a civil Court of competent jurisdiction which means only this that the order is binding upon the parties and cannot be interfered with by a regular civil Court upon the supposition that it is an order of a summary character which is less effective than a decree made between the parties. Rule 2, in our opinion, is peremptory in its terms and leaves no discretion whatever with a Court to dispense with a copy of judgment. The language of this rule stands in striking contrast to the language of R. 1 of O. 41, which empowers the Court to dispense with the copy of judgment. We are unable, therefore, to dispense with the copy of the judgment.

[3] We have considered the applications under S. 5 and have heard counsel in support of them. We are satisfied that having regard to the particular circumstances of this case they have made out a sufficient cause for condoning the delay. The appeals of both parties in the leading case are within time and it is conceivable that parties may have been under a misapprehension in good faith that one single copy of the judgment in the two appeals will be sufficient. We think, therefore, that time should be given to the appellants to file the copies of the judgment. We allow them one month's time to do so. The appeals will be put up for orders when the copies have been filed.

D.S. *Order accordingly.*

A. I. R. (35) 1948 Oudh 262 *[C. N. 95.]*

MISRA AND KIDWAI JJ.

Chhatanki and others — Appellants v. *B. Avadh Narain Sahib and another — Respondents.*

O. C. A. A. No. 4 of 1946, Decided on 22-12-1947, against judgment of Kaul J., Reported in 33 A. I. R. 1946 Oudh 242.

(a) Oudh Civil Rules, Chap. 6, R. 277, sub-r. (41) —Objection by insolvent to sale of his house by Receiver on ground that it was used for agricultural purposes and could not be sold — Objection dismissed—Formal order must be prepared.

Where upon the Receiver's seeking permission of the Court to sell a house belonging to the insolvent, the insolvent files an objection claiming that he was an agriculturist and that the house was used for the purposes of agriculture and could not be sold, it is necessary for the Court dismissing the objection to prepare a formal order as such an order is specified in Sch. 1, Provincial Insolvency Act, and is appealable to the Chief Court under S. 75 (2) of that Act. [Para 6]

(b) Provincial Insolvency Act (1920), S. 75 (2)— Oudh Civil Rules, Chap. 12, R. 2—R. 2 is peremptory—Order dismissing objection of insolvent to sale of his house—Appeal—Memo must be accompanied by copy of order.

Rule 2, Chap. 12, Oudh Civil Rules, having been framed under the powers conferred upon the Court by S. 122, Civil P. C., must govern the procedure in presenting appeals. This rule is peremptory in its terms and leaves no discretion to the Court. An appeal against an order dismissing an objection of the insolvent to the sale of his house on the ground of his being an agriculturist must therefore be accompanied by a copy of the formal order dismissing the objection and where no such copy is filed with the memorandum within the time allowed by law the appeal is not properly constituted : 35 A.I.R. 1948 Oudh 261, *Rel. on.* [Para 7]

(c) Oudh Courts Act (4 [IV] of 1925), S. 12 (2)— Point not raised before single Judge cannot be properly raised in appeal under S. 12 (2) : 34 A.I.R. 1947 Oudh 71, *Rel. on.* [Para 7]

Cases referred : —

1. ('46) 1946 O. W. N. 331 : 34 A. I. R. 1947 Oudh 71: 22 Luck. 19 : 226 I. C. 561, Beni Madho v. Haribar Prasad.
2. ('47) 1947 O. W. N. 525 : 35 A. I. R. 1948 Oudh 261, Tabawar Khan v. Radhey Lal.

Kalbe Mustafa—for Appellants.

Ali Hasan—for Respondents.

Judgment.—The appellants were declared insolvents on 28-4-1941, at the instance of a creditor and a Receiver was appointed to take charge of their property. Thereafter the Receiver sought the permission of the Court to sell a house belonging to the insolvents. The insolvents filed an objection claiming that they were agriculturists and that the house was used for the purposes of agriculture and could not be sold. The District Judge, after recording the evidence, dismissed the objections on 27-3-1942. A formal order was prepared and it was signed by the District Judge on 1-4-1942. The insolvents filed an appeal against the order on 27-4-1942. No copy of the formal order was filed along with the memorandum of appeal, the advocate for the appellants stating that no formal order had been prepared.

[2] On receipt of the record in this Court, it was discovered that a formal order had been prepared. A notice was accordingly issued on 27-6-1942, to the appellants to file a copy of the formal order, but they failed to do so and a report was laid before the Hon'ble the Chief Judge, who, on 25-7-1942, allowed one week's time for filing a copy of the formal order subject

to any objection that the respondents might take as to limitation, since the period allowed for filing an appeal had expired on 11-7-1942. A copy of the formal order was filed on 1-8-1942.

[3] The appeal was then fixed for hearing before our learned brother, Kaul J., and a preliminary objection was taken that, by reason of the failure of the appellants to file a copy of the formal order along with the memorandum of appeal within the time allowed by law, the appeal was not properly presented and should be dismissed. Our learned brother agreed with this contention and dismissed the appeal but, at the oral request of the appellants' learned counsel, he made a declaration that the case was a fit one for appeal under S. 12 (2), Avadh Courts Act.

[4] The argument of the appellants' learned counsel before us has been two-fold. He has contended: (1) That the order being one which was passed under the provisions of the Provincial Insolvency Act, no formal order was required to be prepared; and (2) that, even if a formal order was required to be prepared, it was not necessary to file it since this was not an appeal under the Code of Civil Procedure but was one under S. 75 (2), Provincial Insolvency Act, and that consequently the provisions of O. 41, R. 1 and O. 43, R. 2, Civil P. C., did not apply to it.

[5] With regard to the first point, we are in entire agreement with our learned brother that this was a case in which a formal order was required to be prepared. Apart from R. 3, added by this Court to O. 43, there is an express rule made by this Court in exercise of the powers conferred upon it by S. 79, Provincial Insolvency Act, directing,

"A Court shall draw up a formal order embodying its adjudication and the memorandum of costs incurred by the parties in—

(a) decisions and orders specified in Schedule I of the Act, from which an appeal lies to the Chief Court under S. 75 (2), and,

(b) any other decision or order against which a party or Receiver signifies in writing to the Court his intention to appeal": *vide* Avadh Civil Rules, Chap. 6, R. 277, sub-r. 41.

[6] The provisions of this rule do not seem to have been brought to the notice of our learned brother. They are clear and unambiguous and leave no room for doubt that a formal order should have been prepared in this case which, it is agreed, is specified in Sch. 1 and is appealable to this Court under S. 75 (2), Provincial Insolvency Act.

[7] The second point is one which was not urged before our learned brother and consequently, in view of the rule, laid down in numerous decisions of this Court which are collected together in 1946 O. W. N. 331[1] at p. 336, it cannot properly be advanced in an appeal under S. 12 (2), Avadh Courts Act. Moreover, after hearing the advocates for the parties on this point also we have come to the conclusion that it has no substance. Even accepting the appellants' contention that O. 41, R. 1 and O. 43, R. 2, Civil P. C., do not apply to this case, R. 2 of Chap. 12 of the Rules framed by this Court does apply and that provides that:

"no memorandum of appeal from an appellate decree or from an order shall be presented unless it is accompanied by a copy of the decree or order appealed against and a copy of the judgment upon which it is founded . . ."

This rule having been framed under the powers conferred upon the Court by S. 122, Civil P. C., must govern the procedure in presenting appeals. It has been held in a recent decision by a Division Bench of this Court that this rule is peremptory in its terms and leaves no discretion to the Court: *vide* 1947 O. W. N. 525.[2] No doubt that case involved a consideration of the effect of the failure of the appellants to file a copy of judgment, but there is no difference between copies of formal orders or decrees and judgments under this rule and it is equally peremptory in the matter of filing copies of the formal order. Thus the decision of our learned brother holding that the appeal was not properly constituted is not open to challenge.

[8] The result is that this appeal fails and is dismissed with costs.

S.C. *Appeal dismissed*

A. I. R. (35) 1948 Oudh 263 *[C. N. 90.]*

KAUL J.

Kandhaiya Lal and another — Applicants v. Lal Bahadur and another — Opposite Party.

Civil Revn. Appln. No. 151 of 1943, Decided on 3-2-1948, from order of Addl. Civil Judge, Gonda, D/-31-5-1943.

(a) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 30 (4) — U. P. Debt Redemption Act (13 [XIII] of 1940), S. 9 (4) — 'Refund' implies returning or paying back of a sum to mortgagor — What is prohibited by these Acts is 'refund' and not something which may be 'tantamount to a 'refund'. [Para 4]

(b) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 30 (4) — U. P. Debt Redemption Act (13 [XIII] of 1940), S. 9 (4)—Applicability — Usufructuary mortgage—Subsequent mortgage of same property in favour of same mortgagee with stipulation that two debts would be paid simultaneously —Rights of parties are governed by general law — First mortgage paid out of usufruct — Surplus profits remaining in hands of mortgagee can be appropriated in liquidation of subsequent mortgage — Sections do not apply — T. P. Act (1882), S. 76 (h).

In their application to secured loans, S. 30 (4) of Act (27 [XXVII] of 1934) and S. 9 (4) of Act (13 [XIII] of 1940) would apply only to a case where there is a single mort-

gage on the property of which the mortgagee has been put in possession. If, however, the mortgagor has after creating a mortgage with possession created another mortgage or charge over the same property in favour of the prior mortgagee and there is a stipulation that the two debts would be paid simultaneously or that the first mortgage shall not be redeemed unless the amount due under the subsequent mortgage or charge is also paid, sub-ss. 4 of Ss. 30 and 9 of the two Acts shall not apply. The rights of the mortgagor and mortgagee in such cases shall be determined according to their contract in the light of the ordinary law and principles of justice, equity and good conscience. [Para 4]

Under the general law the mortgagor is entitled at the time of redemption to call upon the mortgagee in possession to account for the profits realised by him from the security during the period of his possession. The mortgagee has to account for any money that has come to his hands. Neither of these Acts has in any way affected the right of the mortgagor to call upon the mortgagee to account for the money received by him. What is prohibited is a claim by the debtor to a refund of any part of the interest already paid by him. Thus, if at the time of taking accounts it appears that of the two debts payable by the mortgagor the first (for satisfaction of which the mortgagee was put in possession of the mortgaged property) has been liquidated and there is a surplus in the hands of the mortgagee, it is not only just and equitable that this surplus should be applied to the liquidation of the second debt but this is also what the law prescribes. There is nothing in the provisions of these two Acts to prohibit such a course. [Para 5]

Case referred:—

1. ('05) 27 All. 351 (F.B.), Madari v. Baldeo Prasad.

Onkar Nath Srivastava—for Applicants.

H. D. Srivastava—for Opposite-party No. 1.

Order. — This is an application for revision of an appellate order passed by the Additional Civil Judge, Gonda, on 31-7-1943 in proceedings for redemption of a mortgage under S. 12, U. P. Agriculturists' Relief Act.

[2] The material facts are as follows: On 11-10-1901, Ram Pargat and three others mortgaged some property in village Birsinghpore, district Gonda to Ram Das for a consideration of Rs. 600. Under this mortgage, the mortgagee was put in possession of the mortgaged property and authorised to appropriate the profits in lieu of interest. The mortgage was given for a period of 10 years from 1310 to 1319F. The mortgagors had no right to redeem within this period. He could, however, pay the principal sum at any time between 1319 and 1327F and redeem the property. If he failed to pay the debt by 1327F the deed of mortgage was to be treated as a deed of sale and the mortgagee the owner of the mortgaged property. The mortgagee's interest is now represented by the present applicants Kandhaiyya Lal and Hazari Lal while the mortgagor's interest has devolved upon the opposite party Lal Bahadur and others. On 18-9-1905 Ram Pargat and his co-mortgagors created another mortgage over the same property in favour of the same mortgagee for a consideration of Rs. 1140. Interest on this debt was agreed to be paid at one per cent. per annum compoundable with yearly rests. It was further stipulated by this deed that the mortgagors would not be entitled to redeem the second mortgage without payment of the amount due under the previous mortgage. Possession of the mortgaged property has throughout continued with the mortgagee and his representatives-in-interest.

[3] On 12th December 1941 an application under S. 12, Agriculturists' Relief Act, was made for redemption of the mortgage. Among other pleas it was urged in defence on behalf of the mortgagee's representatives that in view of the provisions of S. 9 (4), Debt Redemption Act, any excess profits realised by the mortgagee from the mortgaged property over which he was put in possession under the first deed of mortgage should not be applied towards the satisfaction of the second mortgage. This contention was repelled by the trial Court. The Munsif of Tarabganj before whom the matter came up for consideration for the purposes of taking accounts between the mortgagor and the mortgagee applied the usufruct of the mortgaged property first to the satisfaction of the debt of 1901. After it was satisfied in its entirety, the proceeds from the mortgaged property were to be applied towards the reduction of the second debt of 1905. He found that a sum of Rs. 923 11-9 was still due to the mortgagee and ordered payment of this amount by the mortgagors. Both the parties were dissatisfied with this decree. The mortgagee preferred an appeal and cross-objections were filed by the mortgagors. Besides other contentions the argument which was urged before the trial Court with regard to the use of the profits of the mortgaged property for the satisfaction of the second debt were repeated before the lower appellate Court. There also the mortgagee's contention was repelled. On taking accounts, however, the learned Additional Civil Judge of Gonda, who heard the appeal and the cross-objections, came to the conclusion that instead of Rs. 923-11-9 as found by the Munsif a sum of Rs. 696-5-0 only was due to the mortgagors. He modified the decree of the trial Court accordingly. Dissatisfied with this decision the mortgagee has come up in revision.

[4] It was contended by the learned counsel for the applicants that the application of the profits of the mortgaged property for the reduction or discharge of the debt due on the second mortgage was tantamount to a refund of the sums already paid by the mortgagor which was prohibited both under S. 30 (4), Agriculturists' Relief Act, and S. 9 (4), Debt Redemption Act. There is a short answer to this argument. Refund implies returning or paying back of a sum to

the mortgagor. This is what is prohibited by the provisions of law to which reference has just been made. What is prohibited is "refund" and not something which to use the language of the learned counsel for the applicants may be "tantamount to a refund." Apart from this consideration a little reflection and analysis of the legal position subsisting between the mortgagor and the mortgagee will bring to the surface the fallacy underlying the argument of the learned counsel for the applicants. The full significance of S. 30 (4), Agriculturists' Relief Act, and S. 9 (4), U. P. Debt Redemption Act, will be understood if we recall to mind the provisions of S. 76 (b), T. P. Act. Section 76 (b) reads as follows :

"When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property his receipts from the mortgaged property or where such property is personally occupied by him, a fair occupation rent in respect thereof, shall, after deducting the expenses mentioned in cls. (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage money and so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money; *the surplus, if any shall be paid to the mortgagor.*"

This is the general law governing the rights of the mortgagor and his mortgagee in possession. Obviously the legislature had this provision in mind when it enacted S. 30 (4), Agriculturists' Relief Act, and S. 9 (4), Debt Redemption Act. Section 30 (1), Agriculturists' Relief Act, prescribes the rate of interest for undecreed loans taken before that Act came into force for the period after 1st January 1930. Sub-section (2) of that section provides for amendment of decrees passed on the basis of loans advanced to agriculturists in accordance with the provisions of sub-s. (1) in respect of the amount decreed on account of interest. Sub-section (3) is not relevant for our present purpose. Sub-section (4) reads as follows :

"Any amount already received by the creditor on account of interest in excess of that due under this section shall be credited towards the principal; but nothing in this section shall be deemed to entitle a debtor to claim refund of any part of the interest already paid by him."

Section 9, Debt Redemption Act, runs as follows :

"9. (1) In a suit to which this Act applies or in amending a decree under the provisions of S. 8 the Court shall notwithstanding anything to the contrary in any law, decree or contract or in any agreement purporting to close past transactions, determine the principal and take into account all sums paid by or on behalf of the debtor and in the case of mortgage with possession, the net profits realised by the mortgagee or which with the exercise of ordinary diligence might have been realised by him and shall determine the amount if any due by the debtor in accordance with the provisions of the following sub-sections :

. . . . .

(4) *Nothing in this section shall entitle the debtor to a refund of any sum already paid by him.*"

It will be seen that these two enactments materially interfere with contracts as regards interest that can be charged by creditor in respect of loans to agriculturists. The provisions of these two enactments apply not only to future but also to existing contracts. On account of this interference by the legislature with the contracts of parties there would occur cases in which the mortgagee in possession might, acting on his original contract, appropriate to himself in lieu of interest on his debt, the income of the mortgaged property which under the law would exceed what he may legitimately charge on that account in view of these two Acts. In such cases the Legislature says that if the net profits of the property exceed the amount of interest payable in any year at the prescribed rate, the excess shall be applied to a reduction of the principal. Thus in a case where the mortgagee who was entitled to appropriate the profits in lieu of interest has been in possession, say for five years, and the entire debt has on account of reduction in the rate of interest been liquidated in four years, he would have left in his hands a surplus. Under the two sub-sections to which reference has been made the mortgagor cannot claim a refund of the surplus. What is said here applied only to cases where under the contract between the parties the mortgagee is entitled to take the entire annual profits in lieu of interest. Other considerations would apply to cases where interest is to be paid at a stipulated rate. But obviously in their application to secured loans, S. 30 (4) of Act 27 [XXVII] of 1934 and S. 9 (4) of Act 13 [XIII] of 1940 would apply only to a case where there is a single mortgage on the property of which the mortgagee has been put in possession. If, however, the mortgagor has after creating a mortgage with possession created another mortgage or charge over the same property in favour of the prior mortgagee and there is a stipulation that the two debts would be paid simultaneously or that the first mortgage shall not be redeemed unless the amount due under the subsequent mortgage or charge is also paid, sub-ss. (4) of Ss. 30 and 9 of the two Acts shall not apply. The sections in question were I am clear not framed to cover such cases. This is clear from the language in which the two sections are cast. The rights of the mortgagor and mortgagee in such cases shall be determined according to their contract in the light of the ordinary law and principles of justice, equity and good conscience.

[5] We may now consider what will be the position where the mortgagor creates a simple mortgage or charge on property which is already the subject of a possessory mortgage and stipulates that the first mortgage shall not be redeemed unless the second debt is also discharged. In

such a case something is added to the original contract which subsisted between the mortgagor and the mortgagee. Under the first contract the mortgagor was entitled to get back his property immediately after the original debt was discharged. The result of the second contract is that even after the first debt is discharged the mortgagee has a right to continue in possession of the property till the second debt secured on a simple mortgage or if it constitutes a charge, as the case may be, is paid off. The question arises what is to happen to the income of the mortgaged property which is in possession of the mortgagee after the first debt is discharged out of the income of the security. Is there anything in S. 30, Agriculturists' Relief Act or S. 9, Debt Redemption Act which would entitle the mortgagee to appropriate the income of the security to himself even after the first debt is liquidated? Apart from the consideration that such a provision of law would be highly anomalous, there is nothing in the language of either of these two Acts to warrant such a conclusion. Under the general law the mortgagor is entitled at the time of redemption to call upon the mortgagee in possession to account for the profits realised by him from the security during the period of his possession. The mortgagee has to account for any money that has come to his hands. Neither of these Acts has in any way affected the right of the mortgagor to call upon the mortgagee to account for the money received by him. What is prohibited is a claim by the debtor to a refund of any part of the interest already paid by him. Thus, if at the time of taking accounts it appears that of the two debts payable by the mortgagor the first (for satisfaction of which the mortgagee was put in possession of the mortgaged property) has been liquidated and there is a surplus in the hands of the mortgagee, it is not only just and equitable that this surplus should be applied to the liquidation of the second debt but this also what the law prescribes. In the class of cases we are considering the two debts are not wholly unconnected with each other. The connection between the two is created by the stipulation that the first mortgage would not be redeemed unless the second debt was also paid. To take any other view would lead to curious results. The mortgagee would be allowed to continue in possession of the property and appropriate the profits thereof in lieu of interest upon the debt which has already been discharged. Obviously this cannot be the law. Under S. 9, Debt Redemption Act, notwithstanding anything to the contrary in any law, decree or contract or in any agreement purporting to close past transactions the Court has to determine the principal and in case of mortgage with possession the net profits realised by the mortgagee. After determining these sums, the Court shall find out the amount, if any, due by the debtor in accordance with sub ss. (2), (3) and (4). There is nothing in the language of this section which would justify an inference that if there were two debts outstanding in favour of the same mortgagee which are both charged on the same property, the amount due shall be determined only in respect of the first debt and the existence of the second debt will be ignored. Under S. 13, U. P. General Clauses Act 1904, in all United Provinces Acts unless there is anything repugnant in the subject or context, words in the singular shall include the plural, and vice versa. Thus what S. 9 provides for "for case of mortgage with possession" must apply if there are two mortgages created by the mortgagor on the security of the same property in favour of the same mortgagee to both of them.

[6] The fallacy underlying the applicant's counsel's argument consists in an unwarranted assumption that in laying down the rule for claims for refund the law implies that the profits received by the mortgagee under the terms of his mortgage become his property even if another mortgage or charge on the same security in favour of the same mortgagee be outstanding. The general law relating to mortgages is well established that even where the mortgage deed is silent as to possession and there is no agreement to the contrary, the mortgagee who takes possession takes also the obligation upon him to account for the rents and profits during the time he is in possession: 27 ALL. 351[1] at p. 355. Before there can be any surplus in the hands of the mortgagee all the charges subsisting on the security in favour of same mortgagee must be satisfied in full. The view was taken by the learned Judge of this Court in S. 115 application No. 168 of 1943. I am clear that the applicant's contention is not well founded. The application fails and is dismissed with costs.

K.S. *Revision dismissed.*

A. I. R. (35) 1948 Oudh 266 *[C. N. 97.]*

KIDWAI J.

Mrs. Shushila Ganju—Appellant v. *Mr. Kunwar Krishna —Respondent.*

Misc. Appeal No. 27 of 1947, Decided on 8-12-1947, against decree of Dist. Judge, Lucknow, D/-14-3-1947.

(a) Guardians and Wards Act (1890), S. 25 — Application under — Sole criterion for decision is minor's welfare — Son born while husband and wife were living apart—Husband marrying second wife — Welfare of son held required that he should be allowed to remain with his mother.

In an application under S. 25 the sole criterion for disposing of the case is the minor's welfare.

It is only if Court is of opinion that it will be for the welfare of the ward to return to the custody of his guardian that it can pass an order for such return. The rights of the guardian should not weigh at all though it may be presumed that, if the law gives the guardianship to a particular person it is in the interests of the minor that that person should have custody of his person. But other circumstances cannot be ignored. [Para 5]

The husband and wife were married in 1941. In July 1942 when she was enceinte the wife left her husband's house and never returned. In November 1942 the wife gave birth to a son at her father's house. The boy never went to his father's house. In spite of a decree for restitution of conjugal rights and various requests the wife did not return to her husband who married a second wife in 1946. In 1947 the father applied under S. 25 for custody of the boy who was then in the custody of his mother:

Held that (1) in the circumstances of the case it was for the welfare of the minor that he should be allowed to remain with his mother: *Case law discussed.* [Para 14]

(2) the father was nevertheless entitled to have access to his child the method of regulating such access being arranged by the parties or by the Court. [Para 16]

(b) Guardians and Wards Act (1890), S. 25 — Order under, allowing minor to remain with his mother instead of with his father is of temporary character.

An order under S. 25 allowing the minor to remain with his mother instead of with his father is of a temporary character and if at any time it should appear that the mother is not giving that care and attention to the child which is expected of her and is not giving the child a proper education it will always be open to the father to move the Court for a proper order. [Para 15]

(c) Civil P. C. (1908), O. 41, R. 1 — Application under S. 25, Guardians and Wards Act — Point that District Judge had no jurisdiction to entertain application depending on facts — Point cannot be raised for first time in appeal. [Para 17]

Annotation : — ('44-Com.), C. P. C., O. 41, R. 1, N. 12, Pt. 1.

(d) Guardians and Wards Act (1890), S. 25 — Applicability — Minor son never in custody of his father, the guardian de jure — Father still can apply under S. 25.

Even in cases where the minor son has never been in the custody of his father, the guardian de jure, the minor is in the constructive possession of his guardian de jure since he is in the custody of the other person with the express or implied consent of the guardian and consequently S. 25 applies and the guardian can make an application under S. 25: 5 A. I. R. 1918 Oudh 376; 12 A. I. R. 1925 Oudh 257 and 22 A. I. R. 1935 Oudh 492 (F. B.), *Rel. on.* [Para 8]

Cases referred: —

1. ('41) 28 A. I. R. 1941 Bom. 103 : I. L. R. (1941) Bom. 455 : 194 I. C. 48, Saraswatibai Shripad v. Sripad Vasanji.
2. ('10) 13 O. C. 140 : 6 I. C. 1001, Mahomed Anjum v. Azam Qadar.
3. ('07) 4 A. L. J. 22: 29 All. 210, Bindo v. Sham Lal.
4. ('12) 22 M. L. J. 68 : 13 I. C. 16, Muthuveerappa Chetti v. Ponnuswamy Chetti.
5. ('22) 9 A. I. R. 1922 Bom. 405 : 68 I. C. 518, Tarabai v. Mohanlal Lallubhai.
6. ('39) 26 A. I. R. 1939 Lah. 359, Mt. Basant Kuar v. Gian Singh.
7. ('18) 21 O. C. 194 : 5 A. I. R. 1918 Oudh 376 : 48 I. C. 60, Musbaf Husain v. Mahomad Jawad.
8. ('24) 1 O. W. N. 330 : 12 A. I. R. 1925 Oudh 257: 80 I. C. 71, Chhote Lal v. Mt. Chandra Kunwar.
9. ('35) 1935 O. W. N. 1096 : 22 A. I. R. 1935 Oudh 492 : 11 Luck. 553: 158 I. C. 581 (F. B.), Mt. Ghuran v. Syed Riaz Ahmad.

Anand Madho — for Appellant.

Ram Krishna and A. P. Nigam — for Respondent.

Judgment.—This unfortunate litigation has arisen between a husband and a wife for the custody of their minor child. The appellant, Shushila, was married in October 1941, to Mr. Kunwar Krishna Ganju. She is an educated lady who was then receiving training at a welfare centre with a view to entering service. She did not desire this marriage because, as she said in her letter to her mother, Ex. 1, she considered the proposed bridegroom's family too conservative for her views, but she agreed out of deference to her parents' wishes. The result was, as may well be supposed, anything but happy, and the parties soon parted. In July 1942, when she was enceinte, the appellant left her husband's house in the midst of preparations for the marriage of his sister, and she has never returned. The minor was born in November 1942, whilst the appellant was living at her father's house. The boy never went to his father's house and the father had no opportunity to see him till he was produced in Court by the Court's order.

[2] Subsequent to the birth of the child all efforts at reconciliation failed and the appellant entered Government service as Labour Welfare Officer. The appellant filed a suit (which has not yet been disposed of) for the return of some movable, valued at Rs. 36,000 alleged to have been left by her at her husband's house and the husband filed a suit for restitution of conjugal rights in which he obtained a decree on 4.12.1945 after the appellant had withdrawn from the contest. In spite of the decree and various requests made to her the appellant did not return to her husband who married a second wife in May 1946.

[3] On 4-9-1946, Mr. Kunwar Krishna Ganju applied to the District Judge of Lucknow under S. 10, Guardians and Wards Act (8 [VIII] of 1890) to be appointed guardian of his minor son. He also prayed in the same application that custody of the minor be delivered to him. When the application was made, the appellant was in England, having been sent there by the Government for further study, and the minor was with his maternal uncle, Dr. C. M. Aga at Isatnagar, district Bareilly. The appellant, however, returned very shortly afterwards and filed a written statement on 14-12-1946. Thereafter, on 17-2-1947, Mr. Kunwar Krishna applied to the District Judge under S. 25 of Act 8 [VIII] of

1890 for custody of the minor who, he alleged, was now in the custody of the mother. He also prayed that an order be issued directing the mother to produce the child in Court on the next date of hearing, 1-3-1947. No notice of this application was issued to the appellant but an order directing the production of the child was issued and the child was produced in Court on 1-3-1947, on which day the oral statements of the parties' counsel were recorded, the documentary evidence was produced and arguments were heard, since neither party produced any oral evidence. On 14-3-1947, the learned District Judge delivered his judgment by which he dismissed the application praying for the appointment of Mr. Kunwar Krishna as guardian but he granted the application for the return of the child to the custody of the father.

[4] The mother of the minor, being aggrieved by the order, has come to this Court in appeal and I have heard the learned advocates for the parties at considerable length. The learned District Judge has carefully surveyed the facts of the case and the law on the subject and normally I would not interfere with the exercise of discretion by him but the judgment of the learned District Judge discloses that, while he has held that, in an application under S. 25, Guardians and Wards Act, it is the interests of the minor that are primarily to be considered in disposing of the case, he has laid greater emphasis on the rights of the father. Moreover, the record discloses that the complaint of the appellant's learned advocate that he had no notice of the application under S. 25 is well founded. I have, therefore, carefully considered the case of the parties myself.

[5] The first thing that calls for notice is the fact that, in an application under S. 25 of Act 8 [VIII] of 1890, the sole criterion is the minor's welfare. It is only if the Court is of opinion that "it will be for the welfare of the ward to return to the custody of his guardian" that it can pass an order for such return. The rights of the guardian should not weigh at all though, since in all legal systems rules relating to guardianship are framed with a view to protect the interests of minors, it may be presumed that, if the law gives the guardianship to a particular person, it is in the interests of the minor that that person should have custody of his person. This presumption does not, however, carry us very far in the present case, because other circumstances which have arisen cannot be ignored.

[6] Firstly, we have the fact that the mother and father of the minor are living separately. The Hindu jurists did not contemplate divorce or separation between the parents. Thus when the right was conferred on the father, the right of the mother to have custody of the minor was not excluded. The father and mother were thought of as living together and being in fact parts of one body and consequently the custody of the father would be the custody of the mother. Unfortunately that is far from being true in the present case and, therefore, a choice has to be made between the father and mother. In making this choice it is not the right of the two parents that will determine the decision of the Court nor even who is at fault for the present sorry state of affairs but what, in the circumstances of the case as they actually exist, is for the welfare of the minor.

[7] The minor was a child of about four years at the time that the application was made. He is now a little over five years. All this time he has been living with his mother, and while she was away in England, with his maternal grand parents and uncle. He has seen his father only once during all this time. It is perfectly true that the father is not at fault for this. He made every attempt to get the minor's mother herself to go and live with him and it was the mother who refused to go. Nevertheless, the facts are as they have been stated.

[8] Then we have the fact that the father has married again and the minor consequently has a step-mother. A Hindu may have several wives and, in the circumstances of the present case, Mr. Kunwar Krishna cannot be blamed for having married again after all his attempts to persuade his wife to return had failed and he had waited for her for about four years. It is also true that a step-mother may well look after her step-children better than the real mother. Nevertheless this is the exception rather than the rule and, in a case very similar to the present, A. I. R. 1941 Bom. 103,[1] Beaumont C. J., with whom Wadia J. agreed, said:

"Human nature is much the same all the world over, and in my opinion if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years."

and again,

"The parents unfortunately are not living together, and probably will not live together, because the father has contracted marriage with another woman. That under Hindu law he is entitled to do, but it is difficult to suppose that a step-mother, whose age we are told is about 17, is likely to be a good substitute for the natural mother, whilst the father himself will have other occupations and will have to entrust the actual upbringing and charge of a child of this age to somebody else. In my opinion, there is not the slightest doubt that the natural mother is the proper person to have the custody of the child, and there is no evidence before the Court to justify us in thinking that she is not a proper person to have that custody."

[9] In that case the Court refused to return the minor to the custody of the father although

it had been removed from that custody in circumstances which savoured of kidnapping and the mother was a tuberculosis patient who had—unlike the present case—no income of her own but depended upon her parents.

[10] In 13 Avadh Cases 140,[2] also the fact that the father had married another wife with whom he was living weighed greatly with the learned Judicial Commissioner in not giving the father custody of the child. There was no other disqualification of the father and the only difference in the case was the fact that the boy was 13 years old and preferred to live with the mother. The learned Judicial Commissioner said:

"In considering what will be for the welfare of the minor, the Court is to have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of the deceased parent and any existing or previous relations of the proposed guardian with the minor or his property; and if the minor is old enough to form an intelligent preference, the Court may consider that preference. It appears to me that other things being equal and the minor not expressing or being old enough to express an intelligent preference the Court should decide in favour of the person who is entitled to the custody of the minor under the law to which minor is subject. My decision in Miscellaneous Appeal No. 52 of 1906 does not go beyond this and does not appear to me to conflict with any reported decision of which I am aware. It has been held in several cases that a Court is not bound to appoint the person who is entitled to the custody of the minor under the law to which the minor is subject. I agree. I think that it is clear that the paramount consideration is the welfare of the minor. In the present case it is impossible to say that there is anything definite against the father, but it is probable that the minor will be happier with his own mother than with his step-mother."

[11] Similarly in 4 A. L. J. 22[3] the contest as to the custody of a minor girl was between the father who had married again and the maternal grandmother, the mother being dead. The learned Judges refused to deliver the child to the custody of the father and remarked:

"It is true that there is nothing against the father but again it is an admitted fact that he has married a second time and the girl will have to go under the control of a step-mother, of whom probably she knows nothing. We cannot think that the girl under these circumstances will be so happy as she is in the house of the maternal grandmother."

[12] The same view was taken in 22 M. L. J. 68[4] and in A. I. R. 1922 Bom. 405[5] the learned Judges say:

"The petitioner has married again, and it is obvious that the boy, who was only seven years old at the time this application was made, will be much better off living with his mother than with his father. No suggestion whatever has been made as to the character of the mother, which would be good ground for taking away the boy from her tender care and handing him over to the father who would be a perfect stranger to him. The step-mother cannot be expected to be very much interested in his welfare, and the uncles and any members of the prior generation who may be living in the house will also not be likely to give this small boy the attention and sympathy which he naturally requires."

[13] The learned advocate for the respondent relied upon A. I. R. 1939 Lah. 359[6] for the view that the presence of a step mother is no hindrance to the grant of custody. The facts of that case were, however, very different. In that case the mother too had married again and at the time of separation from her husband she had agreed to hand over the child to the father. Thus there was a step-mother on one side and a step-father on the other and in those circumstances the Court ordered that the father should have the custody.

[14] On a consideration of the principles, enunciated in the decisions which I have mentioned, in the circumstances of the present case the child should be allowed to remain with its mother.

[15] The learned advocate for the respondent apprehended that the child could not be brought up according to the traditions of the father's family. There does not seem to be any ground for this apprehension. Both the parties belong to respectable families and the mother is an educated lady. Her father and brother are both doctors. The child is the appellant's only child and, if the relations with the husband continue as at present, she is not likely to have another. There is no reason to suppose that she will not give the best care and attention to her son. It is true that one of the objections which she had to marriage with Mr. Kunwar Krishna was the conservativeness of his family but times change and it does not appear that the child will lose by discarding some at least of this conservativeness. Further such orders are of a temporary character and, if at any time it should appear that the appellant is not giving that care and attention to the child which is expected of her and is not giving the child a proper education, it will always be open to the respondent to move the Court for a proper order.

[16] I should also like to point out that though, in the present case, I do not consider that the circumstances justify an order entrusting the child to the respondent, he is nevertheless entitled to have access to his child. It is to be hoped that the parties will be able to arrange the method in which this access will be regulated. If, unfortunately, they are unable to do this, the matter will again have to be brought before the District Judge so that he may arrange the circumstances in which the father can have access to his child.

[17] The appellant's learned advocate also took the plea of jurisdiction, contending, firstly that the District Judge of Bareilly had jurisdiction and not the District Judge of Lucknow. This ground was not taken in the Court below

and it depends upon the facts which may be found. It cannot be raised for the first time in appeal.

[18] The second plea is based on the fact that the child has, in this case, never been in the custody of its father and so the language of S. 25 of ACT S [VIII] of 1890 does not apply. There is a considerable conflict of authority on this point but the view which has always prevailed in Avadh is that even in such cases the minor is in the constructive custody of the *guardian de jure* since he is in the custody of the other person with the express or implied consent of the guardian, and that consequently S. 25 applies: *vide* 21 Avadh Cases 194,[7] 1 O. W. N. 330[8] and 1935 O. W. N. 1096.[7] I am bound by this view, nor do I see any good reason to doubt its correctness. In view of what I have said about the first point, however, the appeal must be allowed. I accordingly allow this appeal and set aside the order of the District Judge, Lucknow. The application of the respondent for the custody of the minor is rejected. The appellant will get her costs from the respondent.

G. N. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 270 *[C. N. 98.]*

CHANDIRAMANI J.

Salik Ram and others — Defendants — Appellants v. *Subedar Singh, Plaintiff and another, Defendant — Respondents.*

Second Appeal No. 188 of 1942, Decided on 17-11-1947, against order of Addl. Civil Judge, Sitapur, D/- 20-2-1942.

(a) U. P. Tenancy Act (17 [XVII] of 1939), S. 206 —Grove-holder has right to sell trees—Custom to contrary is immaterial.

Under S. 206 it is the interest of the grove-holder which is transferable and so every holder of interest of the grove-holder and not only the grove-holder himself, can exercise the right of transfer. Where therefore the interest of a grove-holder who has planted the trees has devolved on his son under S. 206 (d), the son can sell the trees to a third person. [Para 3]

Interest is a comprehensive term which covers all the legal rights possessed by the owner. If the owner can part with his whole interest in a thing it will be absurd to say that he cannot sell merely a portion of it. The previous decisions in suit between the zamindar and the grove-holder recognizing a custom to the contrary do not operate as res judicata in view of clear provision in S. 206. [Paras 4, 5]

(b) Civil P. C. (1908), S. 11 — Prior decision — Change of law — Prior decision on particular question between particular parties — Change of law — Prior decision does not operate as res judicata on same question between same parties.

Every case must be decided on the law that prevails at the time of decision and not according to the law at any other previous time. Any decision in a previous suit on a particular question between particular parties will not operate as *res judicata* on the same question between the same parties when a different law is in force: 19 A. I. R. 1932 All. 416 and 12 A. I. R. 1925 Cal. 1193, *Rel. on.* [Para 5]

Annotation : ('44-Com.) Civil P. C., S. 11, N. 11.

Cases referred:—

1. ('32) 19 A. I. R. 1932 All. 416 : 54 All. 777 : 141 I. C. 142, Sunder Lal v. Subedar Singh.
2. ('25) 12 A. I. R. 1925 Cal. 1193 : 87 I. C. 767, Nobin Chandra Saha v. Dudu Mia.

K. P. Misra —for Appellants.

K. N. Tandon — for Respondent 1.

Judgment.—This is the defendants' second appeal against the decree dated 20-2-1942, of Mr. Avadh Behari Lal, Additional Civil Judge, Sitapur.

[2] The plaintiff-respondent Subedar Singh filed a suit for possession of two fallen trees in grove No. 948/666 situated in village Bhatpurwa belonging to Bhagwandin, defendant 4, alleging that he had bought the trees from Bhagwandin, the grove-holder and had cut the trees and wished to remove them but defendants 1 to 3, Salik Ram, Sheo Darshan and Kalka Prasad, who were zamindars, had prevented him from removing the trees. He prayed also for a permanent injunction against the appellants. The appellants said that Bhagwandin had no right of transfer under a custom prevailing in the village, but he was merely a licencee with a right to enjoy the fruits of the trees, that in previous litigation of 1925 between the predecessors of the parties and also in 1936 between the parties it had been decided that Bhagwandin could not sell the trees of the grove according to the custom. The trial Court held that the trees in dispute had fallen down and had been sold by Bhagwandin to the plaintiff, that Bhagwandin had a right to transfer the trees, that the custom which prohibited him from selling trees was no longer a bar by virtue of S. 206, U. P. Tenancy Act, and notwithstanding the previous litigation between the defendants *inter se* Bhagwandin could sell the trees, and accordingly decreed the suit. The appellants urged the same objections before the lower appellate Court but the finding of the Munsif were confirmed and the appeal was dismissed.

[3] It has been urged that Bhagwandin, defendant 4 is not a grove-holder within the meaning of S. 205, U. P. Tenancy Act of 1939, as admittedly he had not planted the grove and so he could not sell the trees in exercise of the powers under S. 206, U. P. Tenancy Act. This contention is wrong and is not warranted by the provisions of S. 206 (c) which clearly lays down that the interest of a grove-holder shall be transferable by voluntary transfer or in execution of a decree of a civil or revenue Court or otherwise. It is the interest of the grove-holder which is transferable and so every holder of interest of the grove-holder and not grove-holder himself can exercise the right of transfer. In order that the right under S. 206 should be exercised all

that is necessary to show is that it is the interest of a grove-holder which is to be transferred. Under S. 205, Tenancy Act, a grove-holder must necessarily be a person who has planted a grove. If it can be shown that the grove had been planted by a predecessor of Bhagwandin, defendant 4 then obviously the transfer by him is valid. In 1925 admittedly there was a suit regarding this very grove between Ram Charan, the father of defendants 1 to 3 and Baldeo father of defendant 4, and it appears from the judgment of the trial Court, EX. A-13, that Baldeo had claimed as a defence in the suit that he had planted the grove after the first settlement, and the custom relied on by the plaintiff Ram Charan that grove-holders are entitled only to the fruits of the trees did not apply to groves planted after the first settlement. This point is clearly brought out in the discussion on Issue NO. 2 in the case in the body of the judgment EX. A-13. Baldeo had clearly claimed that he had planted the grove as will appear in para. 8 of his written statement, EX. A-12. It was said for the appellants that this document has been denied by the plaintiff and it had not been proved by any evidence and the document not being a certified copy of a public document it should not have been admitted in evidence. Such an argument comes with ill grace from the appellants whose document it was. The Court admitted it in evidence and exhibited it, and any objection to its admissibility could have been raised by the plaintiff only. In that suit of 1925 clearly it was not challenged that Baldeo had planted the grove. It is thus clear that Baldeo, the father of Bhagwandin, defendant 4, was the grove-holder within the meaning of S. 205, U. P. Tenancy Act. On the death of Baldeo, his interest devolved on Bhagwandin, defendant 4, his son under S. 206 (d), U. P. Tenancy Act. The plaintiff thus acquired the interest in the two trees by sale from Bhagwandin.

[4] It was urged that selling two trees does not amount to transferring an interest in the grove. This contention also has no force. Interest is a comprehensive term which covers all the legal rights possessed by the owner. If the owner can part with his whole interest in a thing it will be absurd to say that he cannot sell merely a portion of it. There is, therefore, no valid reason why the holder of the interest of a grove-holder cannot part with a fraction of such interest.

[5] It was also urged that there was a custom whereby Bhagwandin defendant 4 could not sell the trees and this custom was recognized in the previous litigation of 1925 and 1936 between the parties and these decisions operate as *res judicata*. Admittedly the decisions did no more than recognize a custom. Now, S. 206, Tenancy Act, itself lays down that notwithstanding any custom to the contrary the interest of a grove-holder shall be transferable. Whatever effect the custom may have had it is now nullified by a positive provision of the substantive law. The previous decisions, if any, would under the circumstances be of no avail. It is settled law that every case must be decided on the law that prevails at the time of decision and not according to the law at any other previous time. Any decision in a previous suit on a particular question between particular parties will not operate as *res judicata* on the same question between the same parties when a different law is in force. This has been recognized in A. I. R. 1932 ALL. 416[1] and in A. I. R. 1925 Cal. 1193.[2]

[6] For these reasons there is no substance in the appeal. It is accordingly dismissed with costs.

S. C. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 271 *[C. N. 99.]*

KAUL AND WALFORD JJ.

Ram Dal and others—Defendants—Appellants v. *Suraj Bux—Plaintiff—Respondent.*

Second Appeals Nos. 377, 378 and 379 of 1943, Decided on 9-10-1947, against order of Civil Judge, Bahraich, D/- 24-8-1943.

(a) U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 19 (2) — Special Judge cannot include in list prepared by him for information of collector any property not mentioned in notice under S. 11 even though he has found it to be liable to attachment.

The U. P. Encumbered Estates Act creates a special jurisdiction to be exercised by a special tribunal. When a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with. Thus the Special Judge can exercise only the powers conferred and perform the duties imposed on him by this Act as regards the area and extent of his jurisdiction as pre-cribed by the Provincial Government. The inquiry referred to in sub-section (2) of S. 11, can be made only in relation to property which is mentioned in the notice referred to in that section. Reading S. 19 (2) in the light of Ss. 3 and 11, the Special Judge has no power to include in the list prepared by him for information of the Collector any property which is not mentioned in the notice under S. 11, even though he had on the motion of any of the parties to the proceedings found it to be liable to attachment. If he makes any such inquiry in relation to property not mentioned in S. 11, he exercises a power which is not conferred upon him. In other words, mention of the property in the notice under S. 11, is a condition precedent to the Special Judge acquiring the power to investigate whether such property is liable to attachment, mortgage or sale in satisfaction of the debts of the landlord : 32 A. I. R. 1945 All. 154, *Dissent.* [Paras 10, 11]

(b) U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 11 (4) — Special Judge finding property not mentioned in notice under S. 11, to be liable to attachment and sale—Order cannot be deemed to be decree of civil Court of competent jurisdiction.

The Special Judge is not an ordinary civil Court which has under S. 9, Civil P. C., jurisdiction to try all suits of a civil nature. The mere fact that a Special Judge has in relation to some property not mentioned in the notice under S. 11, come to a finding that it was liable to attachment, sale or mortgage in satisfaction of the debts of the applicant landlord, would not constitute it a decree of a civil Court of competent jurisdiction. [Para 12]

(c) U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 11 — Person failing to claim property specified in notice referred to in S. 11 — He can maintain suit in ordinary civil Court to establish his title to it.

There is nothing in S. 11 of the Act or in any other provision of this statute which leads to the conclusion that it takes away the jurisdiction of the ordinary civil Courts except in matters which are specifically within the jurisdiction of the Special Judge; nor does it take away the ordinary right of the citizen who is not a party to the proceedings before the Special Judge, except as especially provided therein. It cannot be said that the right of the citizen to seek redress in the ordinary Courts of law and the jurisdiction conferred upon the civil Courts to grant such redress are impliedly taken away by S. 11. If the Legislature intended this to be law it would have said so in clear and unambiguous language and not left it to be inferred from the general scheme of the Act. Hence a person who failed to put forward a claim to property specified in the notice referred to in S. 11, Encumbered Estates Act can maintain a suit to establish his title to it in the ordinary civil Court. The principle of *res judicata* does not apply to such a case as it is a cardinal rule of the doctrine of *res judicata* that it is limited to the parties to the proceedings or to parties under whom they or any of them claim : 34 A. I. R. 1947 All. 188, *Dissent*.

[Paras 14, 18, 20]

(d) U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 47—Scope—Bar under, affects only parties to proceedings before Special Judge or Collector.

Section 47 creates a bar which affects only those who are parties to the proceedings before a Special Judge or Collector or who were under some provision of the Act bound under pain of losing other remedies allowed to them by the ordinary law, to be a party to the proceedings before the Special Judge or Collector.

[Para 22]

Cases referred :—

1. ('47) 34 A. I. R. 1947 All. 188 : I. L. R. (1946) All. 733 : 228 I. C. 242, Ram Ran Bijai Prasad Singh v. Sarjoo Singh.
2. ('45) 1945 O. W. N. H. C. 14 : 32 A. I. R. 1945 All. 154 : I. L. R. (1945) All. 56, Lochan Singh v. Mauji Ram.
3. ('07) 34 Cal. 470, Rameshwar Singh v. Secy. of State.

Siraj Hussain — for Appellants.

S. C. Das — for Respondent.

Judgment.—*Second Civil Appeals Nos. 377, 378 and 379 of 1943.*—The above three appeals arise out of two suits — Suit No. 93 of 1942 and Suit No. 103 of 1942—instituted in the Court of the Munsif Qaisarganj. Suit No. 93 was brought by Suraj Bakhsh, son of Debi Prasad, for possession of 1. 3 pies 8 karants zamindari share in khata khewat 1/1, and 2. a 9 3/5 pies out of four annas share in mohal Gaya Prasad in village Dahwa Kalan, Parg. Hisampur, Bahraich district. The second Suit No. 103 of 1942 was brought by Mt. Ramraji for possession of one anna eight pies twelve karants zamindari share in the same khata, which was the subject-matter of dispute in Suraj Bakhsh's suit. The same persons were impleaded as defendants in both the suits. The pedigree given below will show the relationship of the defendants to the original owner of the disputed land and the subsequent devolution of property after his death.

HAR PRASAD

- Ganesh Prasad
- Gaya Prasad
- Ram Ratan
  - Ram Dal, deft. 1
  - Nageshwar, deft. 2
- Sheoratan (died childless.)
  - Avadh Ram, deft. 3
- Gokaran deft. 4
- Kirpa Ram deft. 5

Ganesh Prasad:
- Sitla Din (dead.)
- Durga (dead.)
- Ram Narain (dead.)
- Parmeshwar Din
  - Pargash, deft. 6.
- Sheo Narain.

Har Prasad the common ancestor of all the six defendants against whom the two suits were brought was the owner of village Dahwa Kalan. On his death each of his four sons inherited a four annas share. On death of Ganesh Prasad his four annas devolved upon his five sons, each taking a 9.3/5 pies share. In course of time, three of his sons, Sitla Din, Durga and Ram Narain died and the shares owned by them devolved upon their surviving brothers, Parmeshwar Din and Sheo Narain: Each of them thus became owner of a two annas share. In 1904 Sheo Narain created a mortgage over one anna share in village Dahwa Kalan in favour of Debi Prasad, father of Suraj Bakhsh, plaintiff in Suit No. 93. In 1905 a suit was brought by some members of the family of Har Prasad for cancellation of this mortgage. As a result of this litigation, the mortgage was cancelled but on 18th January 1909, Debi Prasad was granted a personal decree for the amount due against Sheo Narain. In enforcement of this decree Debi Prasad attached the two annas share

owned by Sheo Narain. Gaya Prasad and Parmeshwar Din preferred objections against the attachment under O. 21, R. 58, Civil P. C. These objections were allowed. This was followed by a declaratory suit by Debi Prasad under O. 21, R. 62, Civil P. C. The claim was decreed and an appeal preferred against this decision was dismissed on 1st June 1910. The property was put up for sale and the two annas share was purchased by Debi Dayal on 20-1-1919.

[2] Some time after Debi Prasad created a mortgage by conditional sale over one anna eight pies and 12 krants out of the two annas share purchased by him in favour of one Bisheshwar Dayal on 23-4-1932. Bisheshwar Dayal obtained a final decree for foreclosure of the property mortgaged with him. On 13-3-1934, Bisheshwar Dayal transferred his decree to Mt. Ramraji plaintiff in Suit No. 103.

[3] It will thus be seen that out of the two annas share which belonged to Sheo Narain a three pies eight krants share came to be owned by Debi Prasad and one anna eight pies 12 krants share by Mt. Ramraji. It appears that Gaya Prasad was the lambardar of the village. On his death Ram Dal was appointed lambardar.

[4] On 23-11-1933 a decree for profits was obtained by Debi Prasad against Ram Dal. In execution of his decree he attached and put up for sale a 9 3/5 pies share out of the four annas which belonged to Gaya Prasad and on 6-6-1934, purchased it at the court auction. On Debi Prasad's death, the three pies 8 krants share originally owned by him as well as the 9 3/5 pies share which he acquired at sale in execution of his decree for profits devolved upon Suraj Bakhsh.

[5] In 1936 Ram Dal, Nageshwar, Avadh Ram, sons of Ram Ratan, Gokaran, Kirpa Ram sons of Gaya Prasad and Prakash, son of Parmeshwar Din made an application under S. 4, Encumbered Estates Act. In due course this was transmitted to the Special Judge for disposal. A notice as contemplated by S. 11, Encumbered Estates Act was published in gazette and the following items of property were notified as those mentioned by applicants and their creditors in their written statement and the statements of claim under Ss. 8 and 10 of the Act :

"DETAIL OF THE PROPERTY AS SPECIFIED BY THE APPLICANTS"

Serial No.	Village	Mohal	No. of Khata Khewat of share	Haqiyat
1.	Village Dehwa Kalan Parg. Hisampur, Tahsil Qaisarganj, Dist. Bahraich	Dehwa	1/1 share: applicants 1 to 3, 5 annas 4 piees hare; applicants 4 & 5, 5 annas 4 pies share; applicant No. 6, 3 annas 4 pies	Alla
2.	Village Dehwa Kalan, pergana Hisampur, Tahsil Qaisarganj, District Bahraich.	Kuraspara.	1/1 share: applicants 1 to 3, 5 annas 4 pies share; applicants 4 and 5, 6 annas 8 pies share, applicants No. 6, 4 annas.	Proprietary rights."

Four months after the publication of this notice in the gazette on an application made by one of the creditors and a statement made by the learned counsel for the applicants landlords the special Judge transmitted the decrees passed by him under S. 14 of the Act to the Collector and sent along with them a list of the properties which were liable to attachment and sale for satisfaction of the debts of the applicants. This list included the whole of sixteen annas of both the mohals into which village Dahwa Kalan was divided. After the decrees passed under S. 14 were transmitted to the Collector, action was taken under S. 35 of the Act. Suraj Bakhsh and Ramraji were dispossessed of the shares owned by them in Dahwa Kalan and the landlords (debtors) were put in possession. The attempts of Suraj Bakhsh and Ramraji to seek redress in the Courts of the Collector and the Special Judge were unsuccessful. They accordingly instituted the two suits which have given rise to these appeals.

[6] Suraj Bakhsh's claim was decreed in respect of 9 3/5 pies. His claim for three pies eight krants share was dismissed. Ramraji's suit for possession of an one anna eight pies twelve krants share was decreed.

[7] Suraj Bakhsh filed an appeal against that part of the decree which dismissed a portion of his claim. This was appeal No. 52 of 1943, in the lower Court. The defendants Ram Dal and others preferred two appeals Nos. 53 and 54 the first against the decision in Suraj Bakhsh's suit in so far as it related to 9 3/5 pies share and the second against the decision in Ramraji's suit. Ramraji preferred cross-objections as regards her claim for mesne profits which was dismissed. The appeal preferred by Suraj Bakhsh and the cross objections of Ramraji were allowed, while the appeals preferred by the defendants Ram Dal and others were dismissed. Dissatisfied with these decisions, the defendants have preferred these three appeals. Appeal No. 377 relates to Appeal No. 53 of the lower Court which was preferred by the defendants in Suraj Bakhsh's suit. Appeal No. 379 arises out of Appeal No. 52 of 1943 of the lower Court which was preferred by Suraj Bakhsh and was allowed. Appeal No. 378 relates to Appeal No.

54 of 1943 of the lower Court which arose out of the suit brought by Ramraji.

[8] It was contended before us that the suits brought by Suraj Bakhsh and Ramraji were not maintainable in view of the provisions of Ss. 11 and 47, Encumbered Estates Act. We were not asked to hold that the property in dispute belonged to the applicants landlords. It was argued, however, that even though the real owner of the property in dispute be Mt. Ramraji and Suraj Bakhsh in view of the provisions of the sections to which reference has been made, the civil Court was barred from giving them redress. The contention on the face of it is somewhat startling and must be carefully scrutinized. Mr. Siraj Husain relied on the decision of a Bench of the Allahabad High Court in A. I. R. 1947 ALL. 188[1] and contended that after the special Judge had held that certain property was liable to attachment and sale for satisfaction of the debts of the applicant landlord, a person who failed to put forward a claim to such property under S. 11 was debarred from maintaining a suit to establish his title to it in the ordinary civil Courts. The headnote of the case referred to as found in the All India Reporter runs thus:

"It was clearly the intention of the Legislature to secure finality on all questions of title which might be raised in proceedings under the Encumbered Estates Act. A person who failed to put forward a claim to property specified in the notice referred to in S. 11 cannot maintain a suit to establish his title to it in the ordinary civil Courts."

With the greatest respect for the learned Judges responsible for that decision we find ourselves unable to subscribe to the proposition as stated in this bald form.

[9] Reference was also made by the learned counsel to another decision of that Court in 1945 O. W. N. (H.C.) 14.[2] In the last mentioned case the applicant landlord did not mention some property in his written statement under S. 8. A creditor of his (Mauji Ram) mentioned it in his written statement under S. 10. This property was not mentioned in the notice published in the gazette under S. 11 of the Act, but subsequently it was decided on Mauji Ram's motion that the property belonged to the applicant landlord. The landlord appealed against that finding. By the time the appeal was heard, the decrees passed under S. 14 were transmitted by the Special Judge to the Collector under S. 19 and along with this he sent a list which included the property that was omitted by the landlord applicant but was mentioned in the written statement of his claim by Mauji Ram.

[10] It was argued that as this property was not mentioned in the notice issued under S. 11 the Special Judge had no power to specify this property in the information given by him to the Collector. The learned Judges made the following observations as regards this contention:

"We are again unable to accept this argument because in our judgment the sub-section only casts a duty upon the Special Judge to convey some necessary information to the Collector in respect of the properties which the Special Judge holds are liable to be attached and to be seized and sold in satisfaction of the applicant's debts. It does not contain any prohibition that the Special Judge shall not mention any property which is not referred to in the notice under S. 11 even though it is difinitely found upon an issue raised between the parties before him that the property is liable to be seized in satisfaction of the applicants' debts."

Section 19 (2) runs thus:

"The Special Judge shall inform the Collector of the nature and extent of the property mentioned in the notice under S. 11 which he has found to be liable to attachment, sale or mortgage in satisfaction of the debts of the applicant."

Considering the language of this sub-section, we must with the greatest respect observe that the view taken by the learned Judges of the Allahabad High Court is inconsistent with the provisions of S. 19. Under sub-s. (2), it is true a duty is cast upon the Special Judge to convey some information to the Collector. The statute, however, provides what this information shall be. If the language of the section is not to be disregarded the information must relate to the nature and extent of the property mentioned in the notice under S. 11 which has been found by him to be liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. In our opinion if the Special Judge informs the Collector that some property, which was not mentioned in the notice under S. 11 was liable to attachment, sale or mortgage in satisfaction of the debts of the applicant he would be acting in violation of the language of the statute. It is pertinent to remember in this connexion that the Encumbered Estates Act creates a special jurisdiction to be exercised by a special tribunal. It is a well established rule that when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with (*see* Craies on Statute Law, page 237).

[11] Under the Encumbered Estates Act, which creates a special jurisdiction and a tribunal of limited authority, the Special Judge is enjoined to publish a notice in the manner specified in S. 9 specifying the property mentioned by the applicant under S. 8 or by any claimant under S. 10. By sub-s. (2) of that section any person having claim to the property mentioned in such notice is required within a period of three months from the date of the publication of the notice in the official gazette to make an application to the Special Judge stating his claim

and the Special Judge shall determine whether the property specified in the claim or any part thereof is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. Under sub-s. (4) any order passed by the Special Judge under this section shall be deemed to be a decree of a civil Court of competent jurisdiction. Enactments which create new jurisdiction must be strictly construed (*see* Maxwell on the Interpretation of Statutes, 8th Edn., p. 257). Section 3 of the Act reads as follows:

"3. (1) The Provincial Government may appoint any civil judicial officer to be a Special Judge of the first or second grade for any local area and such Special Judge shall subject to the orders of Government as regards the area and extent of his jurisdiction, exercise the powers conferred and perform the duties imposed on him by this Act.

(2) The Provincial Government may suspend or remove any Special Judge so appointed."

It is clear that the Special Judge can exercise only the powers conferred and perform the duties imposed on him by this Act as regards the area and extent of his jurisdiction as prescribed by the Provincial Government. The inquiry referred to in sub-s. (2) of S. 11 can be made only in relation to property which is mentioned in the notice referred to in that section. Reading S. 19 (2) in the light of S. 3 and S. 11, the Special Judge has no power to include in the list prepared by him for information of the Collector any property which is not mentioned in the notice under S. 11, even though he has on the motion of any of the parties to the proceedings found it to be liable to attachment. Indeed as already observed any inquiry made by him in respect of any property, whether it is liable to attachment, mortgage or sale for satisfaction of the debts of the applicant landlord, must be limited to properties which are mentioned in S. 11. If he makes any such inquiry in relation to property not mentioned in S. 11, he exercises a power which is not conferred upon him. In other words, mention of the property in the notice under S. 11 is a condition precedent to the Special Judge acquiring the power to investigate whether such property is liable to attachment, mortgage or sale in satisfaction of the debts of the landlord.

[12] The Special Judge is not an ordinary civil Court which has under S. 9, Civil P. C., jurisdiction to try all suits of a civil nature. The mere fact that a Special Judge has in relation to some property not mentioned in the notice under S. 11 come to a finding that it was liable to attachment, sale or mortgage in satisfaction of the debts of the applicant landlord, would not constitute it a decree of a civil Court of competent jurisdiction.

[13] We do not find any merit in the objection that S. 19 (2) does not contain any prohibition that the Special Judge shall not mention any property which is not referred to in the notice under S. 11, which is the main ground on which the decision in 1945 O. W. N. H. C. 14[2] on this part of the case was based. The section lays down in affirmative words the direction as to the information to be conveyed by the Special Judge to the Collector. The words

"shall inform the Collector of the nature and extent of the property mentioned in the notice under S. 11 which he has found to be liable to attachment, etc.,"

necessarily imply that the information conveyed must conform to those directions and any information which does not conform with such directions is prohibited. Statutory provisions expressed affirmatively in the form in which they are cast imply a prohibition also and it is not necessary when a section of an Act is cast in such form and the language used is mandatory that it should also express negatively a prohibition that is implied.

[14] We may now turn to the other case on which reliance was placed by Mr. Siraj Husain: A. I. R. 1947 ALL. 168.[1] The question raised in that case was whether a person who failed to put forward a claim to property specified in the notice referred to in S. 11, Encumbered Estates Act can maintain a suit to establish his title to it in the ordinary civil Court. The question was answered in the negative. It was pointed out that under S. 11 (2) a person having any claim to the property mentioned in the notice was required to make an application to the Special Judge stating his claim. This provision is mandatory. Reference was also made to sub-s. (4) under which any order passed by the Special Judge under that section is to be deemed to be a decree of the civil Court of competent jurisdiction. The learned Judges then proceeded to consider the scheme of the Act and were of opinion that it was clearly designed to secure finality both as regards the claims of creditors and also as regards the claim to the property published as that of the applicant. They noticed that there was an express provision in S. 13 that claims of creditors not made as required by the Act shall be deemed to have been discharged, and the absence of any corresponding provision in the Act that the order passed by the Special Judge under S. 11 was conclusive on the point of title and barred a litigation in other Courts. The learned Judge who pronounced the judgment of the Court (Bennett J.) then proceeded to observe as follows:

"Though the matter may not be covered expressly by S. 11, Civil P. C., the principle of *res judicata* is, we think, applicable. Section 11, Encumbered Estates Act, requires all claims to the property to be put forward in the proceedings before the Special Judge and

the order passed by him under the section is defined as a decree of the civil Court of competent jurisdiction. Thus when no objection is taken on the published notice his order with regard to the property claimed by the applicant under S. 11 must have the same effect."

It is difficult to subscribe to the proposition that the principle of *res judicata* is applicable to such a case. Apart from any objections that can be raised on the ground of the difference in the jurisdiction exercised by an ordinary civil Court and that vested in a Special Judge appointed under S. 3, Encumbered Estates Act, it is a cardinal rule of the doctrine of *res judicata* that it is limited to the parties to the proceedings or to parties under whom they or any of them claim. In the case before their Lordships, the Maharaja of Dumraon who instituted a suit in the civil Court to establish his claim to the property was no party to the Encumbered Estates Act proceedings nor was he claiming under any person who was a party to those proceedings. It is in these circumstances difficult to see how the principle of *res judicata* can be applied. The right or title to property is a civil right. If this is invaded the party aggrieved has a right to have recourse to ordinary civil Courts of the country. Corresponding to this right of the citizen there is vested in Courts the jurisdiction to give redress to aggrieved parties. In our province the Munsif, the Civil Judge and the District Judge are Courts which ordinarily exercise original civil jurisdiction that is they have legal authority to administer justice in cases within their respective jurisdictions. Section 9, Civil P. C. confers upon the Courts the jurisdiction to try all suits of a civil nature excepting suits of which the cognizance is either expressly or impliedly barred. It is clear, therefore, that a person whose civil right is invaded can approach a Munsif or a Civil Judge to establish his claim and the Court is under a duty to give him redress in accordance with the procedure laid down by the law. This jurisdiction of the civil Court must be shown to have been taken away expressly by a statutory provision or by necessary implication before the plea raised by Mr. Siraj Husain can be upheld. Is there anything in the Encumbered Estates Act which takes away the jurisdiction of an owner of immovable property, who is not a party to the proceedings under that Act, to seek redress in the ordinary civil Courts?

[15] The Act, as the preamble says, makes provision for the relief of encumbered estates in the United Provinces. Chapter 1 of the Act consists of two sections, which deal with its short title, extent and commencement and the interpretation clause. Chapter 2 relates to appointment of officers who are to exercise the powers conferred and perform the duties imposed by the Act. Chapter 3 comprises Ss. 4 to 7. Section 4 authorises the making of an application for the benefit of the Act and the time within which it is to be made. Section 5 bars a second application to any other Collector if the landlord has made one under S. 4. Section 6 directs that the Collector shall when an application has been duly made transmit it to the Special Judge for disposal. Section 7 deals with certain consequences of acceptance of an application by the Collector. Under this section all proceedings pending at the date of the Collector's order under S. 6, in any civil or revenue Court in the United Provinces in respect of any debt to which the landlord is subject and all attachments and other execution proceedings issued in respect of such debts are stayed and no fresh suit or proceeding is to be instituted in any civil or revenue Court in respect of any debts incurred by the applicant landlord before the passing of an order under S. 6. When an order under S. 6, is passed, the landlord becomes incompetent to sell or otherwise transfer his property.

[16] Chapter IV deals with proof of debts and procedure of the Special Judge. Section 8 requires the applicant to file a written statement furnishing full particulars relating to all his debts and the nature and the extent of the property owned by his which is liable to attachment and sale under S. 60, Civil P. C. He has also to give the names and addresses of all his creditors. Section 9 enjoins upon the Special Judge the duty to publish a notice calling upon all persons having claims both decreed and undecreed against the landlord to file written statement of their claims within a specified time. Sections 9A, 9B, 9C and 9D, which deal with the management and preservation of the property of the landlord are not relevant for our present purposes. Section 10 lays down what particulars these statements of claims are to contain. Section 11 directs that the Special Judge shall publish a notice specifying the property mentioned by the applicant under S. 8, or by any claimant under S. 10. It further enjoins that any person having any claim to the property mentioned in such notice shall, within a specified period make an application to the Special Judge stating his claim and the Special Judge shall determine whether the property specified in the claim or any part thereof is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. The Special Judge is further enjoined to determine all claims under S. 11, before he proceeds to determine the amount due to any creditor. He is not to pass any decree under S. 14, until the expiry of a period of one month after the last day on which he determines a claim under this section. Section 12 relates to annulment of transfers by landlords in certain cases.

Section 13 provides that claims not duly notified shall be deemed to be discharged. Section 14 deals with the examination of claims and determination of the amount of debts of the applicant landlord. Section 15 is a saving clause in respect of existing decrees. Section 16 lays down the procedure for ranking of debts for priority. Under S. 17, the amount of public debts reported by the Collector is to be determined. Section 18 lays down the effect of a decree of the Special Judge passed under S. 14. Section 19 directs the Special Judge to transmit to the Collector for execution the decrees passed by him under S. 14 and to inform him of the extent and nature of the property mentioned in the notice under S. 11, which he has found to be liable to satisfy the applicant's debts. Section 20 provides that in certain cases the proceedings started by the applicant under S. 4, may be quashed. Section 20A provides for restoration of certain applications which have been dismissed and certain other matters not relevant for our purposes.

[17] Chapter V deals with the execution of decrees and liquidation of debts. Chapter VI relates to appeals and revision. Section 47, which is the last section in this Chapter provides that except as provided in Ss. 45 and 46 (which deal with appeals and revision), no proceedings of the Collector or Special Judge under the Act shall be questioned in any Court, and Chap. VII deals with other miscellaneous matters not relevant for the present discussion.

[18] There is nothing in S. 11 of the Act or in any other provision of this statute which would lead us to the conclusion that it takes away the jurisdiction of the ordinary civil Courts except in matters which are specifically within the jurisdiction of the Special Judge; nor does it take away the ordinary right of the citizen who is not a party to the proceedings before the Special Judge, except as especially provided therein. For instance, every claim decreed or un-decreed against the landlord in respect of a private debt other than debt due to a co-operative society registered under the Co-operative Societies Act, 1912, by its members, unless made within the time and the manner required by the Act, is under S. 13, deemed for all purposes and on all occasions to have been duly discharged. Similarly under S. 18, subject to the right of appeal or revision conferred in Chap. VI, the effect of a decree of the Special Judge under sub-s. (7) of S. 14, shall be to extinguish the previously existing rights, if any, of the claimant together with all rights, if any of mortgage or lien by which the same are secured and where any decree is given by the Special Judge to substitute for those rights a right to recover the amount of the decree in the manner and to the extent hereinafter prescribed. The effect of S. 13 is to discharge all debts of the landlord which are not duly notified and S. 18 lays down what will be the effect of a decree passed by the Special Judge under S. 14(7). There is no corresponding provision in the Act which says that if a property is mentioned in the notice published under S. 11, and a person who has a claim to that property does not lay his claim before the Special Judge he shall be barred if his rights affected by an order of the Special Judge from seeking redress in the ordinary civil Courts. Can it be said that the right of the citizen to seek redress in the ordinary Courts of law and the jurisdiction conferred upon the civil Courts to grant such redress are impliedly taken away by S. 11? We find no justification for such a view in any of the provisions of the statute. On the other hand the absence of any provision in the statute relating to matters with which S. 11 deals, corresponding to the provisions laid down in Ss. 13 and 18 confirms us in the view that the Act should not be interpreted so as to take away the ordinary right of the citizen or the jurisdiction of the civil Court to determine such right. To take a different view may lead to serious consequences. How is a person to know that his property has not been mentioned by the landlord in his written statement under S. 8 as his or by a creditor of such landlord in his statement under S. 10? That a notice is published in the gazette under S. 11 specifying the properties mentioned in the written statement filed by the landlords of their creditors is no reply to this question. About a hundred courts of Special Judges are working in this province and it is obviously impossible for any person to know if some of his property has not been included in a written statement under S. 8 or S. 10 filed in one of these Courts, in any of the numerous cases pending therein. Were it intended by the Legislature that if a person having a claim to any property mentioned in the notice under S. 11, fails to apply to the Special Judge he loses his right of bringing a suit to establish his title thereto in the ordinary civil Court, we have no doubt that it would have said so in clear terms. There is no such provision in the statute nor is there anything in any of the provisions thereof which in our opinion could legitimately be regarded to imply such an intention on the part of the Legislature.

[19] It is true that a right is given under S. 11, to every person who has a claim to any property which is mentioned in the notice referred to in the section to approach the Special Judge and seek redress. This does not, however, necessarily imply that if he does not do so his ordinary right to seek redress in the civil Court

is taken away. It was considered by the Allahabad High Court in the case to which reference has been made above that the provisions of S. 11, indicate that the Legislature intended to secure finally on all questions of title which might be raised in proceedings, under the Encumbered Estates Act. That may be so as regards persons who are parties to those proceedings. But it is a different thing to hold that persons, who are not parties to the proceedings, and who have received no notice except such as may be implied by publication of a notice in the gazette and other newspapers, would lose their title to properties mentioned in the notice if they fail to file a claim under S. 11.

[20] We cannot consider it to be at all likely that if the Legislature intended this to be the law it would not have said so in clear and unambiguous language but left it to be inferred from the general scheme of the Act. We have cursorily examined above the scheme of the Act and find nothing therein to justify such a conclusion. Depriving a citizen of his right to seek redress in the ordinary Courts of law in respect of civil rights is a serious matter, and it would be difficult to find any instance where this is done otherwise than by an express provision of a statute.

[21] Mr. Suraj Husain strongly relied on the provisions of S. 47 of the Act. He contended that in the proceedings of the Special Judge it was held that the property now in dispute in the two suits which have given rise to these appeals was liable to attachment and sale for satisfaction of the debts of the applicants landlords. It was argued that in view of the provisions of S. 47, this could not be questioned in any Court. Under the Evidence Act, judgments, orders or decrees unless they by law prevent any Court from taking cognizance of a suit are irrelevant when the question is whether such a Court ought to take cognizance of such suit (S. 40). Under S. 43 of the same Act, judgments, orders or decrees other than those mentioned in Ss. 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of the Evidence Act. We have already shown that the order of Special Judge or to be more accurate the list prepared by him under S. 19 would accordingly be irrelevant unless its existence under any law prevent the civil Court from taking cognizance of the suits which have given rise to these appeals. We have already shown that neither S. 11, Civil P. C., nor the general doctrine of *res judicata* can legitimately be applied to the case before us. Can it be said that S. 47, Encumbered Estates Act, prevents the civil Court from taking cognizance of these suits? It was not argued, as clearly it could not be, that by virtue of S. 47 every proceeding of the Collector or Special Judge under the Encumbered Estates Act has the force of a judgment *in rem*. The language used in this section is very wide in its scope and if interpreted literally would have the effect of giving every order of a Special Judge or Collector passed under the Act the effect of a judgment *in rem*. A literal construction must therefore be ruled out and the section should be construed as subject to some limitation. We have to determine what this limitation should be. The section finds place in the Chapter dealing with appeals and revisions. The statute creates a new jurisdiction of limited character. Provision is made in the Act for remedies against the orders passed by Special Judges and Collectors in Ss. 45 and 46 by way of appeal and revision. Then follows S. 47. It lays down that any proceeding of the Special Judge or Collector under the Act shall, subject to the provisions of Ss. 45 and 46, not be questioned in any Court. But for such a provision it would be open to a party to any proceeding before a Special Judge or a Collector against whom an order was passed under the Encumbered Estates Act to agitate the same matter in any ordinary civil or revenue Court. Section 11, Civil P. C., would not apply to such a case. We are of opinion that S. 47 was enacted to provide against such a contingency and this should enable us to determine the limitation subject to which this section must be read.

[22] "Appeal" is a remedy open only to the parties to the proceedings and not to strangers. Similarly the powers of revision can be exercised only so as to affect the parties to the litigation. It would, having regard to the considerations we have referred to, be only legitimate to hold that S. 47 creates a bar which affects only those who are parties to the proceedings before a Special Judge or Collector, or who were under some provision of the Act bound, under pain of losing other remedies allowed to them by the ordinary law, to be a party to the proceedings before the Special Judge or Collector. We have already given our reasons for the view we take of S. 11 of the Act. The result, therefore, is that on a proper interpretation neither S. 11, nor S. 47 can be a bar to the trial of the suits brought by Ramraji and Suraj Bakhsh.

[23] But apart from these considerations, which are based on an interpretation of Ss. 11 and 47 of the Encumbered Estates Act, we find that the two annas share in Dahwa Kalan of which one anna eight pice twelve krants was owned by Ramraji and three pies eight krants by Suraj Bakhsh, was not mentioned in the notice published under S. 11 in the official gazette. It is clear, therefore, that the inclusion

of these two annas share in the list sent by the Special Judge along with the decree transmitted by him under S. 19 cannot affect their title to this property.

[24] It was argued that Suraj Bakhsh had, when he was dispossessed of his property under S. 35 of the Act, preferred an objection before the Collector which was dismissed and that Ramraji not only filed an objection before the Collector which was rejected but further preferred an objection before the Special Judge which she allowed to be dismissed for default. These orders, it was contended, barred the re-trial of the matter in the civil Court. Neither the Collector nor the Special Judge could entertain these objections under any of the provisions of the Encumbered Estates Act, and the orders passed by them throwing out the objections cannot, therefore, be regarded as proceedings under the Act. The Collector was bound by the Special Judge's decision as regards the property which could be leased, mortgaged or sold for satisfaction of the decrees transmitted to him under S. 19 and had no authority to entertain any objections against that decision. No objections were preferred by Suraj Bakhsh before the Special Judge, and Ramraji's objections related to property which was not mentioned in the notice under S. 11 published in the gazette. The Special Judge thus had no legal authority to give any decision on the title to that property. When a statute creates a special tribunal with limited jurisdiction, conferring upon it specified powers and imposing specified duties and also prescribes the conditions with regard to the manner of their exercise, such conditions must be strictly followed. If there is such a violent departure from the procedure laid down by the statute for exercise of powers conferred by it as to take the matter out of what can be legitimately regarded to be within the contemplation of the statute any order thus passed in disregard of the provisions of the Act cannot be held to be a proceeding under the Act. The objection based upon what was done by Suraj Bakhsh or Ramraji after they were dispossessed under S. 35, Encumbered Estates Act, must therefore fail.

[25] With regard to the 9-3/5 pies share claimed by Suraj Bakhsh it was urged that the notice published in the gazette under S. 11 did not specify clearly whether this share was also claimed by any of the landlords applicants to be his property and accordingly the owner could not know whether he should or should not prefer a claim under S. 11. It was contended on behalf of Suraj Bakhsh that in the circumstances of the case it should be deemed that no notice with respect to this property was published and relying on the principle underlying the decision in 34 Cal. 470[3] we were asked to hold that the provisions of the Encumbered Estates Act were not bar to the maintainability of the suit in the civil Court in respect of this property. In view of the interpretation we have placed upon Ss. 11 and 47, Encumbered Estates Act, it is unnecessary to consider this argument though it may be observed that we do not regard it as wholly without substance.

[26] For reasons given above, we are of opinion that the Courts below came to a correct conclusion. All the three appeals fail and are dismissed with costs.

S.C. *Appeals dismissed.*

A. I. R. (35) 1948 Oudh 279 *[C. N. 100.]*

CHANDIRAMANI J.

Ghafoor and others—*Appellants* v. *Chhotey Lal and others* — *Respondents.*

Second Appeal No. 424 of 1942, Decided on 18-11-1947, against order of Civil Judge, Barabanki, D/- 8-8-1942.

(a) Civil P. C. (1908), S. 9— Right of worship and right to take out procession—These are inherent civil rights enforceable in law Courts and independent of custom — They can be interfered with only on grounds of controlling of traffic, preventing of disturbances and of nuisance, public or private — Rights are personal and cannot be controlled by representative agreements.

The right of worship is a civil right enforceable in the Court of law and it is an inherent right independent of custom : 2 Mad. 143; 5 Mad. 304 and 18 A.I.R. 1931 All. 674, *Rel. on.* [Para 6]

The right to take out a procession is also a civil right enforceable in a Court of law. It is also an inherent right independent of custom : 12 A. I. R. 1925 P. C. 36 and 31 A. I. R. 1944 P. C. 33, *Rel. on.* [Para 8]

The exercise of these rights is however subject to the rights of other members of the public and subject to the powers of the appropriate executive authorities of controlling traffic and preventing disturbances of peace. The rights may be limited by the civil Courts on the ground of nuisance, public or private : 18 A. I. R. 1931 All. 674; 31 A. I. R. 1944 P. C. 33 and 18 A.I.R. 1931 All. 341, *Rel. on.* [Paras 7, 8]

The custom if any does not abridge the inherent rights of the community in respect of religious processions. If however, parties are bound by a contract inter se, a declaration in breach of such a contract will not be granted by a civil Court. But the right of an individual in this matter is his own personal individual right and is not derived from any other person. Any representative agreement between two communities, in the legal sense, is therefore impossible and such representative agreement between the representatives of the two communities cannot control such rights. [Para 9]

Annotation : ('44-Com.) Civil P. C., S. 9, N. 23, 24.

(b) Civil P. C. (1908), S. 35 — Costs are in discretion of Court — Discretion exercised reasonably — Appellate Court will not interfere. [Para 11]

Annotation : ('44-Com.) Civil P. C., S. 35, N. 5.

Cases referred:—

1. ('78-80) 2 Mad. 143, Seshayyanagar v. Seshayyanagar.
2. ('82) 5 Mad. 304, Parthasaradi Ayyangar v. Chinna Krishna Ayyangar.

3. ('32) 53 All. 836 : 18 A. I. R. 1931 All. 674 : 137 I. C. 587, Janki Prasad v. Karamat Husain.
4. ('25) 47 All. 151 : 12 A. I. R. 1925 P. C. 36 : 52 I. A. 61:86 I. C. 236 (P.C.), Manzur Hasan v. Muhammad Zaman.
5. ('44) 31 A. I. R. 1944 P. C. 33 : I. L. R. (1944) Kar. P. C. 181 : I. L. R. (1944) All. 191 : 71 I. A. 25 : 213 I. C. 144 (P.C.), Martin & Co. v. Faiyaz Husain.
6. ('32) 53 All. 484 : 18 A. I. R. 1931 All. 341 : 131 I. C. 40, Muhammad Jalilkhan v. Ram Nath.

Hakimuddin — for Appellants.

N. Banerji and B. K. Dhaon — for Respondents *(1, 2, 3, 5, 6 and 7).*

Judgment. — This is the defendants' second appeal against the decree, dated 8-8-1942, of Mr. G. S. Misra, Civil Judge, Barabanki, confirming the decree passed by the Munsif of Ramsanehighat.

[2] The plaintiffs, a section of the Hindu community of the town of Zaidpur in Barabanki district, filed a suit in representative capacity against the defendants, a section of the Muslim community also in a representative capacity, for a declaration that in the town of Zaidpur (1) they were entitled to perform worship and recitations in all their temples and abodes of deities with music and dancing without any interference from the Muslims, and (2) they were entitled to take out processions practising their religious observances on the public highway on any occasion they liked without interference from the Muslims. They prayed for a permanent injunction restraining the Muslims of Zaidpur from interfering with them in the exercise of the rights so declared. The plaintiffs alleged that at the instance of the Muslims of the town executive authorities had issued orders from time to time interfering with and restricting their rights in such matters. The defendants denied the claim as put forward and contested the suit on various grounds.

[3] The most important objections which are material in the present appeal are that according to a well-recognized custom the Hindus could take out processions on certain specified occasions only subject to certain restrictions regarding times, routes, destination and the playing of music, and that within their knowledge there was only one temple in Zaidpur where Hindus had been performing worship, that the custom pleaded has been incorporated in two agreements between the representatives of the Hindus and Muslims, viz, Ex. J1 dated 21-8-1911 and Ex. J2 dated 9-4-1935, and that the Hindus could exercise the rights subject to the custom and the agreements mentioned above. In their application the plaintiffs denied the custom and pleaded that the agreements were not binding on them.

[4] The trial Court held that there was no custom of the kind pleaded by the defendants, that the agreements did not bind the plaintiffs, that the plaintiffs were entitled as of right to perform worship and take out processions subject to orders or directions issued by the Magistrate or the police for preventing a breach of the peace or obstruction of thoroughfares, or for other matters mentioned in S. 144, Criminal P. C., or under other statutory provisions or for regulations of traffic, provided that the exercise of the rights does not amount to a nuisance recognized by law. The suit was decreed accordingly. As the plaintiffs had asked for an unqualified declaration of rights they were not awarded their costs, and the parties were directed to bear their own costs. The defendants being dissatisfied went up in appeal and the learned Civil Judge held that the question of custom was really irrelevant, that in fact there was no custom, that the agreements pleaded in the case were not binding on the plaintiffs and accordingly the decree of the trial Court was affirmed and the plaintiffs were deprived of their costs in the appeal in the interest of maintenance of cordial commual relations. The plaintiff's cross-objection in respect of the costs of the trial Court was also dismissed.

[5] In the present appeal by the defendants their learned counsel has only urged that the declaration granted should have been further made subject to the custom and the agreements pleaded in the case. He has, however, frankly conceded that he can cite no authorities for his proposition.

[6] The right of worship is a civil right enforceable in the Court of law and it is an inherent right independent of custom. In 2 Mad. 143[1] and 5 Mad. 304[2] it has been held that the various creeds under the British Crown have got full liberty to celebrate their religious rights and to do worship in accordance with the tenets of their creeds, to build places of worship on private lands, and that except under orders of Magistrates no interference with this liberty can be tolerated. In Select Case No. 77 of Oudh, *Queen Empress* v. *Saiyid Muhammad Uskari*, it was stated:

"Yet I cannot concede that any class of the community has a right to oppose such public celebration of worship on the part of others, provided that the latter obey the law of the land and restrict themselves to the limits which the executive officers of Government legally prescribe. Each sect has the right to worship according to its own tenets, provided that it does so under the conditions above stated.

These are the only conditions upon which it would be possible for the British Government to justly administer territories containing millions of men of various creeds and accordingly universal toleration is the settled policy of the Government."

[7] In 53 ALL. 836[3] Mukerji J. observed at p. 858:

"The civil right of every subject of the Crown is that he would be entitled to carry on his worship in

any method he likes but so long as he does not by his performances affect others injuriously. In this view, both Hindus and Muhammadans have the right to carry on their worship, the Muhammadans in their mosque and the Hindus in their temple unrestricted each by the other so long as the civil rights of the parties are not encroached upon ..... There can be no doubt that in India there is an absolute freedom of worship for every person living under the protection of the British Crown. A worship of the deity by a single individual or group of individuals according to their own rites can be interfered with only if the act or acts of the aforesaid persons should amount to an infringement of the rights of the public in general, or of the private rights of individuals, which in this case would be of the defendants. In order that the act or acts of worship may be interfered with they must amount either to a public nuisance or to a private nuisance."

In the case mentioned above the reliefs sought were identical in nature to those sought in the present suit and the reliefs granted in the suit were similar to the reliefs so far granted under this suit. The legal position was stated in the second head-note as follows:

"Every person has a right, independent of custom to worship in his own method and according to his own rites; the right however, is not absolute but is limited by the rights of others. The exercise of the right may be limited by order of the public authorities under Ss. 144 or S. 133, Criminal P. C., or S. 30, Police Act, and by the civil Courts on the grounds of nuisance, public or private."

[8] The right to take out a procession is also a civil right enforceable in a Court of law. It is also an inherent right independent of custom. As regards the right to take out a religious procession the legal position has been set at rest by decisions of their Lordships of the Privy Council. In 47 ALL. 151[4] their Lordships of the Privy Council, while dealing with the right of Shias to perform matam in front of a mosque of Sunnis, held that:

In India there is a right to conduct a religious procession with its appropriate observances through a public street so that it does not interfere with the ordinary use of the street by the public, and subject to lawful directions by the Magistrates. A civil suit for a declaration lies against those who interfere with a religious procession or its appropriate observances."

This principle has been re-affirmed in A. I. R. 1944 P. C. 33.[5] In that case certain Shia Muslims of Amroha in Moradabad district wanted to take out "tazias" of a particular height exceeding that of the electric wires of the local Electric Supply Company. In 1930 they filed a suit to restrain the Electric Supply Company from permitting the wires to interfere with the free passage of the "tazias." Here it was claimed by the Shias that by an old custom they had a right to take out "tazias" to the height of 27 feet. They also alleged a compromise with the Electric Supply Company in the previous years. In the course of their judgment their Lordships while agreeing with the High Court that it is unnecessary to consider the question of custom observed:

"They agree that it is unnecessary to consider the question of custom. The plaintiffs have the right as members of the public to take part in religious processions in the street: subject of course to the rights of other members of the public to pass and repass along the same streets and subject to the powers of the appropriate authorities of controlling traffic and preventing disturbance. This right as a normal user of the highway does not originate in custom. Whether a highway could be dedicated subject to such a custom need not be considered. It is not alleged in the present case and it is difficult to see how such a situation could arise. The rights of the plaintiffs therefore are no more and no less than the rights of any member of the public and subject to questions of danger or disorder there seems no reason why a member of the public should not convey along an open street as part of a normal use of the street articles of any height. But as the plaintiffs' rights are those of the public, so where public rights may lawfully be abridged, so may the plaintiff's."

It is clear from the decision of their Lordships that custom does not affect the rights in regard to religious processions. Their Lordships do not say anything specifically about the effect of the compromise as apparently no right was claimed on its basis.

[9] In 53 ALL. 484[6] where disputes arose between Hindus and Muslims in respect of religious processions and Muslims sought to restrict the rights of Hindus on the basis of both custom and compromise the law was most ably summarized—if I may say so with all respect to the learned Judges—and it was stated:

"There is a right in every community to take out a religious procession, with its appropriate observances, along a high way. This is an inherent right and does not depend on the proof of any custom or long established practice. Even if such a procession be an innovation, it would be in the exercise of legal rights. The right is independent of any long standing tradition and is not lost by mere abstention or non-exercise of it for a number of years. Any inquiry as to the existence or non-existence of an old custom is therefore unnecessary and irrelevant..... Every man is entitled to enjoy his own civil right provided in doing so he does not infringe the legal rights of another..... If the parties are bound by a contract inter se a declaration in breach of such contract will not be granted by a civil Court."

It is clear that the custom if any does not abridge the inherent rights of the community in respect of religious processions, and further if parties are bound by a contract inter se, a declaration in breach of such a contract will not be granted by a Civil Court. In the present case both the Courts below have found it as a fact that the agreements of compromise, Ex. J1 and J2, cannot possibly be considered to have been executed on behalf of every member of the particular community and as such they have no binding effect. The reason for such a finding is that the representatives cannot possibly represent all the persons of the community which must include many minors and without proof of valid autho-

rity, express or implied, it would not be possible to bind the other members of the community who are not parties to the written compromises or could not validly give consent. Further the right of an individual in this matter is his own personal individual right and is not derived from any other person. Any representative agreement in the legal sense is therefore impossible in view of the nature of the right the exercise of which is sought to be controlled by the agreement.

[10] It is thus clear that the rights claimed by the Hindus in this case are not capable of being governed either by any custom or by any compromise. The decisions of the Courts below were obviously right and cannot be interfered with. The appeal accordingly fails and is hereby dismissed with costs of this Court.

[11] As regards the costs of the trial Court and the lower appellate Court, the respondents have filed a crose-objection claiming costs of both the Courts. Costs are always in the discretion of the Court and so long as this discretion is exercised reasonably no appellate Court will interfere. The trial Court refused the costs on the ground that the plaintiffs had claimed an unqualified declaration of their rights. The lower appellate Court thought this a reasonable ground and so dismissed the cross-objection regarding the costs. I agree with the lower appellate Court on this point and there is no reason to interfere. The lower appellate Court refused the costs of the appeal before it in the interest of maintenance of cordial communal relations. This also is a reasonable ground, and I see no reason to interfere. In the result the cross-objection is dismissed, but I direct that the parties shall bear their own costs of the cross-objection.

S C. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 282 *[C. N. 101.]*

MISRA AND KIDWAI JJ.

Municipal Board, Lucknow—Defendant—Appellant v. *Aziz Hussain — Plaintiff — Respondent.*

Second Appeal Nos. 388 and 389 of 1943; 253 and 254 of 1944 and 407 and 452 of 1945, Decided on 29-7-1947, against order of Dist. Judge, Lucknow, D/- 13-8-1943.

(a) U. P. Municipalities Act (2 [II] of 1916), S. 71 —Power under, cannot be delegated by Board to Retrenchment Committee.

The Municipal Board cannot delegate its power under S. 71 to the Retrenchment Select Committee. Hence resolutions delegating such power and action taken in pursuance of such delegation are of no legal effect. [Para 22]

(b) U. P. Municipalities Act (2 [II] of 1916), Ss. 74, 326 — Retrenchment Committee abolishing certain post — No confirmation by Board—Chairman dismissing incumbent—Appeal to Government — Order of Chairman held invalid—Suit to recover provident fund during pendency of appeal decreed — Subsequent resolution by Board confirming decision of Committee and action of Chairman—No fresh order of dismissal — Suit by employee for declaration that he was still in employment and for arrears of pay—Plaintiff held entitled to declaration — He was held not estopped by previous suit — S. 326 held applied — Allowances not mentioned in notice under S. 326 held could not be allowed — Evidence Act (1872), S. 115.

A Retrenchment Committee of a Municipal Board abolished certain post. The incumbent of the post was dismissed by the Chairman of the Board under S. 74. The decision of the Retrenchment Committee was not confirmed by the Board. On appeal by the employee to Government the order was held to be invalid and it directed that the Board should adopt a resolution retrenching the post and the chairman should then pass formal order under S. 74 dismissing the incumbent of the post. During the pendency of the appeal the employee sued to recover his provident fund on the ground of his dismissal and got a decree. The Board then passed a resolution confirming the decision of the Retrenchment Committee and the action of the Chairman. No fresh order of dismissal was thereafter passed by the Chairman. The employee brought a suit for declaration that he was still in service and for recovery of arrears of pay :

Held (1) that the order of the Chairman was *ultra vires* and the subsequent resolution of the Board had no effect. The plaintiff was therefore entitled to the declaration : 32 A. I. R. 1945 F. C. 47, *Disting.*; 30 A. I. R. 1943 Oudh 368, *Rel. on.* [Paras 28, 29, 30]

(2) that the plaintiff was not estopped by reason of his suit for provident fund as it was filed before the decision of the appeal to Government ; [Para 32]

(3) that S. 326 applied and the plaintiff could recover only six months' salary : 19 A. I. R. 1932 Oudh 193 (F. B.), *Foll* ; *Case law reviewed.* [Para 52]

(4) that claim to allowances and increased pay not mentioned in notice under S. 326 could not be allowed. [Para 54]

Annotation : ('46-Man.) Evi. Act, S. 115, N. 4.

(c) U. P. Municipalities Act (2 [II] of 1916), S. 326 — Scope and applicability — Section covers illegal omissions also — Omission by Board to pay employee's salary—S. 326 applies in such case.

It is true that S. 326 applies only to cases in respect of "an act done or purporting to have been done" by the Board. But S. 4 (2), U. P. General Clauses Act, provides that "words which refer to acts done extend also to illegal omissions." Thus the omission of the Board to pay its employee's salary would be an act by the Board to which the provisions of S. 326 would be applicable if the other conditions of the section are satisfied. *Prima facie* the words used in S. 326 (1) are wide enough to cover all cases against the Board of every description : 19 A. I. R. 1932 Oudh 193 (F. B.), *Foll.*; *Case law reviewed.* [Paras 34, 35, 36]

Cases referred :—

1. ('45) 32 A. I. R. 1945 F. C. 47 : 1945 F. C. R. 103 : I. L. R. (1945) Kar. F. C. 101 (F. C.), Secy. of State v. I. M. Lall.
2. ('43) 1943 O. W. N. 118 : 30 A. I. R. 1943 Oudh 368 : 19 Luck. 163 : 207 I. C. 178, Abdul Vakil v. Secy. of State.
3. ('33) 20 A. I. R. 1933 All. 785 : 55 All. 1002 : 147 I. C. 186, Municipal Board, Agra v. Ram Kishan.
4. ('34) 61 I. A. 171 : 21 A. I. R. 1934 P. C. 96 : 61 Cal. 470 : 148 I. C. 482 (P. C.), Revati Mohan Das v. Jatindra Mohan.
5. ('25) 23 A. L. J. 23 : 12 A. I. R. 1925 All. 276 : 86 I. C. 293, Banwari Lal v. Municipal Board, Cawnpore.

6. ('23) 21 A. L. J. 161 : 10 A. I. R. 1923 All. 267 : 71 I. C. 1032, Abdul Wahid v. Municipal Board, Allahabad.
7. ('26) 1 Luck. 444 : 13 A. I. R. 1926 Oudh 388 : 99 I. C. 643, Municipal Board, Lucknow v. Debi Das.
8. ('33) 8 Luck. 1: 19 A.I. R. 1932 Oudh 193: 137 I. C. 574 (F. B.), Municipal Board, Lucknow, v. S. C. Deb.
9. ('30) 17 A. I. R. 1930 All. 365 : 131 I. C. 686, Munir Khan v. Municipal Board, Allahabad.
10. ('17) 4 A.I.R. 1917 P.C. 253, Manche Kajo Ababio IV v. Quartey.
11. ('33) 20 A. I. R. 1933 Bom. 164 : 57 Bom. 67 : 142 I. C. 625, District Local Board, Poona v. Vishnu Raghoba.
12. ('36) 23 A. I. R. 1936 All. 18 : 58 All. 569 : 160 I. C. 226 (F. B.), District Board, Allahabad v. Lala Behari Lal.
13. ('27) 54 I. A. 338 : 14 A. I. R. 1927 P. C. 176 : 51 Bom. 725 : 104 I. C. 257 (P. C.), Bhagchand Dagadusa v. Secy. of State.
14. ('39) 1939 A. W. R. 211: 26 A. I. R. 1939 All. 337: I. L. R. (1939) All. 505 : 183 I. C. 86, Jagannath v. Municipal Board, Soron.
15. ('98) 2 C. W. N. 689, Ambika Churn Mozumdar v. Satish Chunder Sen.

K. P. Misra and Mohammad Ahmad — for Appellant.

Ram Bharose Lal, Iftikhar Husain and R. B. Choudhri — for Respondent.

Judgment. — These six appeals arise out of three suits instituted by Aziz Hussain against the Lucknow Municipal Board (to which we will hereafter refer as the board) in respect of his dismissal from the service of the board. The appeal first came up for hearing before a learned Single Judge of this Court who, by reason of the importance of the questions of law which arise, has referred them to a Bench for decision.

[2] The facts which are admitted and which are common to the three cases are as follows: On 6-8-1936, the plaintiff entered into the service of the board as a Chief Tap Inspector on a salary of Rs. 80-4-90. In 1940 it became necessary for the board to retrench its expenditure. By resolution No. 355, dated 12-7-1940, it appointed a Retrenchment Committee. A suggestion was made by the Superintendent of Water Works that a saving of Rs. 5000 per year could be effected in his department and this proposal was forwarded by the board to the Retrenchment Committee which was authorised to decide the matter of reducing the staff without further reference to the board. For the purposes of carrying out this work, the Chairman of the Water Works Committee was also to be a member of the Retrenchment Committee — *vide* Resolution No. 539 and 540 dated 19-8-1940 (Ex. 10 & 11/P. W. 2 of Suit No. 60 of 1942).

[3] On 6-12-1940, the Retrenchment Committee resolved that certain specified posts in the Water Works Department, including the posts of two Chief Tap Inspectors, should be abolished and it directed the Superintendent of the Water Works to suggest the names of the persons who were to be removed from the service as a result of the abolition of the posts. On 17-12-1940, the Superintendent submitted the list which included the name of the plaintiff also, and on the same date the Chairman directed that notices should be issued to all the persons entered in the list that their services would not be required after 1-1-1941 (*vide* Ex. A-6 of Suit No. 60 of 1942).

[4] Notices were issued by the Superintendent accordingly. The notice to the plaintiff is Ex. 7 of the Suit No. 60. This notice was served on the plaintiff on 23-12-1940. On the same date 19 members of the board (i.e. a majority of the members) made a request in writing to the Chairman to place the resolution of the Retrenchment Committee for a reduction of the staff before the board for reconsideration. (This matter remained pending till 20-3-1942, when the papers were filed without any further action: *vide* Ex. A7 of Suit No. 224/165 of 1943.)

[5] The plaintiff (and the other Tap Inspector dismissed with him) appealed to the Provincial Government in exercise of the right given to them by S. 74, U. P. Municipalities Act (Ex. 9/P. W. 2 of Suit No. 60). They contended that the order for their removal was illegal and they prayed for their re-instatement, or, if the order was found to be legal, for the pay and allowances to which, they alleged, they would, in that event, be entitled. This appeal remained pending for a considerable time and, on 13-8-1942 the Provincial Government decided by G. O. No. 2756/11-30-41 (Ex. 3 of Suit No. 60), that the abolition of the two posts was justified and necessary but that the procedure adopted was illegal, since it was only the board itself that could abolish posts and that this authority could not be delegated. It further held that the Chairman could only order dismissal after the posts had been abolished. As a result it ordered to the board to proceed "now" to adopt a resolution retrenching the two posts and directed further that the Chairman should then pass an order dismissing the appellants unless they had already been absorbed in some other posts. It then directed that the appellants should get three months' salary in lieu of notice and should also get leave to which they were entitled. The effect of this order has been discussed at considerable length by the learned counsel for the board and its meaning and effect has a very important bearing upon the decision of all the appeals.

[6] About six months after the receipt of this Government Order, on 15-2-1943, the board passed two resolutions by one of which it confirmed the proposals of Retrenchment Committee abolishing the two posts of Chief Tap Inspectors (as well as a large number of other posts) from 1-1-1941, and also confirming the order passed

by the Chairman on 17-12-1940, dismissing the plaintiff and others (*vide* EX. A-3 of Suit NO. 224/165 of 1943).

[7] Some money had accumulated to the credit of the plaintiff in the Provident Fund and he desired to get this back. When the board did not give it to him he gave a notice to the board on 8-5-1941, through his counsel alleging his dismissal from service as from 1-1-1941, and, in consequence, his right to get payment of the Provident Fund (EX A-1 of Suit NO. 60). On the failure of the board to pay the money the plaintiff instituted a suit which was decreed by the Munsif South Lucknow, on 20-1-1942 (EX. A-2 of Suit NO. 60).

[8] Thereafter, on 6-5-1942, the plaintiff gave a notice under S. 326 (1), Municipalities Act, to the board of his intention to file a suit for arrears of his salary on the ground that his dismissal was illegal and ultra vires, and he demanded payment of all arrears of salary due up to the date of his notice. He also expressed his intention of suing for damages. The board replied to this notice but refused to accede to the contentions of the plaintiff. Consequently, on 26-9 1942, the plaintiff instituted Suit NO. 60 of 1942 against the board in the Court of the civil Judge, Lucknow. In this suit he alleged that his dismissal was illegal and invalid and that he was entitled to Rs. 1920, as salary for 20 months from 1-1-1941 to 31-8-1942, at the rate of Rs. 96 per month. He further pleaded that he was entitled to Rs. 100 as damages for mental and bodily worry and loss of health and honour owing to his invalid removal from service. At a later stage he added a prayer for a declaration that resolutions 539 and 540 of the board, dated 19-9-1940 were illegal and ultra vires. In the alternative he pleaded that, if his dismissal was lawful, he was entitled to three months salary in lieu of notice and the salary for six months 12 days due to him as leave. He alleged that the cause of action accrued to him on 19-1-1941, and thereafter on the 1st day of each month.

[9] In its written statement the Board denied that the dismissal was invalid or *ultra vires* and contended that the plaint was not in accordance with the terms of the notice, that the suit was barred by time, that the plaintiff had already obtained refund of his Provinent Fund on the basis of his dismissal and he could not consequently plead continuation of his service and that, in any case, the plaintiff was not entitled to more than three months salary. In an additional written statement it was pleaded that the relief for declaration had not been mentioned in the notice and could, consequently not be claimed and further that it was barred by time.

[10] The learned civil Judge framed the following five issues:

1. (a) Whether the Select Committee for retrenchment appointed by the Municipal Board had no authority to dispense with the plaintiff's services?

(b) Whether the order dispensing with plaintiff's services was illegal on account of any other reason? If so, what is its effect.

2. Whether the claim of the plaintiff is time-barred?

3. Whether, in view of the decree, dated 10-1-1942, the plaintiff cannot plead continuation of service?

4. Whether the claim of the plaintiff is not in accordance with the terms of the notice, dated 6-5-1942? If so, what is its effect?

5. To what relief and damages, if any, is the plaintiff entitled?

[11] Upon these issues the learned civil Judge found:

(1) That although the Select Committee was indirectly responsible for the removal of the plaintiff, he was in fact removed under the orders of the Chairman.

(2) That the Chairman had no authority to remove the plaintiff until the Board had abolished the post which he held.

(3) That the functions of the Board under S. 71, Municipalities Act could not be delegated and consequently the resolution of the Select Committee could not operate to abolish the plaintiff's post. It was illegal and *ultra vires*.

(4) Section 68, Municipalities Act does not apply to the case.

(5) That the order for the abolition of the plaintiff's post being illegal, it did not bring about the discharge of the plaintiff.

(6) That, in law, the plaintiff, not having been removed from service, had a recurring cause of action at the expiry of each month.

(7) That the order of the Board having merged in the order of the Government and the suit having been brought within six months of that order it is within time.

(8) That the plaintiff is not estopped from challenging the validity of his removal by reason of his action in obtaining a decree for his provident fund money.

(9) That the claim for declaratory relief is covered by the notice under S. 326.

(10) That it is unncessary to grant the declaration since the plaintiff does not press for it and it makes no difference whether the declaration is granted or not.

(11) That the plaintiff is not entitled to any damages.

(12) That if the removal of the plaintiff has been held to be valid he would have been entitled to three months' salary in lieu of notice and four months' salary on account of privilege leave but this situtation does not arise.

The suit was accordingly decreed for recovery of Rs. 1920, arrears of salary.

[12] From this decision both the parties appealed and by his judgment, dated 13-8 1943, the District Judge of Lucknow, dismissed the Board's appeal and allowed the plaintiff's appeal granting him the declaratory relief claimed also. Appeals NOS. 388 and 389 of 1943 have been filed by the Board against the two decrees of the District Judge, the first being against the decree dismissing its appeal and the second against the decree allowing the plaintiff's appeal.

[13] On 21-7-1943, Aziz Husain instituted another Suit Nos. 234 and 165 of 1943 in the Court of the Munsif South, Lucknow, claiming ten months' pay for the period from 1-9-1942 to 30-6-1943, amounting to Rs. 960 together with Rs. 50 interest on the same grounds as in the previous suit. No declaration of damages were asked for in this suit. The Superintending Engineer, Public Health Department, U. P., was also impleaded as a party since the Government had taken the Water Works under its own management and entrusted it to the Superintending Engineer. In this case also the Board took the same pleas and further pleaded that since the plaintiff had appealed to the Government under S. 74, Municipalities Act, and as the Board had complied with the orders of the Government, no civil suit was maintainable. The learned Munsif framed 12 issuses of which only the following are now material:

(2) Whether the suit is barred by limitation under S. 326 of Act 2 [II] of 1916?

(3) Whether the suit is not maintainable for want of valid notice under S. 326 of Act 2 [II] of 1916?

(4) Whether the plaintiff's suit is barred by estoppel?

(5) Whether the plaintiff has been illegally dismissed from his service? If so, what is its effect?

(10) Whether the plaintiff's suit is not maintainable as alleged in para. 21 of the written statement of defendant 1.

[14] Upon these issues the learned Munsif found:

(1) That the plaintiff's dismissal was illegal and the resolution of the Board, dated 15-2-1943, does not have the effect of legalising it.

(2) That the plaintiff is, therefore, entitled to his salary even for the period subsequent to his removal from service.

(3) That S. 326 (3), Municipalities Act does not apply but Art. 102 of Sch. 1, Limitation Act applied and that suit for each month's salary is within time if it is brought within 3 years.

(4) That the notice given by the plaintiff to the Municipal Board was valid.

(5) That the filing of the suit for, and recovery of, the Provident Fund Money does not estop the plaintiff.

(6) That there is no bar to the institution of the suit by reason of the filing of the appeal to the Provincial Government.

[15-16] Upon these findings, since notice had only been given with regard to seven months' salary, the suit was decreed for Rs. 672. From this decree also both parties appealed and the civil Judge, Malihabad, Lucknow, allowed the appeal of Aziz Husain. He held:

(1) That resolution Nos. 539 and 540 of 19-9-1940, passed by the Board delegating the power of decreasing the number of its servants was not proper.

(2) That the dismissal of the plaintiff by the Chairman was not illegal because the power conferred by S. 74 on the Chairman is independent of S. 71.

(3) That the Government order of 13-8-1942 did not cancel the Chairman's order and did not re-instate the plaintiff.

(4) That the dismissal of the plaintiff was not void and ultra vires.

(5) That since the suit was commenced more than six months after the order passed by the Government in appeal under S. 74, Municipalities Act, and it virtually refused to re-instate the plaintiff, the suit is barred under S. 326 (3) of the Act.

(6) That the plaintiff cannot sue for salary unless he shows that he was always ready to discharge the duties entrusted to him.

[17] From the decrees in the two appeals Aziz Husain has appealed, Appeal No. 253 of 1944 is directed against the decree dismissing his appeal and Appeal No. 254 of 1944 is directed against the decree allowing the Board's appeal.

[18] On 24-2-1944, a third Suit No. 36 of 1944 was filed by Aziz Husain in the Court of the Munsif South, Lucknow (it was subsequently transferred to and decided by the Additional Munsif) against the Board. In this suit he claimed Rs. 700 as salary at the rate of Rs. 100 for seven months from 1-7-1943 to 31-1-1944. He also claimed Rs. 23 as interest and Rs. 280 as motor cycle allowance for seven months. The grounds of his right to the relief prayed for were the same as in the previous suits. The defence was also the same as in Suit No. 224/165 of 1943, except that it was pleaded that the Superintending Engineer, Public Health Department should also be made a party. The material issues in this suit were practically the same as those in Suit No. 224/165 of 1943 and the learned Munsif came to the same conclusion as the Munsif South in that case. He did not hold the plaintiff entitled to any motor cycle allowance or interest but he held him entitled to salary at the rate of 96 per month and dearness allowance from 1-9-1943. A decree for Rs. 726 was, therefore, passed. Again both parties appealed and the civil Judge, Lucknow, dismissed both the appeals upholding all the findings of the Munsif. Both the parties have come up in appeal to this Court. Appeal No. 407 of 1945 has been filed by Aziz Husain while Appeal No. 452 of 1945 has been filed by the Board.

[19] The first point which the learned counsel for the Board has placed before us is that of limitation. In two cases in which this point has been decided against him the Courts have proceeded on two grounds, namely: (1) That since the plaintiff's service continues, he has a recurring cause of action, and (2) that, in any case, the suit has been brought within six months of the Government's order, which is the final order in the matter.

[20] It may be noticed that the Court which has decided the point of limitation in his favour has also held that the order of the Government gives a fresh starting point of limitation.

[21] The learned counsel contends that neither of these grounds is a valid ground. He points out that he pleads the bar of limitation under a

special law, namely S. 326 (3), U. P. Municipalities Act. Consequently he contends, by reason of S. 29 (2) (b), Limitation Act, S. 23 of that Act, which deals with cases of continuing wrong, is not applicable. He, therefore, urges that the suits were within time only in respect of salary for six months at the most in each case. With regard to the suit for declaration he contends that the Government order does not give a fresh starting point for a suit. The determination of the question of limitation depends upon the questions whether the plaintiff can still be deemed to be in the service of the Board or whether he has, in fact, been dismissed, though, perhaps, his dismissal is wrongful, and what is the effect of Government order of 13-8-1942. We, therefore, proceed to decide these questions—which are in reality the questions involved on the merits of the appeal—first.

[22] It is no longer disputed in these appeals that the Board could not delegate its powers under S. 71, Municipalities Act, to the Retrenchment Select Committee. Consequently resolutions NOS. 539 and 540 of 19-9-1940—the resolutions complained of—are of no legal effect and neither they, nor anything done in pursuance of them—operate to cause the termination of the plaintiff's service. The learned counsel for the Board, however, contends that, even if there is no retrenchment or abolition of the post held by the plaintiff the Chairman could nevertheless, in exercise of the powers conferred upon him by S. 74, U. P. Municipalities Act, have lawfully dismissed or removed the plaintiff from service. The argument proceeds that the Chairman did exercise his powers and remove the plaintiff by his order, dated 17-12-1940. That, it is argued, the plaintiff ceased to be in the service of the Board and is not entitled to any of the reliefs for which he prays.

[23] A further argument addressed to us in this connection was that, whatever irregularity might have attached to the order of the Chairman, it was nevertheless an order which he was competent to pass and, consequently, the only remedy open to the person aggrieved by that order was to resort to the remedy provided by S. 74 of the Act and to appeal to the Provincial Government. It is urged that if this view be correct the civil Courts would have no jurisdiction to entertain the suit for a declaration.

[24] Lastly it was contended that, should the civil Courts be considered to have jurisdiction in the matter, nevertheless the frame of the suit is bad and the suit should have been one for wrongful dismissal and not for a declaration that the plaintiff is still in the employment of the Board.

[25] In the view which we take of the case we are not called upon to decide either the first or the second of the points raised by the learned counsel for the Board, because his appeal cannot succeed even if his arguments on these points are accepted. The record discloses the fact that the plaintiff and another official removed by the same order did appeal to the Provincial Government, and the Government set aside the Chairman's orders. The Board's learned counsel contends that, reading the petition of appeal and the order of the Government together, it must be held that the appeal was rejected and that, consequently, the order of the Chairman, dated 17-12-1940, stood. We are unable to accept this contention.

[26] One of the prayers contained in the petition of appeal (EX. 9/P. W. 2 of Suit No. 60) was that the Government should order that the petitioners be re-instated. It is true that the order of the Government (EX. 3 of Suit NO. 60) does not expressly grant this prayer. This was, however, not because the prayer was rejected but because, on the view of the law taken by the Provincial Government, no question of reinstatement arose.

[27] The order first of all states that the abolition of two posts of Chief Inspectors was a genuine piece of retrenchment and was necessary. It then proceeds to state that the Board could not delegate its powers of abolishing the posts and that consequently the resolution of the Select Committee, without its subsequent confirmation by the Board (which had not till then taken place)

"could not bring about the abolition of these posts, or the discharge of their incumbents. The order about the latter should have been passed by the Chairman of the Municipal Board under S. 74 of the Act, when the Municipal Board had resolved to abolish the posts."

After having expressed its view as to the invalidity of the action of the Chairman, the Government proceeded to lay down the procedure which should be adopted in future in the following words:

"3. The Board should *now* adopt a formal resolution under S. 71 of the Act, retrenching the two posts as suggested by the Select Committee appointed by it. The Chairman should then, if the Board has not been able to absorb the appellants in any other posts in its service since, pass formal *orders discharging them from service.*"

The order then proceeds to deal with other points raised in the petition of appeal with which we are not concerned.

[28] There can be no doubt that in the view taken by the Government—whether that view is right or wrong is immaterial—the Chairman could not exercise his powers under S. 74, Municipalities Act, in respect of the petitioners until the Board had abolished the posts held by them. In that view the order of the Chairman was *ultra*

vires and of no effect. Thus the petitioners were —in the opinion of the Government—still in the service of the Board and no question of reinstatement arose. This is made still further clear by the direction given to the Board that it should "now" proceed to abolish the posts and thereafter the Chairman should "pass formal orders discharging them from service." If the petitioners were to be treated as having already ceased to be employees of the Board there was no need for further orders by the Chairman discharging them from service. Thus, for reasons which may be right or wrong, the Government did in fact set aside the order of the Chairman, dated 17th December 1942, though it at the same time held that there was real need for retrenchment in the manner proposed by the Select Committee. In this view of the matter, there is no order of the Chairman in existence and no question as to whether he had authority to pass it without the abolition of the post by the Board under S. 71, Municipalities Act, arises. Nor can it be argued that the plaintiff could not seek a remedy in the civil Courts which would have the effect of setting aside an order of the Chairman because that order has already been set aside by the authority competent to set it aside, namely, the Provincial Government.

[29] The learned counsel for the Board next contended that, after the Government's order had been received by it, the Board did in fact pass orders retrenching some posts, including the post held by the appellant and also confirming the orders of the Chairman removing the plaintiff and others from the service of the Board from 1st January 1941. It was urged that, by reason of the resolutions, the service of the plaintiff terminated. It is true that on 15th February 1943, the Board passed the two resolutions mentioned but, while the Board had authority, to abolish posts, it had no authority to dismiss any particular employee: that was the right of the Chairman under S. 74, U. P. Municipalities Act, and it is agreed that the Chairman passed no order after the receipt of the Government's orders. Merely by framing its resolution in the form of confirming an action of the Chairman the Board cannot usurp to itself the powers of the Chairman, nor can it revive the order of the Chairman which had been held invalid, and consequently of no effect, by the Government in an appeal under S. 74. Further the abolition of the posts did not automatically terminate the services of the holders of the posts: the one was within the power of the Board and the other within the powers of the Chairman. Moreover, we find, on reference to the resolution of the Board, that it covered the cases of a large number of posts to be retrenched out of a much larger number of posts of the same kind. It would be for the Chairman to consider which individual holders of the posts should be removed and it was open to him not to remove the holder of any post from the service of the Board because, though he could not continue him in the post which had been abolished, he could give him some other alternative employment in the service of the Board. Thus, on the first two points, it must be held that there is no valid order dismissing the plaintiff from service in existence and he must be deemed to be still in service.

[30] On these findings the last argument under this head also does not arise because when there has been no dismissal at all there can be no suit for damages for wrongful dismissal. The learned counsel for the Board relied upon the case in A. I. R. 1945 F. C. 47,[1] decided by the Federal Court but the principle of that case is wholly inapplicable to the facts of the present case since in that case the person dismissing the servant had power to dismiss him and his action was not *ultra vires* nor had his order been set aside. Thus there was a valid order dismissing the servant in existence but there were defects in the procedure adopted by the officer giving the order. The result was that there had been a dismissal but it was wrongful. In the present case the order of the officer authorised to dismiss has been set aside by the authority competent to set it aside: it, therefore, no longer exists. The subsequent order passed by the Board is *ultra vires* because the Board had no power to dismiss or remove the plaintiff. Thus in the present case the service of the plaintiff has not been legally terminated and he is entitled to maintain the suit for a declaration that he is in the service of the Board. This view finds full support from 1943 O. W. N. 118,[2] in which also the order for dismissal was passed by a person not competent to pass it and was consequently declared null and void and it was also declared that the plaintiff was still in service.

[31] Another plea taken by the learned counsel for the Board in this connection was one of estoppel and it is said to have arisen in the following manner. Before instituting the suits out of which the present appeals arise the plaintiff on 8th May 1941, gave to the board a notice demanding the amount standing to his credit in the Provident fund. The Board did not pay this money. The plaintiff, therefore, commenced a suit against the Board for payment of the money and on 10th January 1942, he obtained a decree which he executed. It is contended that, since he obtained this money on the representation that he had been dismissed from the service of the Board, he is now estopped from contending that

he is still in the service of the Board. We are unable to accede to this contention.

[32] It will be seen that, when the suit for the Provident Fund was instituted, the order of the Chairman removing the plaintiff from service still stood. He did not know what the result of his appeal to the Government would be. If the order had been allowed to stand the cause of action for his suit for the Provident Fund money would arise from the date of his dismissal and the claim might, by the time that Government orders were received, be barred by time. At the time when he alleged that he had been dismissed in fact an order for his dismissal did exist. It was only on 13th August 1942, that it was cancelled. In these circumstances if the plaintiff alleged, in the suit for recovery of the money in the Provident Fund, that he had been dismissed he was not making any misrepresentation as a result of which the Board was induced to alter its position. Thus no estoppel arises.

[33] In the view which we have taken no question of limitation arises with regard to the relief for a declaration that the plaintiff is still in the service of the Board, but the position with regard to the claim for the arrears of salary is different. That claim is based upon the omission of the Board to pay this salary at the end of each month as it fell due and, as the plaintiff itself states, the cause of action arose on the first day of each succeeding month. The learned counsel for the Board relies upon the provisions of S. 326, U. P. Municipalities Act, for the proposition that the claim to salary for a period more than six months before the date of the filing of each suit is barred by time. Section 326 is as follows:

"326 (1) No suit shall be instituted against a board or against a member, officer or servant of a board, in respect of an act done or purporting to have been done in its or his official capacity, until the expiration of two months next after notice in writing has been in the case of a board, left at its office, and, in the case of a member, officer or servant, delivered to him, or left at his office or place of abode, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and the plaint shall contain a statement that such notice has been so delivered or left.

(2) If the board, member, officer or servant shall, before action is commenced, have tendered sufficient amends to the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered and shall also pay all costs incurred by the defendant after such tender.

(3) No action such as is described in sub-s. (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action.

(4) Provided that nothing in sub-s. (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceedings."

[34] It is true that S. 326 applies only to cases in respect of "an act done or purporting to have been done" by the Board and in the present case the cause of action is an omission of the Board to do something, namely, to pay the salary legally due to the plaintiff; but S. 4 (2), U. P. General Clauses Act, provides that "words which refer to acts done extend also to illegal omissions." Accordingly in A. I. R. 1933 ALL. 785,[3] at p. 786 it was held that the withholding of payment amounts to an act done by the Board. The same view was taken by their Lordships of the Judicial Committee in 61 I. A. 171,[4] at p. 175, in construing the same words in S. 80, Civil P. C. Their Lordships referred to the definitions contained in S. 3, General Clauses Act, which is the same as the definition contained in S. 4 (2), U. P. General Clauses Act.

[35] Thus the omission of the Board to pay the plaintiff's salary would be an act by the Board to which the provisions of S. 326 would be applicable if the other conditions of the section are satisfied.

[36] Prima facie, the words used in S. 326 (1) are wide enough to cover all cases against the Board of every description. In 23 A. L. J. 23,[5] the case was very similar to the present one and S. 326 was held to bar a claim for arrears of pay by an ex-employee of the Municipal Board which had been brought more than six months after it accrued due. Similarly in 21 A. L. J. 161,[6] a claim by a contractor for payment of Rs. 350 which had been struck out from his bill was held to be barred by reason of the 6 months rule laid down in S. 326. In these two cases, however, there is no discussion since it seems to have been agreed that S. 326 was applicable.

[37] In Oudh also the same view prevailed. In 1 Luck. 444,[7] the point was taken that S. 326 does not apply to a case based on contract. The learned Judges were of the opinion that the point did not arise in the view which they took of the case. They, however, discuss the point at p. 455 of the report and they say:

"We would only say that S. 326 should be interpreted according to the terms of that section, and that no decisions as to the differently worded terms of other sections of other Acts are of assistance in interpreting this section. It is noticeable that section 326 speaks of suits" in respect of an act done or purporting to have been done by the Board in its official capacity." The words "in respect of an act done" would appear to us to include an omission because every omission must have reference to some act or series of acts. We also consider that a Board must be deemed to have acted in its official capacity, even though its action was not taken directly under any provision of the Act, but indirectly in pursuance of a contract executed directly under the provisions of the Act, for even in the latter case it must be held to have acted in an official capacity.

A Board indeed can only act in an unofficial capacity when it acts otherwise than under colour of any power conferred on it. The exceptions provided for in sub-sections 3 and 4 of the Act show that the section was meant to include suits of every description, even suits based on contracts."

[38] In 8 Luck. 1[8] which was also a suit arising out of a contract, two questions were referred to a Full Bench for decision, the second was:

"Is the suit barred by limitation under the provisions of S. 326, U. P. Municipalities Act ?"

In expressing his opinion on this question, Sir Syed Wazir Hasan, the then C. J. says :

"In the course of arguments before us the plaintiff's learned advocate raised the contention that S. 326, U. P. Municipalities Act, is inapplicable to this case. I had great difficulty in appreciating the argument. I am of opinion that the section is applicable to the suit. The suit would be barred under sub-s. (3) of S. 326, if it is commenced otherwise than within six months after the accrual of the cause of action. The precise question for determination therefore is as to the date when the cause of action accrued."

[39] This is a Full Bench decision of the Court which we are bound to follow. The learned advocate for the plaintiff, however, contended that the remarks are merely obiter dicta since it was, in the view taken by the Court, not necessary to decide the point. We cannot agree with this contention, the question of limitation had definitely been referred to the Full Bench and the Full Bench was giving an answer. Thus the remarks were not obiter dicta.

[40] In spite of this Full Bench decision, the advocate addressed lengthy arguments to us on this question basing himself on some decisions of the Allahabad Court and other High Courts and requested us, if we did not agree with his contentions that the remarks in 8 Luck. 1[8] were obiter dicta, to refer the point again to a Full Bench for reconsideration. We have examined all the decisions upon which the learned counsel relies and we have come to the conclusion that the decision of the Full Bench in 8 Luck. 1[8] does not require reconsideration and should be followed.

[41] It seems that in the Allahabad High Court there has been a conflict of opinion on this question. We have already referred to two cases in which the limitation laid down in S. 326, U. P. Municipalities Act, was held to apply even in suits arising out of contract. In a later case (A. I. R. 1930 ALL. 365[9]), this question was definitely raised and decided. In that case their Lordships at p. 367 of the report, say :

"The plaintiff contends that the scope of cl. (1) is confined to suit for compensation for wrongful acts on the part of the Municipal Board or of its member, officer or servant and that the words 'act done', should be construed as wrongful or tortious act sounding in damages. An examination of the language of cl. 1 does not lend itself to the interpretation which is sought to be put upon it. The clause provides that the notice must explicitly state the cause of action, the nature of the relief sought and the amount of compensation claimed. The scope of the suits has not been confined to suits for damages founded upon tort. No limitation has been put either as to the nature of the cause of action or as to the nature of the relief claimed. Clause (4) clearly indicates that the relief claimed under cl. (1) may be one for an injunction. The only suits which for purposes of limitation have been excepted from the broad scope of suits referred to in cl. (1) are suits for recovery of immovable property or for a declaration of title thereto. The words "cause of action", are of sufficient amplitude to cover cases involving the infraction of an absolute right or of a right arising out of a contract and also of a right to compensation flowing from tort. The words 'amount of compensation claimed' do not narrow down the denotation of either 'the cause of action' or 'the nature of the relief sought' to mere suits for damages founded upon tort and evidently mean no more than this that where the plaintiff sues for damages he must specify the amount of compensation."

[42] The learned advocate for the plaintiff challenged the correctness of this decision on the ground that its very basis, namely that actions for possession, declaration of title and injunction are not actions in tort, is incorrect. He contended that such actions are also actions in tort. Of course the word "tort" literally means "wrong" and consequently of most actions whether arising *ex contractu* or otherwise, it may be said that they arise out of a tort, but an action in tort has a special signification and it is surprising that a senior counsel like Mr. Ram Bharosey Lal, relying upon some stray passages here and there, in Underhill's Work on Torts should have persisted for a considerable length of time in such an argument in spite of the fact that, though a tort has never been accurately defined, yet one of its essential ingredients has always been considered to be that it is wrong for which the compensation is in damages. The confusion in the mind of the learned advocate seems to be due to his failure to differentiate an action of trespass from such a trespass as gives rise to an action of ejectment.

[43] Underhill in his work on Torts makes it clear that

"in order to maintain an action of trespass, the plaintiff must be in possession of the land; for it is an injury to possession rather than to title. A mere *intersse termini* is not sufficient. But constructive possession, i. e., by a servant or agent, or a present right to possess although no physical transfer has taken place, is sufficient."

[44] In an action for ejectment, which also is the result of a trespass, it is the wrong-doer that is in possession. This distinction is made clear in one of the decisions of their Lordships of the Judicial Committee which the learned advocate himself placed before us (A. I. R. 1917 P. C. 253[10]) At p. 254 of the report their Lordships say :

"If a wrong doer is in actual possession, the real form of action at common law should be one of ejectment. Though the difference between such an action and one of trespass is now of no practical importance if the facts are properly alleged".

[45] The learned advocate also drew our attention to the fact that in the part headed "Of Rules relating to particular torts" there is a section dealing with dispossession. He has, however, failed to notice that the text makes it clear that this is so entered because

"the successful plaintiff gets a judgment for possession and *mesne profits* i. e., *damages for the profits of the land* . . . . ".

Thus such a suit combines two reliefs — one for possession and the other for damages. This is why it is described in this section. This is, however, no authority for saying that suit, in so far as it relates to the relief for possession, is also action of tort. Indeed the same section makes it clear; as their Lordships have done in A. I. R. 1917 P. C. 253,[10] that before the Judicature Act, 1873, the remedy for this wrong was by an action of ejectment.

[46] There is nothing in any of the decisions placed before us on this point to indicate that any Court has ever held that an action for possession of land or for injunction is an action in tort and we need not refer to them. Thus the ground on which the decision in A. I. R. 1930 ALL. 365[9] is challenged is without substance. We should like to point out that the same reasoning was adopted by this Court in 1 Luck. 444.[7]

[47] It is true that in A. I. R. 1933 ALL. 785,[3] following a decision of the Bombay High Court in A. I. R. 1933 Bom. 164[11] it was held that S. 326 is intended to cover wrongful acts done by a Municipal Board but not cases arising *ex contractu*. The learned Judges simply say that in case of restrictions on ordinary rights more must not be read into the words than is necessary and that in their opinion no special privileges should accrue to the Municipal Board in the matter of limitation in suits arising *ex contractu*.

[48] The decision which the learned Judges followed related to the construction of a different statute in which notice was only required in respect of cases arising out of acts done "in pursuance of the act." The Bombay High Court held that claim under contracts could not be covered by these words. Even on this point this Court has taken a different view in 1 Luck. 444.[7] But even supposing the Bombay view to be correct, with all respect to the learned Judges who decided the Allahabad case, the absence of the words "in pursuance of the Act" in the United Provinces Act makes a great deal of difference.

[49] The view expressed in A. I. R. 1933 ALL. 785[3] in the general terms in which it was stated cannot have effect now in view of a Full Bench decision of the same Court in A. I. R. 1936 ALL. 18[12] in which the learned Judges, in interpreting a similar provision in S. 192, U. P. Municipalities Act, held that it could not be said that the section was not applicable to any case arising out of contracts but it depended upon the action complained of in each case to determine whether it could be considered to be an "illegal omission" of such a character as to bring it within the definition of action contained in the General Clauses Act. The learned Judges relied upon two cases of the Judicial Committee reported in 61 I. A. 171[4] and 54 I. A. 338[13] both of which related to the interpretation of S. 80, Civil P. C.

[50] The first of the appeals mentioned arose out of a suit brought by a mortgagee for enforcement of a mortgage executed by a manager appointed under S. 95, Bengal Tenancy Act. It was pleaded that the suit was bad because the two months' previous notice required by S. 80 had not been given. Their Lordships held that, even if it were assumed that the manager was a public officer, the failure to pay the mortgage was not such an illegal omission as to make 'an act' purporting to be done 'by the manager in his official capacity,' and that consequently S. 80, Civil P. C., did not bar the suit. Their Lordships, however, took care to state at page 176 of the report:

"The learned Subordinate Judge held that the section had no application to suits in contract, and this *dictum* was rightly repelled by Mukerji J., who delivered the judgment of the High Court. Having regard to the decision of this Board in 54 I. A. 338[13] their Lordships think that no such distinction is possible. The learned Judges of the High Court, however, seem to have regarded the suit as based on a breach of contract, which they thought would be an "act" within the contemplation of the section. Their Lordships do not suggest that a claim based upon a breach of contract by a public officer may not in many cases be sufficient to entitle him to notice under the section, but they are unable, for the reasons already given, to agree with the learned Judges that the omission by the first respondent to pay off the mortgage was such a breach."

[51] After this decision, however, a Division Bench of the Allahabad High Court once more reverted to the view expressed in A. I. R. 1933 ALL. 785[3] *vide* 1939 A. W. R. 211.[14] In that case, however, the Full Bench decision of the Allahabad High Court was not placed before the learned Judges nor is any other case discussed by them but they simply follow the old case in 2 C. W. N. 689.[15]

[52] A review of these cases shows that the preponderance of authority even in the Allahabad High Court is in favour of the view taken by this Court and we have been shown no reason to induce us to doubt the correctness of that view. We hold, therefore, that the plaintiff can only be allowed six months salary in each case.

[53] One or two minor points remain to be

disposed of. In deciding the appeal in suit No. 224/165 of 1943, the learned Civil Judge gives as one of the reasons for disallowing the plaintiff's claim for arrears of salary, the absence of evidence to show that the plaintiff was willing to do his work after the order of the Chairman directing his removal. He further says that since the powers of the Chairman with regard to the water works were transferred to the Superintending Engineer, Public Health Department

"the plaintiff cannot now be dismissed by the Chairman Municipal Board and the Superintendent Water Works cannot recognise the plaintiff as in service of the water works in view of the fact that the plaintiff has not been doing any work."

This reasoning is wholly unwarranted and there is no plea by the Municipal Board which would justify a consideration of these matters or which would impose upon the plaintiff the duty of showing that he was always prepared to work for the Board. Further these considerations are wholly irrelevant. If an official has been removed by a wrong order, he cannot insist upon doing the work in spite of the wrong order until his dismissal is set aside; the mere passing of the order of removal is sufficient evidence that he will not be permitted to work. To hold otherwise would be to create confusion, since, according to this view, it would be necessary for the discharged servant, who has filed an appeal against his dismissal, to insist on continuing to do the work in order to get his salary if his appeal is allowed, while the dismissing authority would equally insist on its order being considered valid. Thus, the principle which the learned Civil Judge has adumbrated is wholly untenable. Further, if the Chairman's power of dismissal was conferred on the Superintending Engineer the latter would have exercised it if he thought it necessary. If on the other hand, it was not taken away, the Chairman could still exercise it. It cannot be that there was no authority left with the power of either dismissing or employing officials in the Water Works Department. Thus both these objections, which seem to have been raised by the learned Civil Judge suo motu are wholly untenable.

[54] In Suit No. 36 of 1944, the plaintiff claimed salary at the rate of Rs. 100 per month plus dearness allowance plus motor cycle allowance at the rate of Rs. 28. per month. The notice claimed salary only at the rate of Rs. 96 per month and did not mention anything about the dearness allowance or the motor cycle allowance. The Courts below have disallowed the claim for an increment in salary and for motor cycle allowance on the ground that they were not covered by the notice but have allowed the claim to dearness allowance. The reason for this distinction does not appear because S. 326 (1), U. P. Municipalities Act also requires the notice to state the amount of compensation claimed and the plaintiff cannot get anything more than that amount. Thus the dearness allowance, not having been mentioned in the notice cannot be awarded.

[55] The result is that Appeal No. 256 of 1944 is partly allowed with proportionate costs of this Court as well as of the lower appellate Court. Appeals Nos. 389 of 1943 and 407 of 1945 are dismissed with costs of this and the lower appellate Courts. Appeal No. 388 of 1943 is partly allowed and the plaintiff's suit is decreed for Rs. 576 only and is dismissed with regard to the balance of the salary claimed. Similarly Appeal No. 452 of 1945 is partly allowed and the amount of salary decreed is reduced to Rs. 576 only. Appeal No. 253 of 1944 is dismissed with costs. The parties will receive and pay costs in Appeals Nos. 388 of 1943, and 452 of 1945 in this Court, Appeals Nos. 74 of 1943, and 24/1/73, 196 of 1944-45 in the lower appellate Court and in the original suits in the trial Court in proportion to their success and failure.

S.C. *Order accordingly.*

A. I. R. (35) 1948 Oudh 291 *[C. N. 102.]*

KIDWAI J.

B. Hirday Narain Dhaon— Defendant—Appellant v. *Har Prasad — Plaintiff — Respondent.*

Second Appeal No. 342 of 1942, Decided on 18-1-1948, from order of Dist. Judge, Lucknow, D/- 7-8-1942.

(a) Civil P. C. (1908), S. 100 — Finding of fact — Lower appellate Court not applying its mind nor considering evidence — Finding is not binding in second appeal.

Where it appears that in arriving at a finding of fact the first appellate Court did not consider the oral evidence, nor did it apply its mind to the question, it is not possible to say that there is any finding of fact which should not be interfered with in second appeal.

[Para 14]

Annotation : ('44-Com.) Civil P. C., Ss. 100-101 N. 53.

(b) Tort—Malicious prosecution— Person giving information to police if and when real "prosecutor" indicated.

If a complainant does not go beyond giving what he believed to be correct information to the police, and the police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant, if he *misleads* the police by bringing suborned witnesses to support it, if he influences the police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be, who was the pro-

secutor and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion ; the conduct of the complainant, before and after making the charge, must also be taken into consideration. Nor is it enough to say that the prosecution was instituted and conducted by the police. That again in a question of fact. Thus, although a person who gives information to the police and renders to it such assistance as it may require does not thereby become liable in an action for malicious prosecution, he does become so liable if he has made himself the prosecutor by his conduct both before and after the prosecution was launched : 30 All. 525 (P. C.), *Rel. on.*; *Case law referred.* [Paras 15, 16]

Where the information given by the complainant to the police did not contain full and accurate statement of facts and the facts which would exonerate the person (complained against) of criminal liability were omitted while words were added which would make him guilty of an offence and in subsequent application the complainant had called himself the complainant :

Held that the complainant already associated himself with the prosecution as a prosecutor and that he could not escape liability if it was shown that he acted without reasonable and probable cause and was actuated by malice. [Para 25]

(c) Tort—Malicious prosecution—"Malice" means any indirect or improper motive.

The word 'malice' as used in connection with malicious prosecution has a technical meaning. It means *malus animus* or any indirect or improper motive and not the vindication of the law. But a prosecution is not malicious merely because it is inspired by anger : 34 A. I. R. 1947 Oudh 116 ; 25 A.I.R. 1938 Cal. 829 ; 25 A.I.R. 1938 Pat. 529 and 31 A. I. R. 1944 P. C. 1, *Rel. on.* [Para 26]

(d) Tort — Malicious prosecution — Reasonable and probable cause.

If it appears that the facts as known to the defendant at the time when he made a report to the police, were such as to induce a reasonable belief in his mind that an offence had been committed, he would not be liable for damages for malicious prosecution if it was subsequently found that no such offence was committed. [Para 28]

Cases referred :—

1. ('36) 23 A.I.R. 1936 All. 441 : 161 I.C. 443, Narain Das v. Municipal Board, Gorakhpur.
2. ('39) 26 A.I.R. 1939 All. 554: I.L.R. (1939) All. 424: 184 I.C. 247, Dharam Nath v. Mahomed Umarkhan.
3. ('46) 33 A.I.R. 1946 Nag. 46 : I L. R. (1946) Nag. 358 : 221 I.C. 666, Mehtab v. Balaji Krishnarao.
4. ('44) 1944 O. W. N. 64 : 31 A.I.R. 1944 Oudh 232 : 217 I.C. 307, Kunj Behari v. Fateh Chand.
5. ('08) 35 I. A. 189 : 30 All. 525 : 11 O. C. 371 (P.C.), Gaya Prasad Tewari v. Bhagat Singh.
6. ('03) 26 Mad. 362, Narsingha Rao v. Muthaya Pillai.
7. ('40) 27 A.I.R. 1940 All. 231 : 188 I.C. 211, Raghubar Dayal v. Kallu.
8. ('37) 24 A.I.R. 1937 Sind 44 : 30 S. L. R. 431 : 168 I.C. 643, Fakir Mahomed v. Fakir Mahomed Nanji.
9. ('30) 17 A.I.R, 1930 Cal. 392 : 57 Cal. 25 : 125 I.C. 667, Nagendra Nath v. Basanta Das.
10. ('45) 32 A.I.R. 1945 Bom. 320: I.L.R. (1945) Bom. 547, Dhanjishaw Rattanji v. Bombay Municipality.
11. ('46) 1946 O. W. N. 307 : 34 A. I. R. 1947 Oudh 116 : 22 Luck. 1 : 227 I. C. 390, Vilayati Begam v. Naval Kishore.
12. ('38) 25 A.I R. 1938 Cal. 829 : I.L.R. (1939) 1 Cal. 123 : 180 I.C. 755, Chatra Serampore Co-operative Credit Society Ltd. v. Becharam Sarkar.
13. ('38) 25 A.I.R. 1938 Pat. 529: 178 I.C. 619, Taharat Karim v. Abdul Khaliq.
14. ('44) 31 A. I. R. 1944 P. C. 1: I. L. R. (1944) Kar. P. C. 47 : 211 I.C. 141 : 45 Cr. L. J. 303 (P.C.), Braja Sunder Deb v. Bamdeb Das.

Saraswati Prasad — for Appellant.
K. P. Misra — for Respondent.

Judgment.—The appellant is a doctor practising in Daliganj in the city of Lucknow and the respondent is a shop-keeper in Aliganj in the same city. In September or October 1939 both the parties had ordered some goods from Calcutta : the appellant had ordered medicines and glucose D while the respondent had ordered tea. Parcels for both the parties were booked to the Mohibullahpur Railway Station of the O. T. (then known as the B. N. W.) Railway and both sets of parcels arrived at the Railway station on 11th October 1939. On that day in the evening, a servant of the respondent went and got three parcels released but, by mistake of the authorities, the appellant's parcels were handed to him. This mistake was discovered by the respondent at about 9.0 A. M. when one of the parcels was opened at his shop by his servant. The appellant went to the railway station at about 10.0 A. M. on 12th October 1939. On his asking for his parcels he was told that they had been delivered by mistake to a servant of the firm of which the respondent was the proprietor and that a railway employee had been sent to get them back. The appellant was asked to send for them later in the day. The appellant himself went about half an hour later. By that time the railway employee had returned but he had not taken back the parcels. (The Station Master, Babu Harbans Lal, D. W. 4, states that the respondent had sent word that he would bring the parcels back himself and that he had informed the appellant of this while the appellant as D. W. 1 denies having received any such information.) Thereupon the appellant himself proceeded to the respondent's shop to get the parcels. The appellant asserts that he had a note from the Station Master asking the respondent to deliver the parcels to the appellant, but the respondent denies this. The respondent did not deliver the parcels and so the appellant went to the railway station Mohibullapur and from there to the police station Mandiaon, which is close by and within the jurisdiction of which the station lay. At the police station he lodged a report which is Ex. 2.

[2] Exhibit 2 indicates that an offence under S. 406/411, Penal Code, had been committed by the respondent at the railway station, Mohibullapur in the morning of 12th October 1939. The material part of the actual report, however, is in the following words :

"Main mal chhorane aj subah Mohibullapur station par aya — station master saheb say mal ki nisbat

daryaft kiya to malum hua ki Ganga Din Har Prasad ki dukan Aliganj ka admi ghalti say woh mal chhora-kar laigaya — main Mubammad Shuaib aur Abdul Ahad ko sath laikar Aliganj pahuncha —malik dukan say bat chit hui to parsalon ka lana taslim karta hai —main ne usko batlaya ki woh parcel mere hain wapas kardo lekin wapas karne ke mutabiq woh inkar karta hai chunki yeh sakhs baddiyanti say jante hue mary chizon ko apne qabze men ab bhi rakhe hue hai lihaza ittla karta hun."

[3] This report is signed by the appellant. After it had been lodged the police went to the respondent's shop and demanded the parcels. There was some dispute, about the reasons for which various allegations are made, but eventually the police took possession of all the three parcels, which were sealed then and there and entrusted to the appellant under a supurdnama, Ex. 16, in which the appellant undertook not to open the parcels until the Magistrate so ordered. A recovery list was prepared and a receipt for the parcels was given to the respondent. On 3rd November 1939, the appellant made an application to the Sub-Divisional Magistrate of Lucknow, stating that the three parcels contained medicines of which he was badly in need and seeking permission to open them and take out his medicines— Ex. 15. In this application it was stated that, at the time of the recovery by the police, two of the packages were found to have been opened by the accused and that they had been sealed by the police without comparing the contents with the invoice. It then proceeded,

"I, the complainant, am not yet in the know of the fact whether the contents of the packages were intact in accordance with the invoice or not."

[4] On this application a police report was called for and, on the police stating that there was no objection to the grant of the application, the parcels were ordered to be opened. This was done on 15th November 1939 on which date the appellant gave a receipt, a copy of which is Ex. A-5, in which he acknowledged receipt of all the articles mentioned in the list — which is a part of Ex. 15—receipt of four tins of Glucose D.

[5] Thereafter, on 8 h December 1939, a charge-sheet was submitted against the respondent in which he was charged not only under Ss. 406/411, Penal Code, but also under S. 379, Penal Code. The trial commenced on 11th January 1940, and the respondent was acquitted by Tahsil Bench of Honorary Magistrates of Lucknow, by its order, dated 27th June 1940 : vide Ex. 1.

[6] The suit out of which this appeal arises was commenced by the respondent on 2nd July 1941. He alleged that the prosecution initiated by the appellant by lodging the First Information Report Ex. 2, was false, and without reasonable and probable cause and had been inspired by malice. He accordingly claimed a decree for Rs. 2,000 as damages for malicious prosecution.

[7] The defendant-appellant pleaded that the report had been made after consultation with the railway authorities — the Station Master of Mohibullapur — and was not inspired by any malice but was the result of what the appellant felt it to be his duty to do. That, in any case, the defendant had reasonable and probable cause for his action and consequently the suit should be dismissed.

[8] The trial Court held that the proceedings had not been commenced without reasonable and probable cause and that there was no ill-will or malice behind the report. It also held that, apart from lodging the first information report, nothing was done by the defendant which would constitute him the prosecutor and that, consequently, it cannot be said that the defendant was responsible for the prosecution. On those findings the suit was dismissed.

[9] The plaintiff appealed and the District Judge of Lucknow allowed the appeal. He thought that the question that really called for decision was whether there was any justification for the defendant to make a report under Ss. 406/411, Penal Code, when the plaintiff refused to hand over the boxes to him, and upon this question, he held that there was no such justification. He held that the evidence of Station Master, Babu Harbans Lal, P. W. 4, to the effect that the plaintiff had sent word that he would be soon returning the parcels and that he had informed the defendant of this should be believed and that consequently the defendant should have had no real fear that he would not get back his parcels within a reasonable time, which inference he finds to be supported by the statement of the defendant himself. The learned District Judge also held that the real motive behind the report was not that the defendant suspected that an offence would be committed in respect of his property but he desired to get the boxes back as quickly as possible with the help of the police. He also held that the subsequent statement of the defendant further proved malice and the fact that the defendant was the real prosecutor or was, at any rate, assisting the prosecution. He consequently passed a decree for Rs. 1150 as damages out of which Rs. 400 were on account of the expenses of the criminal case and Rs. 750 were for the mental pain and worry occasioned by the prosecution.

[10] The defendant has come up in second appeal and his learned advocate has contended that the lower appellate Court has entirely misdirected itself to the case and that it has failed to notice that the mere lodging of a report is not the commencement of a criminal litigation. He contends that the defendant has merely made a true and accurate statement of the facts of the

case to the police without formulating any charge or asking for any enquiry, after which the police undertook an enquiry and started a case on its own responsibility. He accordingly contended that the defendant was not a prosecutor at all and that consequently he would not be held liable for any damages for malicious prosecution.

[11] In the alternative, the learned advocate contended that, even if the defendant is held responsible for the prosecution, there was reasonable and probable cause and no malice, which required independent proof, was legally proved.

[12] On the other hand, the learned counsel for the respondent contended that this appeal was concluded by findings of fact and, in the alternative, that the evidence on the record supported the conclusions at which the lower appellate Court had arrived since it established that the defendant was actually acting as the prosecutor or was rendering such assistance to the prosecution as to make him liable as a prosecutor. He has contended that malice is any indirect or improper motive, apart from a desire to vindicate the law and that consequently the 'malice' which is required to constitute a case of malicious prosecution has been established.

[13] In support of his plea that the case was concluded by findings of fact, the learned counsel relied upon A. I. R. 1936 ALL. 441,[1] A. I. R. 1939 ALL. 554[2] and A.I.R. 1946 Nag. 46.[3] To these may be added a decision of this Court in 1944 O. W. N. 64.[4] In the last mentioned case a Bench of this Court reversed a decision of a single Judge on an appeal under S. 12 (2), Avadh Courts Act, and held that the single Judge did not have jurisdiction to reverse the findings of fact arrived at by the first appellate Court and arrive at fresh findings of fact for himself.

[14] The decisions to which reference has been made do not affect the case before me because the learned District Judge has himself stated that he had not been through the oral evidence as to what had taken place on the day of the occurrence at the plaintiff's shop and, in arriving at a finding as to what was the motive of the defendant in making the report, it was necessary for him to ascertain which of the two rival versions of the incidents were correct. Moreover the learned District Judge does not seem to have applied his mind to the question whether the defendant was, in fact, a prosecutor or not. From certain paragraphs in his judgment it appears as if he was confusing the lodging of a report with the filing of a complaint. It is not possible to say that, in the present case, there is any finding of fact which should not be interfered with in second appeal. A consideration of the evidence on the record, however, establishes the fact that the defendant had so associated himself with the prosecution as to be a de facto prosecutor and that he acted with malice and without reasonable and probable cause:

[15] In 35 I.A. 189[5] their Lordships of Judicial Committee say, at pp. 192 and 193.

"It will be convenient to refer at once to the decision of the Madras High Court: 26 Mad 362[6] which the learned Judicial Commissioner appears to have followed with some reluctance. The judgment is in these terms: "The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though defendant 1 may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The defendant is not responsible for their act, and no action lies against him for malicious prosecution."

The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified; but, in the opinion of their Lordships, it is not of universal application. In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believed to be correct information to the police, and the police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant, if he misleads the police by bringing suborned witnesses to support it, if he influences the police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be, who was the prosecutor and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant, before and after making the charge, must also be taken into consideration. Nor is it enough to say that the prosecution was instituted and conducted by the police. That again is a question of fact."

[16] Thus according to their Lordships, although a person who gives information to the police and renders to it such assistance as it may require does not thereby become liable in an action for malicious prosecution, he does become so liable if he has made himself the prosecutor by his conduct both before and after the prosecution was launched.

[17] After considering this decision as well as another decision of the Judicial Committee, a learned Judge of the Allahabad High Court in A. I. R. 1940 ALL. 231[7] stated at p. 232 of the report:

"It is obvious from these remarks that the question is whether the defendant is substantially responsible for the prosecution of the plaintiff and whether he has or has not acted in good faith."

To the same effect is the view expressed in A. I. R. 1937 Sind 44[8] at p. 45 and A.I.R. 1930 Cal. 392[9]

at p. 394. In A. I. R. 1935 Bom. 320[10] a learned Judge of the Bombay High Court says at pp. 325 and 326 of the report:

"To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question. The defendant must be the person who set the law in motion against the plaintiff. It is not necessary, however, that he should be a party to the proceedings. In the case of malicious prosecution by way of indictment in name of the King, the person liable is the prosecutor to whose instigation the proceedings are due. Instigating a prosecution is, however, to be distinguished from the act of merely giving information on the strength of which a prosecution is commenced by some one in the exercise of his own discretion. The gist of the action for malicious prosecution is that the defendant sets the Magistrate in motion. A person who simply makes a candid statement of facts to a Magistrate without formulating any charge is not responsible for the consequences of any step which the Magistrate may thereupon in the exercise of his discretion think fit to take. The Magistrate acts of his own motion and not at the instigation of the person giving the information, who therefore is not to be considered as a prosecutor."

[18] Thus on the view expressed in all these decisions the mere giving of information of true facts, including the fact that a particular person is suspected, either to the police or to the Magistrate does not make a person liable to damages for malicious prosecution if the prosecution launched as a result of that information fails. We have, therefore, to ascertain whether in the present case the defendant did anything more than give full and accurate information to the police.

[19] The information which the defendant gave is contained in Ex. 2. The question is, is it full and accurate? Exhibit 2 is signed by the defendant. It shows that the police was taking down a report under Ss. 406/411, Penal Code, in respect of an offence said to have been committed at Railway Station Mohibullapur. Then in the facts stated in the body of the report it is stated that the plaintiff refused to return the parcels although the defendant had assured him that they were his. The report then proceeds, "*Chunki yeh Shakhs baddiyanti say jante hue mery chizon ko apne qabze men ab bhi rakhe hue hai lihaza ittla karta hun.*"

[20] It is true that the defendant does not in so many words ask for an enquiry but the whole object of giving information to the police is to get an enquiry made or to get assistance to recover the property. In this case the defendant himself stated as D. W. 1 that he went to police because he wanted his property delivered at once. Obviously, therefore, he wanted the police to take action and we find that the police did, in fact, take action. D. W. 5, Shyam Kishori Lal, the officer who took action, would have the Court believe that he took action on his own responsibility without instigation from the defendant; but he also states that he started the case only because the plaintiff did not give the parcels to him when he went and that he would not have started the case merely because the plaintiff refused to give the parcels to the defendant. Moreover, according to him, he has forgotten most of the important incidents.

[21] It is somewhat surprising that he should make this last statement because, if what he says is true, he had no business to go to the plaintiff's shop. The police are only expected to intervene in the matter if the facts of a report disclose that some criminal offence has been committed. If the facts stated do not disclose even a *prima facie* criminal case, the police has no business to interfere in the matter. If this statement was to be believed, read with the statement of the defendant as D. W. 1 that, "at the time of the report I believed that Har Prasad would return the boxes and that it would take some time. I wanted them to be delivered at once," it would indicate that, as a matter of fact, no offence had been committed by the plaintiff and that was a conspiracy between the defendant and the police of police station Mandiaon to use police influence to get direct delivery of the parcels for the defendant, a conspiracy which was miscarried and by reason of which the hands of the police were forced so that they had to commence a prosecution.

[22] In this view of the matter the defendant must clearly be held responsible for launching a false prosecution. If, on the other hand, the statement of D. W. 5 is not believed, it means that the report did disclose the commission of an offence. If the language of Ex. 2 is examined, it will be found that this is so. It clearly indicates that the plaintiff although he knew who the real owner of the parcels was, refused to deliver the parcels to that owner by reason of bad faith. This was not a full and accurate account of what the position was. Both the Station Master, D. W. 4, Harbans Lal, who has been believed on this point by the District Judge and the plaintiff himself as P. W. 2 have stated that the defendant was informed that the parcels would be returned to the station master and he could take them back from there. Defendant D. W. 1, did not deny this but satisfied himself with saying that he did not remember whether Har Prasad had told that he would return the boxes to the Railway Station. If this was so, and there is no reason why I should not accept the finding of the District Judge that it was so, obviously there was no 'baddiyanti' in the plaintiff not returning the boxes to the defendant whom, it is agreed, he did not know from before.

[23] The defendant stated that he was given a slip by the Station Master to deliver it to the

plaintiff. The Station Master at first denied having given such a slip but later he admitted that he had given one. This slip was not produced and the defendant stated he had lost it before he even got to the police station for making the report. It cannot be said what this slip contained and there is no reliable evidence to prove that it was shown to the plaintiff. There is no mention of any such slip in EX. 2. In these circumstances, it cannot possibly be said that the plaintiff, in not delivering parcels to a person whom he did not know, and promising to send them back to the Railway Station from where he had got them, was actuated by any dishonest motives.

[24] Thus the statement of facts given in EX. 2 was not full and accurate and facts which would exonerate the defendant of criminal liability were omitted while words were added which would make him guilty of an offence.

[25] Further we have it from EX. 15, the copy of an application made by the defendant to the Sub-Divisional Magistrate, Lucknow, on 3-11-1939, that the police authorities had recovered the packages on his request. In the same application he calls himself the complainant, which indicates that that was the position which he thought he was actually occupying at the time. This would make it highly probable that he was doing all that a prosecutor would do to prosecute the case to a successful conclusion. The defendant thus clearly associated himself with the prosecution as a prosecutor and he cannot escape liability if it is shown that he acted without reasonable and probable cause and was actuated by malice.

[26] The word 'malice' as used in connection with malicious prosecutor has a technical meaning. It means *malus animus* or any indirect or improper motive and not the vindication of the law: *vide* 1946 O. W. N. 307.[11] Similarly, in A. I R. 1938 Cal. 829[12] it is laid down at p. 835 of the report that "a prosecution is malicious only if it is commenced or continued with a desire to use the criminal law for a purpose for which it is not intended". See also A. I. R. 1938 Pat. 529.[13] In A I. R. 1944 P. C. 1[14] at p. 4 their Lordships of the Judicial Committee also say that malice means any indirect or improper motive though of course, they make it clear that a prosecution is not malicious merely because it is inspired by anger.

[27] In the present case, it appears from the evidence of the defendant himself as D. W. 1 that he made the report only to get back the parcels as early as possible that is to say, that he invoked the aid of the criminal law by making a report merely in order to get back his parcels early whether any offence had or had not, in fact, been committed. Thus the action of the defendant was not to vindicate the law but was with an indirect motive. This is sufficient 'malice' to justify an action for malicious prosecution. It is thus not necessary for me to consider how the application, of which EX. 15 is a copy came to be made on which point there was considerable debate at the bar.

[28] The only question that remains is whether the defendant had reasonable and probable cause for the initiation of the proceedings. If it appears that the facts as known to the defendant at the time were such as to induce a reasonable belief in his mind that an offence had been committed, he would not be liable if it was subsquently found that no such offence was committed. In the present case, if only the prosecution under Ss. 406/411, Penal Code is considered, leaving out of consideration the charge under S. 379, Penal Code, it would appear that the defendant could not entertain a reasonable belief that any offence had been committed. The plaintiff refused to return the parcels to the defendant but he did state that he would send them back to the Railway Station. The defendant knew that he was not known to the plaintiff from before and so the latter could not reasonably return the parcels to him. His refusal to do so did not constitute an offence or a crimial misappropriation of the property belonging to another.

[29] The plaintiff had only got to know of the mistake as to the parcles at about 9 0 A. M. on that very morning. He had since then informed the Station Master and the defendant that he would return the parcels to the Railway Station. He had his own parcels at the station which he would naturally be anxious to get back but he would try to avoid two journies and would like to get his own parcels by the same conveyance—or labour—by which he sent the defendant's parcels back. He states that he had already made arrangements for returning the parcels when his programme was upset by the arrival of the police.

[30] Then there is the statement of the defendant himself as D. W. 1 and he states that, at the time that he made the report to the police, he had no idea that Har Prasad would not return the boxes. This makes it quite clear that the defendant did not believe, at the time of making the report that any criminal offence had been committed. He had, therefore, no reasonable or probable cause for making the report.

[31] The result is that the decision of the District Judge must be upheld and this appeal fails and is dismissed with costs. The stay order dated 23 12-1942 is vacated.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 297 *[C. N. 103.]*

MISRA J.

Subedar Singh and others — Applicants v. *Durga Singh and others— Opposite Party.*

Civil Reference No. 2 of 1942, Decided on 19-11-1947.

Court-fees Act (1870), S. 7 (iv) (a) (U. P.) — Suit for declarations and injunctions—Prayer for declaration that plaintiff was entitled to future profits of bazar and to accumulated profits—As regards future profits ad valorem court-fee under S. 7 (v) held must be paid — Suit held was under-valued and valuation could be corrected by Court —Value of declaration or consequential relief held could not be less than amount of accumulated profits.

The plaintiffs brought a suit for certain declarations and injunctions and prayed: "(1) that it be declared that they alone are entitled to the future profits of the bazar and to the accumulated profits which are in deposit with the sub-Divisional Magistrate, and (2) that an injunction be issued against the defendants restraining them from interfering in the plaintiff's management of the bazar and in making realisations therein and that they be also restrained from causing any interference in the realisations of Rs. 3800 which were in deposit with the Magistrate." The jurisdictional value as to the future right to realize the profits had been assessed at Rs. 8000. The relief claimed in respect of Rs. 3800 had not been separately valued. The total valuation of the suit for purposes of court-fee was fixed at Rs. 200 only :

Held (1) that suit so far as it related to the future profits of the bazar necessitated the payment of court-fee at an *ad valorem* scale on Rs. 8000 under sub-s. (v) of S. 7 in accordance with the proviso to S. 7 (IV) : 27 A. I. R. 1940 Oudh 249, *Rel. on.* [Para 5]

(2) that the relief with respect to Rs. 3800 in deposit with the Magistrate had obviously been under-valued in an arbitrary manner and it was open to the Court to charge upon what it may call the true value of the relief. It was obvious that the value of the declaration or the consequential relief regarding Rs. 3800 could not be less than Rs. 3800: *Case law referred.* [Para 6]

Annotation : ('44-Com.) Court-fees Act, S. 7 (iv) (c), N. 21, 26.

Cases referred :—

1. *Reported in* ('40) 27 A. I. R. 1940 Oudh 249 : 15 Luck. 415 : 186 I. 671.
2. ('28) 15 A. I. R. 1928 Oudh 260 : 107 I. C. 330, Rajendra Bakhsh Singh v. Babu Rani.
3. ('35) 22 A. I. R. 1935 All. 849 : 158 I. C. 447, Aijaz Ahmad v. Nazirul Hasan.
4. ('32) 1932 A. L. J. 416 : 19 A. I. R. 1932 All. 413 : 141 I. C. 141, Inayat Husain v. Bashir Ahmad.
5. ('39) 26 A. I. R. 1939 Nag. 50 : I. L. R. (1938) Nag. 558 : 180 I. C. 271 (FB), Motiram v. Daulat.
6. ('44) 31 A. I. R. 1944 Pat. 17 : 22 Pat. 783 : 216 I. C. 132 (FB), Mt. Rupia v. Bhatu Mahton.
7. ('37) 24 A. I. R. 1937 Sind 241 : 31 S. L. R. 442 : 171 I. C. 420 (FB), Lakhomal Deepchand v. Deepchand Tolaram.

Government Advocate (Basir Ullah Beg) — for Chief Inspector of Stamps.

Anand Madhava – for Opposite Party.

Order.— This is a reference by the Chief Inspector of Stamps under S. 6-B (1) (introduced by ?) Court-fees (Amendment) Act of 1938. It raises a question regarding the sufficiency or otherwise of court-fee paid by the plaintiffs Subedar Singh and others in suit No. 37 of 1940 instituted by them in the Court of the learned civil Judge, Unao. The suit was for certain declarations and injunctions. The reliefs related to the right to realise the profits of a bazar which is held on certain abadi and kishtwar plots in village Birwaghat, district Unao. There was, it appears, an agreement in or about the year 1921 between Madho Singh (father of plaintiff 1), Gumani Singh, plaintiff 2 and Gajraj Singh, father of defendants 1 and 2 for starting the bazar and for sharing the profits in certain proportions. The aforesaid agreement was said to have been varied on 8-11-1932, and the share of profits of defendants 1 and 2 was reduced to a consolidated figure of Rs 5 per annum. There were disputes subsequently between the parties, and the matter was taken to criminal Court under S. 145, Criminal P. C. It is unnecessary to refer to the criminal proceedings except that a sum of Rs. 3800 representing the profits of the aforesaid bazar is still held by the S. D. M. Safipur.

[2] In the civil suit with which we are concerned the plaintiffs prayed (1) that it be declared that they alone are entitled to the future profits of the bazar and to the accumulated profits which are in deposit with the Sub Divisional Magistrate, and (2) that an injunction be issued against the defendants restraining them from interfering in the plaintiffs' management of the bazar and in making realisations therein and that they be also restrained from causing any interference in the realisations of the monies in deposit with the Magistrate.

[2a] The suit was filed on a court-fee stamp of Rs. 15 only, and the Chief Inspector of Stamps recorded an inspection note to the effect that there was a deficiency of Rs. 777 8 0. The learned Civil Judge held that the total court-fee payable was Rs. 92-8 0 and that there was only a deficiency of Rs. 77-8-0. The aforesaid amount has been made good by the plaintiffs, and their suit has since been decreed with costs. The Chief Inspector of Stamps, however, was dissatisfied with the order of the learned Civil Judge regarding court-fee and has submitted for orders of this Court under S. 6-B (1) (introduced by ?) Court-fees (Amendment) Act of 1938 his objections to the decision of the learned Civil Judge, Unao regarding the extent of deficiency.

[3] From the facts stated above, it would appear that the suit covers two items of property. The first of these items consists of the future right to realise the profits of the bazar. The jurisdictional value so far as these profits are concerned has been assessed by the plaintiffs at Rs. 8000. The aforesaid amount has been arrived at on an averment that the average annual net profits amount to Rs. 400. This sum has been multiplied by 20 in order to arrive at the jurisdictional value in accordance apparently

with R. 3 (c) (ii) framed under S. 3, Suits Valuation Act. Item 2 consists of the profits amounting to Rs. 3800 which are in the custody of the Sub-Divisional Magistrate. The relief claimed in respect of the sum has not been separately valued. The total valuation of the suit for purposes of court-fee was fixed at Rs. 200 only. The Chief Inspector of Stamps considers that the total of the aforesaid figures, namely Rs. 8000 plus Rs. 3800, should be regarded as the value for the purposes of payment of court-fee, and under S. 7 (iv) (a), Court-fees Act, an *ad valorem* court-fee is payable on that amount. Section 7 (iv) (a) provides that in suits to obtain a declaratory decree or order, where consequential relief is prayed, the court-fee is leviable on the amount at which the relief sought is valued in the plaint or memorandum of appeal, and if the relief is with reference to immovable property court-fee should be paid on the value of the consequential relief which, if it be incapable of valuation, must be computed in accordance with sub-s. (v), (v-A) or (v-B) of S. 7. The right to collect the bazar dues constitutes no doubt an immovable property, and this right is obviously not capable of exact valuation in the ordinary way. The value must, therefore, be ascertained in accordance with sub-s. (v) of S. 7 which prescribes that 20 times the annual average of the net profits of the land during the three years immediately preceding the date of presenting the plaint should be regarded as its true value. The learned lower Court, however, did not apply this rule for ascertaining the court-fee. It held that the proviso attached to sub-s. (iv-B) applied. That sub-section relates *inter alia* to suits for obtaining an injunction, and the proviso lays down that the amount at which the reliefs sought should be valued for computation of court-fee should not be less than one-tenth of the market value of the property involved in or affected by the relief sought or Rs. 50 whichever is greater the maximum limit of court-fee leviable being Rs. 200. Calculated on this basis only a sum of Rs. 77-8-0 was found due.

[4] As regards the sum in deposit, the Chief Inspector of Stamps claimed that the value of the declaration and of injunction relating to the aforesaid sum must be the sum itself and that the value placed by the plaintiffs on the suit was arbitrary and inadequate. The view expressed by the learned Civil Judge in respect of this contention was that the Legislature enjoined the payment of court-fee in respect of movable property on "the amount at which the relief was valued in the plaint." The plaintiffs' counsel valued it at Rs. 200 and the Court applied the rule literally. The learned Judge did not consider it necessary to determine whether the plaintiffs' valuation was the real value of the relief which they sought. He held that Rs. 15, paid by the plaintiffs on Rs. 200 were sufficient.

[5] I have heard the learned counsel for the parties and the conclusion, to which I have reached, is that the view, expressed by the learned Civil Judge, cannot be sustained. The suit so far as it related to the future profits of the bazar necessitated the payment of court-fee at an *ad valorem* scale on Rs. 8000 under sub-s. (v) of S. 7. The principle, enunciated in *Mrs. Janot Anna Bonarjee* v. *The United Provinces of Agra and Avadh*[1] covers the point. The case is authority for the proposition that in a suit to obtain a declaratory decree if there is a prayer for consequential relief with respect of immovable property and the relief is incapable of valuation, the amount at which it should be valued is the value of the immovable property computed in accordance with sub-s. (v) of S. 7. The learned Judges, constituting the Division Bench considered that S. 7 (iv-B) (b) applied only to suits for injunction and not to the declaratory suits, referred to by sub-s. (iv) (a) of S. 7. The contention of the Chief Inspector of Stamps as regards this relief must, therefore, be accepetd.

[6] The relief with respect to Rs. 3,800 in deposit with the Sub-Divisional Magistrate, Safipur has obviously been under-valued in an arbitrary manner. There is no doubt that S. 7 (iv) (a) confers upon the plaintiff or the appellant the right to value the relief and it is upon this value that the fee is to be charged. The question which, however, arises for determination is whether in cases where it is manifest that the valuation placed by the plaintiff cannot be the real value but is merely a fictitious value it is open to the Court to charge upon what we may call the true value of the relief. In A. I. R. 1928 Avadh 260[2] Pullan, J. considered that S. 151, Civil P. C., might be brought into use if the plaintiff made an absurd and outrageous misrepresentation as to the value of his suit in order to have it tried by a particular Court. In A. I. R. 1935 ALL. 849[3] a Division Bench of the Allahabad High Court ruled that in a suit for declaration with consequential relief it was not open to the plaintiff to give any arbitrary valuation in the plaint, and the Court was not bound by such valuation. Reliance was placed upon the earlier decisions of that Court in 1932 A. L. J. 416[4] and the principles propounded therein. Reference may also be made to three Full Bench decisions wherein the right of the Court to demand court-fee on the true valuation is recognised. These are A. I. R. 1939 Nag. 50,[5] A. I. R. 1944 Patna 17[6] A. I. R. 1937 Sind 241.[7] The plaintiffs' valuation for purposes of court-fee under S. 7 (iv) (a) must

be a *bona fide* assessment of value and a flagrant abuse of the power, conferred on him by the sub-section, can be and should be guarded against. It is in my opinion obvious that the value of the declaration or the consequential relief regarding Rs. 3,800 cannot be less than Rs. 3,800.

[7] I agree with the Chief Inspector of Stamps that the total sum upon which court-fee was payable Rs. 11,800. There is therefore still a deficiency of Rs. 700. I accept the reference and declare accordingly. I pass no orders as to costs. Let a copy of this declaration be sent to the Collector under S. 6-B (4), Court-fees Act, for recovery of the amount.

S.C. *Reference accepted.*

A. I. R. (35) 1948 Oudh 299 *[C. N. 104.]*

KAUL AND KIDWAI JJ.

Sm. Hira Devi and another—Judgment debtors — Appellants v. *B. Ajodhia Nath Tandon and another — Decree-holders —Respondents.*

Execution of Decree Appeal No. 38 of 1942, Decided on 6-2-1948, against order of Civil Judge, Mohanlalganj, Lucknow, D/- 18-4-1942.

(a) Civil P. C. (1908), O. 21, R. 2—Decree-holder includes his successor.

Even where a decree is sought to be executed by the successor of the original decree-holder, the provisions of O. 21, R. 2 are applicable and no payment can be considered by the Court unless it has either been certified under sub-r. (1) or recorded under sub-r. (2) of that rule : *Case law discussed.* [Para 19]

Annotation : ('44-Com.) Civil P. C. O. 21, R. 2 N. 9.

(b) Civil P. C. (1908), O. 21, R. 15 — An application for execution of the whole decree presented by the sons of a deceased Hindu decree-holder without the widow being joined in the application is not defective. 32 A. I. R. 1945 Oudh 196, *Ref.* [Para 22]

Annotation : ('44-Com.) Civil P. C., O. 21 R. 15 N. 4.

Cases referred : —

1. ('23) 47 Bom. 643 : 10 A. I. R. 1923 Bom. 404 : 75 I. C. 893, Raghunath Govind v. Gangaram Yesu.
2. ('24) 11 A. I. R 1924 Bom. 394 : 80 I. C. 422, Ganpaya Narnappa v. Krishnappa Annaya.
3. ('35) 22 A. I. R. 1935 Nag. 230 : 31 N. L. R. Sup. 111 : 160 I. C. 309, Radhakisan v. Daudas.
4. ('43) 30 A. I. R. 1943 P. C. 66 : I. L. R. (1944) Mad. 1 : I. L. R. (1943) Kar. P. C. 77 : 70 I. A. 50 : 207 I. C. 131 (P. C.), Bhavani Shankar v. Gordhandas Jamnadas.
5. ('41) 28 A. I. R 1941 Bom. 302 : I. L. R. (1941) Bom. 596 : 196 I. C. 1 (F. B.), Krishna Govind v. Moolchand Keshavchand.
6. ('32) 55 Mad. 720 : 19 A. I. R. 1932 Mad. 372 : 137 I. C. 28 (F. B.), Subramanyam v. Ramaswami.
7. ('34) 56 All. 694 : 21 A. I. R. 1934 All. 209 : 148 I. C. 1118, Murari Lal v. Raghubir Saran.
8. ('45) 1945 O. W. N. 136 : 32 A. I. R. 1945 Oudh 196 : 20 Luck 305 : 221 I. C. 174, Radha Raman Lal v. Anant Singh.

K. P. Misra and M. K. Seth — for Appellants.
G. D. Khare — for Respondents.

Judgment.—By a partition decree, based on an award, to which the sons of one Lala Brij Mohan Lal Tandon were parties, a sum of Rs. 1261 was made payable by Badri Nath Tandon to his elder brother, Mr. Jagannath Prasad Tandon. Mr. Jagannath Prasad Tandon died on 28th July 1940 and on 20th December 1942, his sons, Ajodhia Nath and Radhey Shiam applied for the execution of the decree, invoking the aid of O. 21, R. 16, Civil P. C., for realisation of the money decreed. Radhey Shiam was a minor and his elder brother acted as his next friend. The deceased also left a widow but she did not join in the application.

[2] On 17th March 1942, Mr. Badri Nath filed an objection under S. 47, Civil P. C., in which he pleaded that the sum due under the decree, as well as a sum of Rs. 813 due on accounting, had been paid off to Babu Ajudhia Nath out of Court on 22nd July 1941. In the alternative, he pleaded that, at any rate he was entitled to set off against the decretal amount a sum of Rs. 1138-8-0 due under a promissory note which had been allotted to him by the same decree and which was in the possession of Babu Jagannath Prasad. It was also pleaded that the application was defective because the widow of Babu Jagannath Prasad had not joined in making it.

[3] In reply to this objection, Ajodhia Nath denied the alleged payment and pleaded that even if it was made, it being uncertified, could not be taken into consideration in the execution proceedings. He repudiated the claim to a set-off and intimated that the decree might be executed for the benefit of Mt. Doorga Devi, the widow of Babu Jagannath Prasad, also.

[4] Upon the pleadings the learned Civil Judge of Mohanlalganj, Lucknow, who was executing the decree, framed the following three issues :

1. (a) Can an uncertified payment made beyond 90 days from the presentation of the application be recognised by this Court ? (b) If so, has the decree been satisfied, as alleged ? 2. Is the applicant entitled to claim a set-off for Rs. 1,138-8-0 as alleged ? 3. Is the present application for execution not maintainable ?

[5] The trial Court found : (1) An uncertified payment cannot be recognised by the Court executing a decree. (2) That no set-off can be allowed in respect of the claim based on the pronote. (3) That the sons have been permitted by the Court to execute the decree on behalf of the mother also and so no question of impleading her arises. (4) In view of the above decisions it was not necessary to decide whether payment of the decretal amount had actually been made or not.

[6] Babu Badri Prasad Tandon filed an appeal in this Court but he died during the pendency of the appeal and the present appellants, his widow and son, have been brought on the record in his place. The appeal was first

heard by the learned Chief Judge, who in view of the importance of the questions of law involved, referred the case to a Bench under the provisions of S. 14 (2), Avadh Courts Act. The appeal was accordingly placed before us and we have heard the learned counsel of the parties at considerable length.

[7] The contention of the appellants' learned counsel is that O. 21, R. 2, Civil P. C., is only applicable where payment is made to the decree-holder himself and not to any successor or transferee of the decree-holder. It is true that the definition of the word "decree-holder" given in S. 2 (3), Civil P. C., means "any person in whose favour a decree has been passed or an order capable of execution has been made." There is no reference to a successor or legal representative of the person who has obtained a decree, but that is immaterial because S. 146, Civil P. C., provides that "where any proceeding may be taken or any application made by or against any person, then the proceeding may be taken or application made against any person claiming under him."

[8] Thus in the case of a payment of the decretal amount out of Court to the successor of a decree-holder, that successor may certify payment under O. 21, R. 2 (1) or the judgment-debtor may apply against that successor under O. 21, R. 2 (2) for getting the payment recorded.

[9] The effect of S. 146, Civil P. C., is clear and leads to the result which we have indicated. Further it is only by dealing with the matter in accordance with the provisions of that section that a consistent meaning can be given to the various provisions of O. 21.

[10] For instance R. 1 of the Order provides that, among the methods by which a decree may be satisfied is payment "out of Court to the decree-holder." If the appellants' contention that the word "decree-holder" does not include the successor of a decree-holder is correct then no payment can be made out of Court to such successor in satisfaction of the decree. This is not the meaning which can be given to the provision. Indeed the appellants' learned counsel agrees that in R. 1, at any rate, the word "decree-holder" also includes the successor of the decree-holder. Were this not so, the payment which is alleged to have been made by his client to the successor of the decree-holder would not be payment of "money payable under a decree" and could not be taken into consideration at all in proceedings for the execution of the decree. The result of such a payment would, therefore, be exactly the same as if the payment made had not been certified, or recorded in, Court.

[11] If then the word "decree-holder" is given this extended meaning in R. 1, it follows that it must have the same meaning in R. 2 (1) because, at any rate, it must be open to the person who receives the payment to certify it, and since all this is by reason of S. 146, Civil P. C., there appears to be no reason why the operation of S. 146, Civil P. C., should not be extended when considering sub-r. (2) of R. 2 of O. 21, Civil P. C.

[12] The appellants' learned counsel relied upon a number of decisions which support his contention. They are 47 Bom. 643,[1] A. I. R. 1924 Bom. 394[2] and A. I. R. 1935 Nag. 230.[3]

[13] In all these cases the decree-holder transferred the decree and the transferees applied, under O. 21, R. 16, Civil P. C., for execution. The judgment-debtor pleaded that he had paid off the decretal amount to the transferee and that there was nothing to execute. It was held that in spite of the provisions of O. 21, R. 2 (3), Civil P. C., this objection could be taken. In none of these cases was any reference made to S. 146, Civil P. C., or to O. 21, R. 1. Moreover the line of reasoning adopted was entirely different. In 47 Bom. 643[1] the learned Judges held that, when an application is made under O. 21, R. 16, Civil P. C., it is made to the Court as the Court which passed the decree and not as the Court executing the decree. They then say:

"It is true that the decree-holder may be allowed, under O. 21, R. 2, sub-r. 3, to take advantage of the fact that the payment was not certified, to contend that it cannot be recognized by the Court executing the decree. But the fact remains, assuming that the payment has been made, that the decree has been satisfied and there is nothing to transfer, so that when a transferee comes to the Court which passed the decree and asks the Court to recognise him as a decree-holder, it is open to the judgment-debtor to say I have satisfied the debt which was merged in the decree."

[14] This decision was disapproved by their Lordships of the Judicial Committee in A. I. R. 1943 P. C. 66.[4] Their Lordships observed:

"The rule says that 'the transferee may apply for execution of the decree to the Court which passed it.' On the face of the rule, the application to be made thereunder is an application for execution: that it is made to the Court which passed the decree does not tend to show the contrary."

[15] With regard to the remarks of the learned Judge of the Bombay High Court which we have quoted we may say, that on the face of it, they do not correctly interpret the position. At the time of the transfer, there was a debt in existence and it was subsequently extinguished. Thus the transfer was valid and the Court must give effect to it and thereafter execute the decree "in the same manner and subject to the same conditions as if the application were made by such decree-holder": *vide* O. 21, R. 16. Thus on a transfer taking place the procedure to be followed is exactly the same as would be followed in case the decree-holder himself sought to

execute the decree and O. 21, R. 2 (3), Civil P. C., would bar the plea of payment.

[16] We may also point out that this decision as well as that in A. I. R. 1924 Bom. 394[2] have been expressly overruled in A. I. R. 1941 Bom. 302.[5]

[17] The Nagpur case followed the earlier Bombay case and certain decisions of the Madras High Court which too were overruled by a Full Bench decision of the Madras High Court in 55 Mad. 720.[6]

[18] In 56 ALL. 694[7] the same view is expressed as in the Full Bench decision. Both the Full Bench decision of the Madras High Court as well as the decision of the Allahabad High Court mentioned above received the approval of their Lordships of the Judicial Committee in A. I. R. 1943 P. C. 66.[4] Thus the Nagpur case can no longer be considered as laying down good law.

[19] We have, therefore, come to the conclusion that even when a decree is sought to be executed by the successor of the original decree-holder, the provisions of O. 21, R. 2, Civil P. C., are applicable and no payment can be considered by the Court unless it has either been certified under sub-r. (1) or recorded under sub-r. (2) of that rule. The decision of the learned Civil Judge on this point is, therefore, correct and must be upheld.

[20] The second point pressed before us in appeal was that the widow not having been joined in the application, it is defective. Under O. 21, R. 15, Civil P. C., one of several joint decree-holders may execute the decree on behalf of all for their benefit. In the present case the Court has permitted them to do so and there is no conflict of interest between them. Further it is not a part of the decree that is sought to be executed but the whole of it and, therefore, it does not conflict with any provision of O. 21, R. 15, Civil P. C. In 1945 O. W. N. 136[8] a Bench of this Court, of which one of us was a member, laid down the proposition that

"although the law now vests in a Hindu widow the limited interest of her husband in the joint property, it does not operate to alter the Hindu law of joint family so as to make her a member of the coparcenary. It is clear that if the property in respect of which the profits were claimed, was joint family property of Jung Bahadur and his sons, the joint family is now represented by Anant Singh and Narendra Singh alone. The provision would seem to indicate that a mere devolution of the husband's interest would not otherwise affect the joint family status as such or invest the widow with the rights of a male co-parcener other than those necessary for enforcing the interest expressly conferred on her. The right of coparcenership of a representation of the joint family is not included among the rights so conferred, and it is difficult to regard her as a legal representative of her husband in that sense."

[21] It was also held that, even if the widow was a legal representative of the deceased, the fact that some of the legal representative had applied would be sufficient to meet the requirements of the law.

[22] Thus there is no defect in the application for execution which was presented by the sons of the deceased decree-holder.

[23] The result is that this appeal fails and is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 301 *[C. N. 105.]*

MISRA AND CHANDIRAMANI JJ.

Quazi Mumtaz Ahmed—Plaintiff—Appellant v. Mt. Wasiulnisa and others — Defendants—Respondents.

First Appeal No. 33 of 1944, Decided on 17-2-1948, against decree of Civil Judge, Sitapur, D/- 29-2-1944.

(a) U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 7 (3)—Section must be construed strictly —Transfer by "gift" does not include wakf alal-aulad.

Being in derogation of the ordinary law, the provision in S. 7 (3) must be construed strictly. The language of the enactment restricts the prohibition to particular kinds of transfers and without seriously violating its scope, the inclusion in it of conveyances which, notwithstanding their family resemblance, are regarded as distinct from those transfers in the eye of law, cannot be permitted. The import of the word "gift" in S. 7 (3) cannot be stretched so as to include all gratuitous transfers. Regard must be had to the question whether it is in favour of a donee who is capable of being regarded as a juristic person and therefore one who can signify his assent, or in favour of God Almighty who cannot be conceived of as such person or as capable of indicating acceptance. The waqf alal-aulad does not fulfil the requirements of a gift and cannot, therefore, be regarded as such for the purposes of sub-section (3) of S. 7. Consequently no sanction is required under S. 7 (3) for creating waqf alal-aulad : 3 A. I. R. 1916 P. C. 27 and 15 A. I. R. 1928 All. 516, *Disting.* [Para 7]

(b) Muhammadan law—Gift — Death bed gift— Marzulmaut, doctrine of — Applicability — There must be a proximate danger of death resulting subjectively in preponderance of apprehension.

The doctrine of marzulmaut, applies to cases where the gift is made under pressure of a sense of imminence of death. The essential condition, thus, for its application is that there must be a subjective feeling in the mind of the patient that he is not going to recover; in other words, there must be a proximate danger of death resulting subjectively in the preponderance of apprehension. The facts have to be proved like any other fact and may be evidenced by some external indicia in the patient's condition or his expressions and declarations : 35 Cal. 1 (P. C.), 35 Cal. 271 (P. C.), 19 A. I. R. 1932 Oudh 233, 30 Bom. 537 and 9 A. I. R. 1922 Cal. 429, *Rel. on.* [Para 8]

Cases referred :—

1. ('16) 19 O. C. 192 : 3 A.I.R. 1916 P. C. 27 : 38 All. 627 : 43 I. A. 212 : 36 I. C. 104 (P. C.), Sadik Hussain Khan v. Hashim Ali.
2. ('29) 51 All. 40 : 15 A. I. R. 1928 All. 516 : 111 I. C. 583, Musharraf Begam v. Sikundar Jahan Begam.

3. ('36) 11 Luck. 735 : 23 A. I. R. 1936 Oudh 213 : 160 I. C. 495 (F. B.), Mt. Rahiman v. Mt. Baqridan.
4. ('07) 34 I. A. 167 : 35 Cal. 1 : 4 L.B.R. 154 (P.C.), Ibrahim Goolam Ariff v. Saiboo.
5. ('08) 35 I. A. 67 : 35 Cal. 271 (P. C.), Fatima Bibi v. Ahmad Buksh.
6. ('32) 7 Luck. 705 : 19 A. I. R. 1932 Oudh 233: 137 I. C. 804, Mahomed Ayub Khan v. Mt. Gauhar Begam.
7. ('06) 30 Bom. 537, Sarabai v. Rabiabai.
8. ('22) 49 Cal. 477 : 9 A. I. R. 1922 Cal. 429 : 67 I. C. 77, Jinjira Khatun v. Mahomed Fakirulla Mia.

Akhtar Husain and R. N. Har Kauli — for Appellant.

Mohd. Ayub and Abdul Hasan (for No. 1) and Niamat Ullah and Inayat Ullah — for Respondents Nos. 1 to 5.

Judgment.—This is a plaintiff's appeal. The point in dispute related to a deed of *wakf alal-aulad* executed by late Qasi Iftikhar Ahmad on 17th October 1941. He died on 11th January 1942. The plaintiff Qazi Mumtaz Ahmad is his brother. His other heirs, namely, his widow, Mt. Wasiunnisa and his daughters, Mt. Khurshed Fatima, Mt. Shakil Fatima, Mt. Saghir Fatima and Mst. Jalis Fatima are the defendants. The plaintiff claimed a three annas four pies share by inheritance in the property left by his brother and in reply to the defence based on the waqf deed of 17th October 1941, he challenged its genuineness and validity. He failed on both these points. It is unnecessary to set out in detail the various grounds upon which the invalidity of the document was alleged. Only two of them are material at this stage. The first ground was that since the waqf was executed after the passing of the order under S. 6, Encumbered Estates Act, and during the pendency of the liquidation proceedings thereunder and since the sanction of the Collector as required by S. 7, Encumbered Estates Act, was not obtained it was devoid of legal effect and was wholly inoperative. The second ground of attack was an alternative ground. It was based upon an averment that the waqf deed was executed during marzulmaut and as such it could be valid to the extent of 1/3rd only. As stated above, Qazi Mumtaz Ahmad did not succeed in his endeavour to get over the deed. His suit, therefore, failed. Dissatisfied with the decision of the learned Civil Judge of Sitapur, he has now come up in appeal.

[2] The appellant's contention about the genuineness of the deed of waqf, Ex. A2, may be disposed of shortly. (Their Lordships after going through the evidence concluded that Ex. A2 was genuine and proceeded :) The contention regarding the invalidity of Ex. A2 on account of the absence of the Collector's permission was based on the provisions of sub-s. (3) of S. 7. That sub-section prescribes *inter alia* that after the passing of the order under S. 6, Encumbered Estates Act, and until the Collector has declared in accordance with S. 44 that the landlord has ceased to be subject to the disabilities imposed by S. 7, Encumbered Estates Act, or until the application is dismissed or the proceedings are otherwise quashed the landlord applicant is incompetent, without the sanction of the Collector, to make any exchange or gift of, or to sell, mortgage or lease the whole or part of proprietary rights in land mentioned in the notice published under S. 11. By sub-s. (4) it is declared that a transfer made in contravention of the above provision shall be void. It is not disputed that on the date of execution of the deed of waqf Qazi Iftikhar Ahmad was subject to the disabilities imposed by sub-s. (3) inasmuch as the proceedings for the liquidation of his debts were still pending in the Court of the Sub Divisional Officer, Sitapur. It is contended on behalf of the appellant that a transfer by way of gift which is specifically prohibited by the sub-section is wide enough to cover the case of waqf alal-aulad. The respondents, on the other hand, maintain that Ex. A2 does not come within the prohibition.

[3] Qazi Iftikhar Ahmad, it would appear, conceived the idea of creating a waqf in respect of his property after he lost his only son in or about the year 1935. He postponed action till after the commencement of the liquidation proceedings under Chap. V, Encumbered Estates Act. In 1941 he applied to the Sub-Divisional Officer for sanction to transfer his property by waqf but his application was rejected because the liquidation officer considered that transfers by waqf were not included amongst the categories of transfers for the execution of which leave was required under sub-s. (3) of S. 7. The order is dated 15th October 1941. The deed, we have already mentioned, was executed on 17th October of the same year. The Qazi was anxious to safeguard the interest of the waqf, and he, therefore, applied again to the same officer and prayed that the Court might supplement its order of 15th October 1941, by adding that the scheme of the waqf did not embarrass the creditors and that it was not opposed to the spirit of rule 83 framed under the Act. The aforesaid rule was obviously mentioned by a clerical error for R. 84 which provides that before the completion of the liquidation scheme no sanction for transfer of property under sub-s. (3) of S. 7 should be given if it prejudices the interests of the creditors collectively or individually. The Qazi had in mind apparently the para. 3 of the deed of waqf whereby it was provided that the proceedings under the Encumbered Estates Act case were to continue in the normal way and that in place of the executant's name the name of waqf under his management would be substituted and the payment of all the debts found due in accord-

ance with the decision of the Special Judge as well as the proceedings of the case would bind the wakf and the mutwallis.

[4] On the application of Qazi Iftikhar Ahmad the Liquidation Officer passed the following order on 4th November 1941, (Ex. A11):

"I have no objection to add the following to the order already passed by me on 15th October 1941. Sanction would not have embarrassed the condition on the liquidation scheme as it was not against the spirit of R. 83. But as it was a case of (paper punched) "wakf" no order of sanction passed nor necessary."

[5] The above proceedings of the Court of the Sub-Divisional Officer show unmistakably that the sanction for the execution of the waqf alal-aulad was refused. The reason for the refusal was not that it was liable to affect the creditors adversely but only that sub-s. (3) of S. 7 did not extend to a waqf alal-aulad. The respondents maintain that the effect of the two orders being to leave the landlord free to execute the projected deed they should be deemed to constitute sanction in case the sub-section on its true construction be held to render sanction necessary. The argument thus put is ingenious but is wholly against the intention or the tenor of the orders. On its face and in effect we must hold that no sanction was given by the Liquidation Officer.

[6] It is next urged on appellant's behalf that the waqf in question was at best a mere gift though a gift in trust, and that it must by force of sub-s. (4) be held to be void in the absence of permission. Reliance in this connection is placed upon the decision of their Lordships of the Privy Council in 19 O. C. 192[1] and of the Allahabad High Court in 51 ALL. 40.[2] Section 7, Encumbered Estates Act, did not fall to be considered in any of these cases. In 19 O. C. 192[1] their Lordships had to decide whether or not the word "gift" in S. 3, Avadh Laws Act, included a gift through the medium of a trust. The case related to a deed of trust which contained a settlement in favour of the executant's wife. The preamble recited that an agreement had been entered into between the settlor and his second wife Fatima to the effect that she would accept the provision made for her in satisfaction of her dower. The deed conveyed to the trustees the properties described in the schedule to the deed to hold them subject to certain mortgages and payment of certain annuities, cost of maintaining and managing the said properties and collecting their rents and to pay the income to the executant's second wife, Fatima, during her lifetime for her sole and separate use, subject to the cost of maintaining and educating her children. After her death the property was to be held in trust for all the aforesaid children living at the settlor's death, as tenants-in-common, in equal shares. In dealing with this document their Lordships observed that it was not possible to exclude a gift from the ambit of S. 3, Avadh Laws Act, merely because the donor's bounty passed to his intended beneficiary through the medium of a trust. In order that a conveyance may be impressed with the character of a gift it must fulfil the essential ingredients of that form of transfer. A gift under the Transfer of Property Act as well as under the Mahomedan law must be a transfer by one person in favour of another made voluntarily and without consideration and it must be accepted by and on behalf of the donee. Where the property is given to a beneficiary either directly or through a trustee the essential nature of the transaction remains the same. Where, however, the conveyance is in favour of God Almighty it would be difficult to put it at par with a gift in favour of a living beneficiary through the medium of a trust. It is not disputed that under the Hanafi Law the creation of a valid waqf divests the wakif of ownership with immediate effect and passes the property to God Almighty forthwith. A Sunni waqf contemplates a purely unilateral transaction and a declaration to constitute a waqf accompanied by delivery of possession would seem to be sufficient compliance with the requirements of law to effectuate an alienation: vide 11 Luck. 735.[3] In the case of a gift, on the other hand, it is essential that a donee should signify his assent to the declaration of gift and it is only on his accepting the gift and on the donor's effectively transferring possession to the donee that the transaction is complete — (*vide* Tayabji's Muhammadan Law, Ss. 345 and 346 and Baillie's Digest of Muhammadan Law, Vol. I, p. 515 *et seq*). The Privy Council case has, therefore, no relevancy.

[7] The Allahabad case referred to on appellant's behalf appears at first sight to support him but when it is realised that the case was governed by Shia Law it becomes difficult to apply it to the facts of the case before us. Under the Shia Law, a waqf alal-aulad is a contract and the property vests not in God Almighty but in the beneficiaries. A conveyance by a Shia Muslim by way of waqf may, therefore, in an appropriate case amount to a gift. The case was decided under the Bundelkhand Encumbered Estates Act of 1903. Section 10 (2) (a) of that enactment provided that until the proprietor ceased to be subject to the disabilities of the Act, he was incompetent "to exchange, give or without the consent of the Commissioner sell, mortgage or lease his proprietary rights in land or any part thereof." The waqf was made during the continuance of the disabilities imposed by the sub-section. The document recited that a part of

the property was pledged and hypothecated to the creditors and the settler wished to make the waqf of the entire property therein described in favour of his male issues under the provisions of the Waqf Validating Act of 1913. After referring to the legal formula the mutwallis were named and it was provided that on the extinction of the line of the wakif's son, Hyder Husain Khan, a managing committee should be appointed to spend the income on religious and charitable purposes named in the subsequent paragraphs. The learned Judges of the Allahabad High Court held that the deed was inoperative in view of S. 10 (2) (a) of the Act and that the word "give" as used therein was not confined to the restricted sense, in which it was used in the Transfer of Property Act, 1882, but was intended to include dedication of property by way of waqf. Apart from the fact that the word "give" in the aforesaid section is of much wider amplitude than the word "gift" in sub-s. (3) of S. 7, Encumbered Estates Act, it is to be observed that the transfers named in the latter sub-section have a special technical meaning given to them by law. The import of the word "gift" cannot, in our judgment, be stretched so as to include all gratuitous transfers. Regard must be had to the question whether it is in favour of a donee who is capable of being regarded as a juristic person and therefore one who can signify his assent, or in favour of God Almighty who cannot be conceived of as such person or as capable of indicating acceptance. The waqf with which we are concerned does not fulfil the requirements of a gift and cannot, therefore, be regarded as such for the purposes of sub-s. (3) of S. 7, Encumbered Estates Act. Being in derogation of the ordinary law, it would seem obvious that the provision must be construed strictly. The language of the enactment restricts the prohibition to particular kinds of transfers and unless we seriously violate its scope we cannot permit the inclusion in it of conveyances which notwithstanding the family resemblance are regarded as distinct from those transfers in the eye of law. The view taken by the learned Sub-Divisional Officer in 1944 and the conclusion reached by the learned Civil Judge of Sitapur in the judgment under appeal appear to us to be justified and we overrule the appellant's plea regarding invalidity of EX. A2, for want of sanction.

[8] The only other point that remains to be disposed of relates to the objections on the ground of marzulmaut. The law on the point does not admit of doubt. As observed by their Lordships of the Privy Council in 34 I. A. 167[4] the doctrine applies to cases where the gift is made under pressure of a sense of imminence of death. The essential condition thus for its application is that there must be a subjective feeling in the mind of the patient that he is not going to recover; in other words there must be a proximate danger of death resulting subjectively in the preponderance of apprehension. These facts have to be proved like any other fact and may be evidenced by some external indicia in the patient's condition or his expressions and declarations. *See* 35 I. A. 67,[5] 7 Luck. 705,[6] 30 Bom. 537[7] and 49 Cal. 477.[8] In the case before us there is no evidence to prove the existence of such apprehension. It appears from the evidence of Dr. Rahmat Husain, P. W. 11, who treated him at the hospital and from the Bed-head ticket etc. that Qazi Iftikhar Ahmad suffered from a dangerous vulvular disease of the heart called Aortic Regurgitation and from Anaemia and Collitis. His troubles began shortly before he entered the Balrampur Hospital in September 1941. He complained of pain in his abdomen round about the umbelicus and it occasionally radiated towards the epigastrium. He also suffered from flatulence and occasional vomiting. He got 5 or 6 semi-formed stools every day and though there was a slight tension there was no mucus or blood and no griping. There was an increase in micturition and there was progressive weakness. These complaints, it would seem obvious, were not likely to engender in the mind of the patient any fear of death. There is no evidence that he was informed of the dangerousness of the disease. On the day of the execution of the deed of waqf, namely, 10-10-1941, the patient's blood pressure had risen. It was 200 sistolic and 80 diastolic. The pulse was 120. This may be attributable to the excitement and the worry which the importance of the step which he was taking was likely to entail. Be that as it may, the Qazi appears to have improved considerably when he left the hospital. Exhibit A-35 is the discharge certificate. It says that he was "relieved". There is evidence to the effect that the nature of the Qazi Iftikhar Ahmad's illness was such that when he was free from attack he was not likely to feel much out of the normal. According to the expert medical evidence, which in this case is copious, persons suffering from Aortic Regurgitation may live for 4 to 5 years though there is always a chance of their dying at any time. There is no evidence to show that the fatal possibilities of his malady were ever made known to the patient by his attendants. P. W. 12, Hakim Abdul Aziz, treated him last of all. In his opinion, the Qazi's malady consisted only of swelling of the liver and some heart trouble. The evidence of D. W. 7, Jalis Fatima, would further seem to indicate that Qazi had improved at least outwardly

when he left the hospital. Qazi Iftikhar Ahmad performed the marriage of the witness a few days before he died and this circumstance is an indication of the fact that he did not think that his condition called for any special anxiety. The oral and documentary evidence to which the parties' learned counsel drew our attention has led us to the conclusion that the Qazi did not despair of his life at any time much less at the time when the deed of waqf was executed. We consider that the evidence of the plaintiff as P. W. 9 greatly exaggerates the case when he makes out that Qazi Iftikhar Ahmad's condition was known to be hopeless from the very commencement of his treatment in the hospital. The appellant's learned counsel says that since death in aortic regurgitation is more frequent than any other cardiac vulvular disease the patient must have been in apprehension that he will not survive. We have already said that there is no evidence that the dangerous aspect of the disease was brought to the consciousness of the wakif. The invalidity can be invoked only in cases of pressure of the sense of imminent death. The doctrine of marzulmaut has no application.

[9] There is no reason to interfere with the decision of the Court below. The appeal fails and is dismissed with costs. The stay order, dated 1-11-1944, is vacated.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 305 *[C. N. 106.]*

GHULAM HASAN C. J.

Ghani—Defendant—Appellant v. *Mustafa Khan and others—Defendants—Respondents.*

Mis. Appeal No. 68 of 1947, Decided on 2-12-1947, against decree of Civil Judge, Bahraich, D/- 3-10-1947.

Civil P. C. (1908), O. 41, R. 23—Scope—Decision that Court has no jurisdiction and plaint returned for presentation to proper Court—Order reversed in appeal and case remanded—Remand is not under R. 23 — No appeal and revision lies — Civil P. C., O. 43, R. 1 (u).

Order 41, R. 23, contemplates a decree passed by lower Court from which an appeal is preferred. The decision that the Court has no jurisdiction to try the suit and returning the plaint for presentation to proper Court is not a decree and where the appellate Court reverses this order and remands the case for trial according to law, the remand is not one under O. 41, R. 23, and neither an appeal under O. 43, R. 1 (u) nor revision under S. 115 is maintainable against it : 29 A. I. R. 1942 Oudh 370 and 31 A. I. R. 1944 Oudh 260, *Rel. on*; 17 A. I. R. 1930 All. 713 (F. B.), *Disting.* [Para 2]

Annotation :—('44-Com.) Civil P. C., O. 41, R. 23, N. 21, O. 43, R. 1, N. 12.

Cases referred:—

1. ('42) 29 A. I. R. 1942 Oudh 370 : 200 I. C. 512, Bhagoley v. Bala Din.
2. ('44) 1944 O. A. C. C. 122 : 31 A. I. R. 1944 Oudh 260 : 20 Luck. 38 : 219 I. C. 278, District Board, Bahraich v. Ramendra Prasad Singh.
3. ('30) 17 A. I. R. 1930 All. 713: 53 All. 75 : 127 I.C. 434 (F. B.), Ram Iqbal Rai v. Telessari Kuari.

K. N. Tandon— for Appellant.

B. K. Dhaon (for No. 1) and Virasat Hussain (for Nos. 2 and 3)—for Respondents.

Judgment.— In this case a preliminary objection has been raised on behalf of the respondents that this miscellaneous appeal is not maintainable. The contention raised is that the appeal is directed against an order passed by the lower appellate Court remanding the case to the trial Court by reversing the decision of that Court that it had no jurisdiction to decide the suit. The trial Court before whom the suit was originally filed remitted the two issues arising in respect of the tenancy to the Revenue Court. That Court returned the finding in favour of the plaintiffs-respondents. Before the third issue relating to the question of damages was determined, a plea was raised on behalf of the defendant-appellant that in view of the amened Tenancy Act the suit was not cognizable by the civil Court. This plea prevailed and the trial Court directed the return of the plaint for presentation to the proper Court under O. 7, R. 10, Civil P. C. The lower appellate Court in appeal has reversed that view and held that the Munsif had jurisdiction to try the suit. As the question of damages had been left undetermined, the case was remanded for disposal according to law. Treating this as an order of remand under R. 23 of O. 41, Civil P. C., the defendant-appellant has filed the present appeal under the provisions of O. 43, R. 1 (u), Civil P. C. Rule 23 contemplates a decree passed by the lower Court from which an appeal is preferred. The order passed by the lower Court however was not a decree but an order as distinguished from a decree. It is obvious therefore that the case does not fall under R. 23 of O. 41, and consequently no appeal is maintainable.

[2] This view is supported by a decision in A.I.R. 1942 Oudh 370[1] upon which reliance was placed by learned counsel for the respondents. There also a preliminary issue on the question of jurisdiction had been decided by the trial Court and the plaint was returned for presentation to the proper Court. The lower appellate Court having set aside that order and remanded the case to the trial Court for disposal according to law an appeal against the lower appellate Court's order was held to be an appeal against an interlocutory order which did not decide or terminate the suit and hence the order was not open to revision under S. 115, Civil P. C. A similar view was taken in 1944 O.A.C C. 122.[2] It is clear therefore that no appeal lies against the order of the lower appellate Court nor is that order open to revision under S. 115, Civil P. C.

[3] Learned counsel for the appellant has asked me to treat the appeal as a revision and

relies upon a Full Bench decision of the Allahabad High Court in A. I. R. 1930 ALL. 713.[3] That was, however, a case in which the Full Bench did not consider whether the order of the lower appellate Court which was sought to be revised was an order which amounted to the decision of a case within the meaning of S. 115, Civil P. C. On the other hand, this Court has definitely held in the aforementioned cases that the order is not revisable in that it is interlocutory and does not amount to the decision of a case. Accordingly this appeal being unmaintainable, it is dismissed with costs.

[4] As the appeal has been dismissed, Civil Misc. Application NO. 1430 of 1947 for stay is also dismissed and the stay order dated 29-10-1947, passed thereon is hereby vacated.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 306 *[C. N. 107.]*

KAUL AND KIDWAI JJ.

L. Ambika Prasad and others — Plaintiffs — Appellants v. *Town Area Committee, Bachhrawan and others—Defendants — Respondents.*

First Appeal No. 69 of 1942, Decided on 29-10-1947, against decree of Civil Judge, Rae Bareli, D/- 30-4 1942.

Court-fees Act (1887), S. 7 (iv) proviso (U. P.) —Plaintiff collecting 'chungi and mahusul' in bazar as proprietor — Town Area Committee interfering with plaintiff's collection and recovering dues itself — Suit by plaintiff for declaration, for perpetual injunction and for damages — Relief held claimed with reference to immovable property and first proviso to S. 7 (iv) applied — Relief for declaration held did not require to be separately valued.

The plaintiff was the owner of all the land in a village in which a bazar was being held and had always been realising 'chungi and mahasul' in this bazar in exercise of his proprietary right. The Town Area Committee interfered with the collection of the plaintiff and itself began realising the dues which it called 'Tah Bazari.' The plaintiff brought a suit and claimed the following reliefs: (1) A declaration that the actions of the Committee were against law: (2) a perpetual injunction restraining the Committee for ever from realising dues in respect of the road and lane ('chungi wa mahsul sarak wa gali') of the Bazar and (3) Rs. 1800 as damages. The plaintiff paid a court-fee in respect of relief relating to damages, and also with respect to relief for injunction which also was valued at Rs. 1800. The relief for declaration was not separately valued. The suit was valued at Rs. 18,000 for the purposes of jurisdiction:

Held, that the relief claimed was with reference to immovable property and the first proviso to S. 7 (iv) was applicable. The relief with regard to declaration thus did not require to be separately valued and the court-fee paid was sufficient. [Para 6]

Annotation: — ('44-Com) Court-fees Act, S. 7 (iv) (c) N. 21.

Case referred:—

1. ('44) 1944 A. L. J. 95 : 31 A. I. R. 1944 All. 113 : I. L. R. 1944 All. 214 : 213 I. C. 227, Chief Inspector of Stamps v. Kedarnath.

Wasim and Ali Hasan—for Appellants.

Order.—The appellants instituted the suit, out of which his appeal arises, in the Court of the Civil Judge, Rai Bareli, for the following reliefs:

(A) That a declaration be made to the effect that the order issued by defendant 2 dated 28-6-1940, and the actions of the Town Area Committee, Bachrawan, are against the law.

(B) That a perpetual injunction be granted to the effect that defendant 2 and his officers are restrained from issuing such orders and the Town Area Committee, Bachrawan, and its officials, members and Chairman of the Panchayat be prohibited for ever from realising dues in respect of the road and lane ("chungi wa mahsul sarak wa gali") of Bazzar Girdharaganj in Bachrawan, pargana Bachrawan, district Rai Bareli.

(C) That Rs. 1800 as damages or any other sum deemed just by the Court may be directed to be paid by both the defendants or any of them.

[2] The suit was dismissed and the plaintiffs have appealed to this Court. They have paid a court-fee of Rs. 162/8/- in respect of the relief relating to damages. The correctness of this amount is not challenged. They have also paid a court-fee of Rs. 162/8 with respect to the relief for injunction which also was valued at Rs. 1800. The Chief Inspector of Stamps, U. P., has reported that this is incorrect and that, since the suit was valued at Rs. 18000, the proper valuation for the relief for declaration and injunction was Rs. 18,000 minus Rs. 1,800, (the value of the relief for damages), that is Rs. 16,200. He has accordingly reported that there is a deficiency of Rs. 832-8-0 in the court-fee which should be made good by the appellants.

[3] It appears that this report is due to a misapprehension. According to S. 7 (iv), amended Court-fees Act, which it is not disputed, applies to the present case, the court-fee is payable ad valorem on the 'amount at which the relief sought is valued in the plant.' The plaint claims three reliefs and gives the valuation of only two of them; it does not give any separate valuation of the relief for declaration. It, however, gives Rs. 18,000 as the valuation of the suit for the purposes of jurisdiction. In view of the provisions of S. 8, Court-fees Act, as amended for this Province, which provides that, in cases of this nature, the valuation for the purposes of jurisdiction shall be the same as for the purposes of court-fee, the learned Government Advocate argues that the valuation of the relief for declaration must be deemed to be Rs. 18,000 minus Rs. 3600 that is Rs. 14,400. He contends on the basis of the decision in 1944 A. L. J. 95,[1] that the court-fee must be paid on the sum total of the reliefs for declaration and injunction; that is on Rs. 16,200.

[4] This argument reverses the process laid down in S. 3, Suits Valuation Act; that section provides that the valuation for purposes of jurisdiction shall be the same as for the purposes of court-fee and not vice versa. The plaint definitely states that the valuation of the reliefs is Rs. 3600. This statement cannot be ignored and a higher valuation can be fixed upon the relief sought merely because the plaintiffs have made a mistake, a mistake which no longer affects jurisdiction having regard to S. 11, Suits Valuation Act, with regard to valuation for purposes of jurisdiction.

[5] The fact that no separate valuation is given of the relief for declaration does not affect the matter. This relief and the relief for declaration (injunction?) are part and parcel of one relief and only one valuation that of the consequential relief was required in this case: vide the first proviso to S. 7 (iv), Court-fees Act, as applicable to this Province. The learned Government Advocate contends that that proviso is not applicable because the injunction to restrain defendants 1 and 2 and their officers for collecting 'mahsul and chungi' is not a relief sought with reference to an immovable property, since the collection of a tax is quite independent of the ownership of any property and has no reference to it. Whatever force this argument might have had if the charges were in fact in the nature of a tax, it has no application to the facts of the present case, because a perusal of the plaint clearly indicates that the relief sought is with reference to immovable property. The relief claimed is with reference to the statement of the case contained in the plaint and cannot be read apart from it.

[6] Paragraph 2 of the plaint states that the plaintiffs are the owner of all the land in village Bachrawan, whether abadi or cultivated or uncultivated. In paras 3 and 4, it is stated that within the area of the village is an ancient Bazaar known as Girdharaganj Bazaar which has been, and is, under the control of the plaintiffs who look after its sanitation etc. Paragraphs 5 and 6 then state that the plaintiffs and their predecessors have always been realising 'chungi and mahsul' in this Bazar in the exercise of their proprietary right ('Bataur-i-haq milkiat') and this charge is in the nature of ground rent. In Paras 8 to 13 it is stated that the Town Area Committee has interfered in the collection of the plaintiffs and is itself realising the dues which it calls 'Tah Bazari.' Para 14 clearly states that this is unlawful interference in the proprietary rights ('haquq milkiat') of the plaintiffs. Then follow the formal paragraphs of the plaint those relating to the due giving of notice, array of parties, accrual of cause of action and valuation and then comes the relief paragraph in which the reliefs which we have already stated have been claimed. A consideration of these paragraphs leads to the conclusion that, in the present case, there is no claim with regard to any tax but only with regard to a levy based upon a claim to proprietary rights in the Bazaar and the side of the road. It is, therefore, a relief claimed with reference to immovable property and the first proviso to S. 7 (iv), Court-fees Act is applicable. The relief with regard to declaration thus did not require to be separately valued and the court-fee paid is sufficient. We hold accordingly.

S.C. *Order accordingly.*

A. I. R. (35) 1948 Oudh 307 *[C. N. 108.]*

GHULAM HASAN C. J. AND KIDWAI J.

B. Parbhu Narain Singh and others—Appellants v. *B. Jitendra Mohan Singh and another—Respondents.*

First Appeal No. 63 of 1941, Decided on 9-5-1947, against decree of Addl. Civil Judge, Fyzabad, D/- 31-5-1940.

(a) Interpretation of statutes — Retrospective effect—Vested rights.

It is not in accordance with sound principles of interpreting statutes to give them retrospective effect or in other words, it is a maxim that affirmative words in a statute without any negative expressed or implied do not take away existing rights : 26 All. 119 (P. C.) and 11 Beng. L. R. 115 (P. C.), *Rel. on.* [Para 23]

(b) Oudh Estates Act (U. P. Act, 1 [I] of 1869), S. 10—Operation of Act, if retrospective—Person entered in Lists dying before Act—Vested rights if divested—Enquiry whether any rights vested, if can be carried.

U.P. Act I of 1869 is given retrospective effect unless the effect of doing so would be to divest rights which had already vested in some person other than the person entitled to get them by virtue of the provisions of the Act and in case the Act is applicable, a conclusive presumption arises not only that the person entered in the lists is a Taluqdar but that the fact upon which his entry in the lists is based also exists, that is to say that the person entered was a Taluqdar to whom a primogeniture sanad was granted. The question whether there did in fact exist any sanad which governed succession to the deceased in 1862 i. e. before the Act can be considered. The presumption arising out of the entry in List III will not stand in the way of such an enquiry since this enquiry is directed to ascertain whether any rights are divested or not by the application of the Act or in other words, whether the Act has application to the case or not: *Case law considered.* [Para 33]

(c) Civil P. C. (1908), O. 6, R. 7—New case—Issue wide enough to cover new case set up by defendant — All record before Court—Plaintiff not taken by surprise— No prejudice — New case allowed to be set up.

Where the issue framed was sufficiently wide enough to cover a case set up by the defendant which was different from that pleaded in his written statement and all the documents relating to the case were before

the Court so that no prejudice could have been caused to the plaintiffs:

Held, that the objection of the plaintiffs, that the new case set up by the defendant could not be allowed, must be overruled: 27 All. 634 (P. C.), *Rel. on.* [Paras 36 & 37]

Annotation :—('44-Com) Civil P. C., O. 6, R. 7, N. 2.

(d) Evidence Act (1872), S. 35—Document kept with official record—Person preparing it not under duty—Extract of such document, held not admissible under S. 35 -- Oudh Estates Act (1 [I] of 1869), S. 33.

Where a certain document is an extract from a list prepared by or under the directions of a Maharaja for the purposes of assisting in the preparation of the lists under Act 1 [I] of 1869, but there was no duty imposed upon Maharaja to prepare such a list: he had merely to assist in revising the lists prepared by the Deputy Commissioners and he could not be expected to have personal knowledge of the claims of all the Taluqdars in Oudh and the list was prepared to assist him :

Held, that although that list was kept with the official records by the Board of Revenue (but as a separate file) it could not be treated as an official paper and consequently was not admissible under S. 35. [Para 73]

Held, however that the extract was admissible though not as official record, but as evidence of custom, under S. 33, Oudh Estates Act: 26 Cal. 81 (P. C.), *Rel. on.* [Para 74]

(e) Evidence Act (1872), Ss. 91 and 35—Proof of fact of grant of Sanad and proof of contents thereof —Proof of former—Admissibility of evidence other than Sanad—Admissibility under S. 35.

There is a distinction between proof of the terms of a contract or grant and proof of the fact that a grant was made or a contract was entered into. The fact of a grant as distinct from the terms of the grant can be proved by such evidence which is admissible as a copy of an entry in a public record. It is not necessary to prove it by production of the Sanad itself or by secondary evidence.

Assertion that a person was present at Durbar of 1859 and got a joint Sanad for Birhar Taluqdars can be corroborated from a remark made by some officer, either the Settlement Commissioner or some Assistant Settlement Officer that the names of the four Babus "are entered as proprietors in the Bihar Pargana Sunnad." 21 A. I. R. 1934 P. C. 157, 15 A.I R. 1928 Oudh 307, 35 A. I. R. 1948 Oudh 9, 2 A. I. R. 1915 Oudh 75, 4 A. I. R. 1917 Bom. 206 and 9 A. I. R. 1922 Pat. 222, *Rel. on.* [Paras 78 and 79]

Though the document above referred to was not written in the performance of an official duty and no enquiry as to whether there was a sanad or not was entrusted to the official who wrote it, yet it was his duty to ascertain under-proprietary rights, and the first step that he had to take in the performance of that duty was to ascertain how far the Taluqdar admitted those rights, and the letter was written to the Settlement Officer setting out the circumstances in which the enquiry was delayed and asking for further instructions and the object of mentioning a sanad was to show that while the persons who were classed by the rules as Taluqdars had been sent for, a fifth person had claimed to be interested and it was necessary to ascertain his rights before statements could be called for from the superior proprietors:

Held, that the statement contained in the letter was germane to his duties and was admissible as such under S. 35, Evidence Act. [Para 80]

(f) Evidence Act (1872), S. 35—Evidence of fact —Document is evidence of fact contained in it.

From the facts that enquiries were made from certain persons as to whether they desired sanads in the primogeniture form or not and the replies were sent by them and their names were thereafter inserted in the list of Taluqdars who desired primogeniture sanads are no doubt evidence of the fact that those persons were considered to be Taluqdars and enquiries were made from them with a view to grant them primogeniture sanads but this is no indication of the fact that Taluqdari sanads in the ordinary form had previously been granted to them. [Para 82]

(g) Oudh Estates Act (1 [I] of 1869)—Oudh Laws —Primogeniture Sanad—Date of grant—Proof.

The date of the sanad is no indication of the date on which it was actually given to the Taluqdar: 16 Cal. 397 (P. C.), *Rel. on.* [Para 85]

(h) Evidence Act (1872), S. 35 — Settlement orders and akhir Rubkars based on Sanad—Admissibility to show that sanad was granted to person named therein.

Orders of Settlement Courts and Rubkars akhir, containing a summary of all the proceedings, prepared and kept on the settlement files in accordance with directions of the Chief Commissioner, which indicate that claims were dismissed on the basis of the villages to which they related being covered by sanads, are admissible to show that a sanad was granted to the persons named therein : 15 A. I. R. 1928 Oudh 307; 35 A. I. R. 1948 Oudh 9 and 14 A. I. R. 1927 P. C. 8, *Rel. on.* [Para 89]

Further it is not necessary to prove on what enquiry these entries were based : 33 A. I. R. 1946 P. C. 103, *Rel. on.* [Para 89]

(i) Oudh Estates Act (1 [I] of 1869), S. 10, List III —Presumption under S. 10, when conclusive.

It is only when the Oudh Estates Act applies and not otherwise, that the presumption under S. 10, that a primogeniture Sanad has been granted to a person whose name has been entered in List III, is conclusive: 26 All. 119 (P. C.), *Rel. on.* [Paras 30 & 93]

There is no scope for any presumption as to the correctness of the entry by reason of the principle "*Omina præsumuntur rite esse acta*" where evidence is available establishing that no sanad of any kind was granted. [Para 93]

(j) Oudh Law — Primogeniture Sanad—Grant— When gives.

Grant of primogeniture Sanad to a Taluqdar who is not a sole successor of his predecessor-in-interest, in respect of properties of others would give no title to him. If he is the sole successor then Act 1 [I] of 1869 (Oudh Laws Act) would govern succession and whether he had or had not a sanad would be immaterial. [Para 95]

(k) Will—Construction—Rules of — Will of Taluqdar executed before Succession Act and Oudh Estates Act — Technicalities of rules of construction, if should be applied —Succession Act (1865), Ss. 82, 83, 85 and 88 to 98—Oudh Estates Act (1 [I] of 1869), Ss. 2 and 19 — Succession Act (1925), Ss. 95, 96, 98 and 100 to 111.

Where a document contended to be a will of a taluqdar was written when neither the Succession Act 10 [X] of 1865 nor the Oudh Estates Act, U. P. Act, 1 [I] of 1869, had been enacted and there were thus no particular rules applicable to the wills of Taluqdars, all that is necessary to ascertain is whether the document was meant by the executant to express his desires with regard to

the devolution of his estate after his death. Absence of reference to his death in specific words is immaterial. [Para 103]

Answers given by deceased in reply to a circular No. 7/217 of 1860 to all Commissioners by the Chief Commissioner of Oudh, on 18th January 1860, expressing desires with regard to the devolution of his property *held* operated as a will and did not fail as a will on the ground that it only expressed executants' views as to custom and did not go further : 3 I. A. 259 (P. C.) ; 18 Cal. 1 (P. C.) and 25 A.I.R. 1938 P. C. 113, *Rel. on* ; 33 All. 344 (P. C.), *Ref.* [Paras 107 & 108]

(l) Succession Act (1925), S. 89—Succession Act (10 [X] of 1865), S. 76 — Will of taluqdar executed before 1869 —Applicability of S. 89—Oudh Estates Act (1 [I] of 1869), S. 19, Proviso 2.

Section 89, Succession Act (corresponding to S. 76 of Act 10 [X] of 1865) does not apply to the will of taluqdar executed before Act 1 [I] of 1869 (Oudh Estates Act), by virtue of S. 19, proviso 2 of Oudh Estates Act. But it does not mean that the principle contained in it is not applicable as a general principle of law. If the will is framed in such uncertain language that it is not possible to determine in whose favour it operates it must fail. Before, however, it can be allowed to fail every effort must be made to ascertain the legatee. [Para 109]

(m) Succession Act (1925), S. 81—Succession Act (10 [X] of 1865), S. 68 — Will of taluqdar executed before Oudh Estates Act (1 [I] of 1869)—Intention of testator—Exclusive evidence, admissibility.

It is only if all attempts to discover the intention of the testator fail that the heir at law will succeed: 9 Beng. L. R. 377 (P. C.), *Ref.*

Although it is the words of the will which are primarily to be considered to acertain the intention of the testator, his surroundings and the circumstances in which he came to execute the will may also legitimately be called in to assist in determining his meaning. Where the will of a taluqdar was executed before 1869 (before Oudh Estates Act), S. 81, Succession Act (corresponding to S. 68 of Act 10 [X] of 1865) cannot be applied. It is thus permissible to consider even extrinsic evidence to resolve a patent ambiguity : 3 I. A. 259 (P.C.),; 6 M. I. A. 526 (P. C.) and 25 A. I. R. 1938 P. C. 228, *Rel. on.* [Para 111]

(n) Oudh Estates Act (1 [I] of 1869), S. 14 — Applicability.

If a bequest was made not by the Taluqdar but by his heir before the commencement of Act 1 [I] of 1869 S. 14 would not operate to place the legatee in the same position as the testator : 27 All. 634 (P. C.), *Expl.* [Para 120]

(o) Oudh Estates Act (1 [1] of 1869), S. 22 — Applicability.

Held after considering the historical and other evidence that the succession was governed by the Act. [Para 122]

(p) Civil P. C. (1908), O. 6, R. 17—Pleadings as they stand in case must be taken.

Court must take the pleadings in the case as they stand and leave out of consideration the pleadings as they stood before the amendment: 17 A.I.R. 1930 P. C, 205, *Applied.* [Objection to new pleas was considered to be at too late a stage and was not allowed.] [Para 126]

Annotation : — ('44-Com) Civil P. C., O. 6, R. 17, N. 19.

(q) Civil P. C. (1908), O. 22, R. 3 — Statement made by party to suit is admissible against his legal representative.

Where the plaintiffs have come in only as the legal representative of another, any statements made by the latter are as much admissible against the plaintiff as they would have been against his predecessor, were he alive. [Para 127]

Annotation :— ('44-Com) Civil P. C., O: 22, R. 3, N. 16, Pt. 5.

(r) Custom—Primogeniture — Oudh Estates — Proof—Onus—Paucity of divisions of estate during course of 25 years—Inference—Evidence Act (1872), Ss. 13, 101 to 103.

Burden of proof rests heavily upon those who prove custom (custom of single heir succession) which is at variance with ordinary rule and this burden cannot be discharged by production of ambiguous evidence. [Para 144]

Where utmost that could be said regarding single heir succession is that it might be due to custom, on the other hand, it might equally have been in accordance with law, such evidence is not sufficient to prove custom of single heir succession. In the absence of evidence to the contrary an inference as to single heir succession can be drawn from the paucity of division of the estate during the course of 25 generations. [Held on a consideration of all the evidence that the alleged custom of single heir succession had not been established] : *Case law reviewed.* [Paras 144, 161]

(s) Evidence Act (1872), Ss. 48, 49 and 32—Scope and applicability.

Statements of persons dead, made after the controversy had arisen are inadmissible under S. 32 (4). Sections 48 and 49 do not apply to such a case. These sections do not deal with the statements of dead persons or persons who cannot be found. Such cases are dealt with by S. 32: 12 A. I. R. 1925 P. C. 267, 18 A. I. R. 1931 Oudh 89, 26 A. I. R. 1939 P. C. 22 and 23 All. 37 (P. C.), *Disting.* [Para 154]

(t) Civil P. C. (1908), O. 6, R. 1—Pleading undergoing various changes—Value of.

Where the pleadings of the parties had undergone a change during the course of the suit, *held* no importance could attached to them: 25 A. I. R. 1938 P. C. 189, *Rel. on.* [Para 163]

(u) Hindu Law—Joint family—Separation—Tests —Conduct of parties is real guide.

Generally speaking, the normal condition of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption. Separation from commensality and joint worship does not necessarily effect a division of a joint undivided Hindu family. Such a separation may be due to various causes, and the family yet continues joint in estate: To constitute separation there must be a clear and unambiguous declaration by a member of his intention to separate himself from the family. It is not necessary that all the parties should agree to a separation: the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate. It is by no means a rare thing that a person makes a statement that he is a member of a joint family with his relative, but has reasons of his own for making that statement. It is not his statement but his actings and dealings with the estate, which furnish a true guide to the determination of the question of the jointness. There can be a partition of the joint property without an actual division of the property by metes and bounds. If one member separates there is no presumption either that all have separated or that the others have remained joint. This must be proved like

any other fact. Property may be co-parcenary with regard to some members but the other members of the family may have no interest in it : *Case law relied on.* [Paras 165—168]

(v) Hindu Law—Joint family—Exclusion of member—What constitutes—Adverse possession—Limitation Act (1908), Art. 127.

As to what amounts to exclusion of a member of a joint Hindu family from enjoyment of joint property depends upon the facts of each particular case but an intention to exclude is essential: 16 A. I. R. 1929 P. C. 231, *Ref.* [Para 170]

Held, on evidence that there was exclusion : 2 A. L. J. 225 and 18 Cal. 341 (P. C.), *Disting.* [Paras 179, 186]

Annotation:—('42-Com) Limitation Act, Art. 127 N. 11.

(w) Hindu Law—Joint family—Acquisition—Self-acquisition—Presumption.

In the case of an ordinary Hindu family possessed of joint property, it would be presumed that the acquisitions of movable property by a member would also be joint property, but when the member derived a very large income from his exclusive property and only a small income from the joint family property, it cannot be presumed that the movable property was acquired from one source or the other or that it was ancestral and not self-acquired : 11 Cal. 777 (P. C.), *Rel. on.* [Para 171]

(x) Evidence Act (1872), S. 91—Secondary evidence.

In the absence of an entry in the list under Oudh Estates Act, the fact that the villages were taluqdari is capable of proof by the production of other evidence i.e., the Rubkhar Akhin and the wajib-ul-arz : 15 A I.R. 1928 Oudh 307, *Rel. on.* [Para 188]

Cases referred:—

1. ('04) 31 I. A. 30: 26 All. 119: 7 O. C. 254: 8 Sar. 593 (P. C.), Mahomed Abdulsamad v. Kurban Husain.
2. ('75) 1 I. A. 282: 14 Beng. L. R. 115: 3 Sar. 318 (P. C.), Collector of Trichinopoly v. Lekkamani.
3. ('77) 3 I. A. 259: 3 Sar. 611: 3 Suther 304 (P.C.), Hurpurshad v. Sheo Dayal.
4. ('79) 4 I. A. 178: 3 Cal. 522 (P.C.), Thakoor Hardeo Bux v. Thakoor Jawahir Singh.
5. ('84) 11 I. A. 51: 10 Cal 511 (P.C.), Achal Ram v. Udai Partab.
6. ('33) 60 I. A. 103: 20 A. I. R. 1933 P. C. 95: 8 Luck. 65: 143 I. C. 395 (P. C.), Raja Mohan v. Nisar Mahomed Khan.
7. ('38) 65 I. A. 137: 25 A. I. R. 1938 P. C. 113: 32 S. L. R. 433: 173 I. C. 625 (P.C.), Gaya Bakhsh Singh v. Deo Singh.
8. ('93) 20 I. A. 77: 20 Cal. 649 (P. C.), Narindar Bahadur Singh v. Achal Ram.
9. ('35) 1935 O. W. N. 178: 22 A. I. R. 1935 P. C. 53: 154 I. C. 27 (P. C.), Ejaz Ali Qidwai v. Court of Wards, Balrampur Estate.
10. ('16) 43 I. A. 269: 3 A. I. R. 1916 P. C. 89: 38 All. 552: 19 O. C. 290: 36 I. C. 299 (P. C.), Murtaza Husain Khan v. Mahomed Yasin Ali Khan.
11. ('89) 16 I. A. 71: 16 Cal. 397: 5 Sar. 299 (P. C.), Shankar Bakhsh v. Hardeo Bakhsh.
12. ('27) 54 I. A. 5: 14 A. I. R. 1927 P. C. 8: 1 Luck. 583: 100 I. C. 485 (P. C.), Nand Rani Kunwar v. Mt. Inder Kunwar.
13. ('99) 26 I. A. 194: 27 Cal. 344 (P. C.), Balbhaddar Singh v. Sheo Narain Singh.
14. ('28) 55 I. A. 303: 15 A. I. R. 1928 P. C. 202: 3 Luck. 372: 113 I. C. 113 (P. C.), Zarif-un-nisa v. Shafiq-uz-Zaman Khan.
15. ('32) 59 I. A. 1: 19 A. I. R. 1932 P. C. 13: 6 Luck. 556: 136 I. C. 385 (P. C.), Mahomed Sadiq Ali Khan v. Fakhr Jahan Begam.
16. ('08) 32 I. A. 203: 27 All. 634: 8 O. C. 317: 8 Sar. 791 (P. C.), Thakur Sheo Singh v. Rani Raghubans Kunwar.
17. ('81) 6 I. A. 63: 3 Sar. 244 (P. C.), Nawab Malka Jahan Sahiba v. Deputy Commr. of Lucknow.
18. ('99) 25 I. A. 161: 26 Cal. 81: 7 Sar. 432 (P. C.), Mahomed Imam Ali Khan v. Sardar Husain Khan.
19. ('34) 61 I. A. 286: 21 A. I. R. 1934 P. C. 157: 56 All. 468: 150 I. C. 545 (P. C.), Collector of Gorakhpur v. Ram Sundar Mal.
20. ('28) 5 O. W. N. 299: 15 A. I. R. 1928 Oudh 307: 3 Luck. 326: 109 I. C. 422, Haribar Pratap Baksh Singh v. Bisheshwar Bakhsh Singh.
21. ('47) 1947 O.W.N. 168: 35 A. I. R. 1948 Oudh 9, Tej Singh v. Daljit Singh.
22. ('15) 18 O. C. 122: 2 A. I. R. 1915 Oudh 75: 28 I. C. 180, Ali Baksh v. Ghurai.
23. ('17) 41 Bom. 466: 4 A. I. R. 1917 Bom. 206: 40 I. C 83, Chhotalal Aditram v. Bai Mahakore,
24. ('22) 9 A. I. R. 1922 Pat. 222: 80 I. C. 187, Mt. Makhduman v. Saiyed Altaf Hussain.
25. ('47) 1947 O. W. N. 5: 33 A. I. R. 1946 P. C. 103: I. L. R. (1946) Kar. P. C. 111: 225 I. C. 188, Shyam Pratap Singh v. Collector of Etawah.
26. ('46) 21 Luck. 463: 34 A. I. R. 1947 Oudh 45: 226 I. C. 154, Deputy Commr. in Charge, Jhandi.
27. ('90) 17 I. A. 82: 18 Cal. 1 (P. C.), Haidar Ali v. Tassaduk Rasul Khan.
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31. ('38) 25 A. I. R. 1938 P. C. 228: 32 S. L. R. 886: 176 I. C. 1 (P. C.), Nathu Ramu v. Ganga Bai.
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33. ('08) 11 O. C. 256, Rajendra Bahadur Singh v. Rani Raghubans Kunwar.
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45. ('14) 41 I. A. 275: 1 A. I. R. 1914 P.C. 76: 42 Cal. 582: 25 I. C. 417 (P. C.), Ekradeshwar Singh v. Mt. Janeshwari Bahuasin.
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60. ('13) 40 I. A. 40: 35 All. 80: 16 O. C. 129: 18 I.C. 30 (P. C.), Suraj Narain v. Ikbal Narain.
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72. ('97) 24 I. A. 118: 20 Mad. 256: 7 Sar. 185 (P. C.), Lakshmi Devi Garu v. Surya Narayana.
73. ('26) 53 I. A. 220: 13 A. I. R. 1926 P. C. 100: 48 All. 529: 29 O. C. 316: 1 Luck. 389: 98 I. C. 1013 (P. C.), Nirman Singh v. Lal Rudra Partab Narain Singh.

Niamat Ullah, Naim Ullah and Naim Ullah — for Appellant.

M. Wasim, F. Ali and Ali Hasan; and Hasan Mussama — for Respondents Nos. 1 & 2, respectively.

Judgment. — The suit out of which this appeal arises relates to the property described in various lists given in schedule B and commonly known as Taluqa Haswar. Babu Narendra Bahadur Singh the last person in possession of the Taluqa, died issueless on 4-2-1936. List A of schedule B comprises by far the most valuable portion of the estate, namely, the villages situated in the Fyzabad district. In lists B to D are entered shares in villages situated in the Azamgarh, Basti and Gorakhpur districts (i. e., properties outside Oudh). Lists E, F, H and J give the movable properties: list G is a list of papers and documents and list I is a list of house properties.

[2] The original plaintiff, Babu Jai Narain Singh, was a brother of Babu Narendra Bahadur Singh. On his death on 12-1-1938, his three sons appellants 1 to 3 were substituted as plaintiffs by an order, dated 3-8-1938.

[3] Defendant 1 is Babu Jitendra Mohan Singh, the eldest son of Babu Inder Bikram Singh, a younger brother of Babu Narendra Bahadur Singh who predeceased him. It is agreed that Babu Inder Bikram Singh was older than Babu Jai Narain Singh. Rajendra Mohan Singh, the younger son of Inder Bikram Singh, is not a party to the suit. Defendant 2, Thakurain Bind Basni Kunwar, is the widow of Babu Narendra Bahadur Singh.

[4] During the pendency of the appeal in this Court the three plaintiffs appellants being unable to provide funds for the prosecution of the appeal, sold a portion of their rights to Kunwar Rabi Indra Bahadur Singh, who has now been impleaded as appellant 4.

[5] The suit was filed in this Court on its original side. Later on, this Court ceasing to possess ordinary original civil jurisdiction, the suit was transferred to the Court of the Additional Civil Judge of Fyzabad and he has disposed of it by the judgment under appeal.

[6] In order to elucidate the pleas of the parties and the facts of the case it is necessary to give a pedigree of the family Since one of the principal questions which we will have to decide is whether an alleged custom of single heir succession has been established the pedigree which we give below is much fuller than that given by the trial Court. This pedigree is no longer in dispute though the learned counsel for respondent 1 contends that it is not complete.

PATRAJ DEO

- Jobraj Hem Deo (He is mentioned in the Fyzabad Settlement Report as Bheem Deo and is said to have become a hermit.)
- Man Deo
- Nar Singh Deo
  - Dalip Deo
    - Purohit Deo
      - Karan Deo
        - Dulah Deo
          - Ram Deo
            - Pitam Deo
              - Mahraj Deo
              - Sukat Deo
              - Bharat Deo (He is mentioned in the Settlement Report as the second son of Patraj Deo)
                - Gohraj Deo
                - Sukhraj Deo
                - Gaudhan Sah
                - Ganpat Sah
                - (Illegible)
                - Khanmal Sah
                - Indarjit Sah
                - Bhulamman Sah
                - Uchit Sah
                - Rahman Sah
                - Bali Ram
                - Horal Singh
                - Ain Singh
                - Lashkar Singh
                - Jubraj Singh
                - Ganjan Singh (D. S. P.)
                - Jaisuri Singh
                - Fateh Singh (D. S. P.)
                - Harbans Singh
                - Mani Ram (His descendants are alive)
- Har Har Deo (The pedigree of this branch is given opposite to page 201 of the Fyzabad Settlement Report.)

Pitambar Sen

Adal Singh

Lalji

Ranjit Singh (D. S. P.)

Pahalwan Singh

Gur Prasad (D. S. P.)

Bhawani Singh

Sarabjit Singh

Paltan Singh

Meharban Singh

Pirthipal Singh

Sheo Dutt Singh (D. S. P.)

Hakim Singh

Issuri Dayal Singh

Parshad Singh

Sheo Prakash Singh

Udit Kumar Singh

Sital Prasad Singh (D. S. P.)

Mahip Narain Singh

Jagat Narain Singh (D. S. P.)

Sheo Dayal Singh

Durga Dayal Singh (D. S. P.)

Jit Bahadur Singh (D. S. P.)

Raghunath Singh

Sarabdoon Singh

Daljit Singh (D. S. P.)

Ram Manorath Singh

Panwar Singh (D. S. P.)

Pirthi Pal Singh

Ran Bahadur Singh (D. S. P.)

Narain Dutt Singh (D. S. P.)

Munna Singh

Madho Prasad Singh

Kishen Prasad Singh
(His descendants are alive)

Har Dutt Singh

Gopal Saran Singh

Raj Bahadur Singh

Suraj Bali Singh
(D. S. P.)

Girdhariji

Jagatdhariji

Rasikbehariji

Babu Narendra Bahadur Singh:Thakurain Bind Basni Kunwar (Deft. 2).

Inder Bikram Singh alias Babban Sahib (dead)

Jai Narain Singh alias Deo Narain alias Lallan Sahib

Jitendra Mohan Singh alias Behariji (Defendant 1).

Rajendra Mohan Singh alias Banwariji

Parbhu Narain alias Baldeoji (Plaintiff 1)

Debi Prasad alias Lalji (Plaintiff 2)

Bhagwati Prasad alias Hiraji (Plaintiff 3).

[7] The ancient history of the family, resting, as it does, upon tradition, is somewhat confused but, so far as it can be gathered from EX. A-20 and the Fyzabad Settlement Report, it is as follows :

Patraj Deo was the first ancestor of the family to migrate, about 700 years ago, to Fyzabad where he settled down in village Rannupur, pargana Surhurpur. He was Sombasi Thakur but since the place of his origin was Pali, about the locality of which there is some uncertainty, his descendants came to be known as "Palwars." The tradition goes that Patraj Deo took service under the Rajbhars, who then ruled in this part of the country, and he attained to a considerable position under them, being entrusted with the management of 96 villages constituting tappas Tardi and Khurka. During his time the Bhars ceased to rule and Patraj Deo engaged for the revenue of those 96 villages with the Muslim Government established at Delhi. He is said to have acquired later parganas Kauria, Tilheni, Ahraula and Dadar-Kariat, in the Azamgarh district.

[8] The Settlement report states that Patraj Deo had two legitimate sons, Bheem Deo and Bharat Deo (the latter is shown in EX. A-20 not as the son of Patraj Deo but as being eighth in descent from him), a son from the daughter of a fairy, Har Har Deo, and some illegitimate sons. The eldest, Bheem Deo, became a hermit. The second son obtained parganas Kauria and Tilheni (in district Azamgarh) : Har Har Deo got tappas Tardi and Khurka in pargana Surhurpur, district Fyzabad, where his descendants still hold several estates, including two Taluqas Tigra and Murerah. The rest of Patraj Deo's property, went to his illegitimate offspring whose descendants still flourish in the Azamgarh district.

[9] The tradition proceeds that, about 120 years later, Gohraj Deo, ninth in descent from Patraj Deo, left his ancestral home in Azamgarh and migrated to pargana Birhar, district Fyzabad, where he took up his residence in village Pokarbhita. It is said about him also that he took service with the Bhars, though this is inaccurate because the Bhars had ceased to rule much earlier, and that he himself, or he and his descendants acquired tappas Sati, Barohi and Haveli comprising 302 villages. About 360 years ago, Bali Ram and Mani Ram, the two sons of Rahman Sah divided the estate between them, half and half. If the chronology is correct, this would probably be in the reign of the Emperor Akbar. Later, there was a division between Ain Singh and Lashkar Singh. It is said that this was about 150 years after the partition between Bali Ram and Mani Ram but that period of time cannot have elapsed between the two partitions because Ain and Lashkar were the grandsons of Bali Ram and cannot have lived so long after him.

[10] About 150 years after the division between their ancestors, i. e. about the time of the death of the Emperor Aurangzeb when disorders had commenced it seems that the descendants of Maniram were ousted from all but a few villages, which they continued to hold till the annexation, and the descendants of Bali Ram again entered into possession of this property also. The various members of the family continued to possess the property till in 1261 Fasli (1854) Madho Prasad Singh and his brother, Kishen Prasad, divided the property of Ain Singh's branch between them. The property of Lashkar Singh's branch was also held by two persons, Sheo Prakash Singh and Mahip Narain Singh. At the time of the second summary settlement the estates in the possession of these four persons were settled with them and later when Act 1[I] of 1869 was passed the names of them all were entered in lists I and III of the lists prepared under S. 8 of the Act. The estate shown against them all is Birhar.

[11] Although Babu Madho Prasad Singh had died in 1862 before the Act was passed his name is entered in lists I and III at Nos. 142 and 57 respectively. The questions as to whether he got a sanad, and if so, what its nature was are questions which arise in this appeal and must be decided. It is also a point in dispute whether Madho Prasad Singh's eldest son, Har Dutt Singh alone or all his three sons succeeded him It is not disputed that Suraj Bali Singh the youngest son died issueless, probably when still quite young. It is also not disputed that Gopal Saran Singh and his heirs are not in possession of any of the Oudh properties appertaining to Taluqa Haswar, though the parties do not agree as to whether they never succeeded or whether for some reason or other, they were subsequently excluded. They are no parties to this litigation and anything that we might say in the course of this judgment will not affect any rights which they may have. Har Dutt Singh died in about 1892 and Babu Narendra Bahadur Singh entered into possession of the property of which he had been in possession.

[12] On the death of Babu Narendra Bahadur Singh, the usual disputes arose as to the mutation of names, Jai Narain Singh, Jitendra Mohan Singh and Thakurain Bind Basni Kunwar being the rival claimants. On 28th October 1936 the Sub-Divisional Officer of Tanda district Fyzabad, ordered mutation in favour of Babu Jai Narain Singh who thereupon obtained possession of all the immovable property. The order was, however, set aside in appeal by the Deputy Com-

missioner, Fyzabad, on 12th June 1937 and mutation was ordered in favour of Babu Jitendra Mohan Singh. This order was upheld by the Commissioner of Fyzabad on 3rd July 1937.

[13] On 6th July 1937 Babu Jai Narain Singh instituted the suit out of which this appeal arises for a declaration of his title to the entire property. He died on 12th January 1938 and as already stated, his three sons were brought on the record as plaintiffs.

[14] On 27th September 1938 the substituted plaintiffs applied for permission to amend the plaint. This permission was granted and the amendments were made. It is not necessary at this stage to give the case originally set up by Babu Jai Narain Singh or by this amendment because the new plaintiffs considerably changed their position again in the course of their oral pleadings. The case finally taken up by them was that Madho Prasad Singh was the absolute owner of the property since he alone obtained it after the confiscation effected by Lord Canning's Proclamation, but that on his death it descended, according to Hindu Law unchanged by any custom on all his descendants then in existence and it has been governed by the Hindu Law ever since. It was pleaded that, as laid down in 31 I. A. 30,[1] the entry of Babu Madho Prasad Singh's name in lists I and III prepared under S. 8 of Act 1 [I] of 1869 cannot affect the rights of persons who had already acquired them before the Act was passed. The plaintiffs also pleaded that Babu Jai Narain Singh was the preferential heir under Act 1 [I] of 1869 and that, in any case, all the property was not governed by that Act.

[15] Defendant 1 pleaded that Madho Prasad Singh received, jointly with the other three Birhar Taluqdars, a Taluqdari and later a primogeniture sanad for all the property of which the second summary settlement had been made with him, and that the death of Babu Madho Prasad Singh before the passing of Act 1 [I] of 1869 makes no difference to his status and his rights. It was also pleaded that there was a custom of single heir succession according to the rule of male lineal primogeniture prevailing in this family and that Babu Madho Prasad Singh had made a will in favour of Har Dutt Singh, so that the latter alone succeeded to all the property left by his father. This defendant further alleged that all the other members of the family had accepted the sole title of Har Dutt Singh so that in any case, when Act 1 [I] of 1869 was passed he was the sole person having title and the effect of applying Act 1 [I] of 1869 retrospectively would not be to divest any rights. In any case, it was pleaded, Babu Har Dutt Singh and the other three Birhar Taluqdars, obtained fresh primogeniture sanads in 1873 and those operated as Government grants which regulate succession to the estate left by them. Thus, on the death of Babu Har Dutt Singh in 1892, his eldest son, Narendra Bahadur Singh alone succeeded to all the properties left by him (a) under Act 1 [I] of 1869, (b) the joint primogeniture sanad, (c) family custom of single heir succession according to the rule of male lineal primogeniture, (d) according to the sanad of 1873 and (e) as the senior-most person entitled under the custom of impartibility. Defendant 1 claimed exclusive title in himself on the same grounds (except the last) and he claimed non-taluqdari property under the custom of single heir succession according to the rule of male lineal primogeniture by virtue of which females were excluded from inheritance. In oral pleadings he added that, in any case, Babu Jai Narain Singh had separated from Babu Narendra Bahadur Singh while he himself and his father had remained joint and that consequently Jai Narain Singh could not succeed in preference to him.

[16] Defendant 2 denied that the second summary settlement of any of the properties had been made with Babu Madho Prasad Singh or that his property was governed by Act 1 [I] of 1869 or any sanad. She also denied that Narendra Bahadur Singh was a member of a joint family it being alleged that he had separated both from Jai Narain Singh and Inder Bikram Singh in 1892 or, at any rate, in 1935. She claimed title in herself on the death of Narendra Bahadur Singh as his widow. She pleaded that, at any rate, so far as the movables and the other property found to be non-taluqdari were concerned, she alone was entitled to succeed. She further, pleaded that, during mutation proceedings, there had been a settlement between her and defendant 1 which was binding on both of them and that she was entitled to the property assigned to her by that settlement; but, if defendant 1 could lawfully resile from that settlement, then she alone should get all the property, movable and immovable, left by her deceased husband.

[17] Upon the pleadings of the parties Hamilton J. framed the following issues :

"1. Was all or any of the immovable property in suit ancestral property of a joint Hindu family on the death of Madho Prasad Singh?

2. Was all or any of the immovable property in suit, property subject to -

(1) a custom of male lineal primogeniture,

(2) a taluqdari sanad,

(3) a primogeniture sanad in the name of Madho Prasad Singh and three others,

(4) a subsequent primogeniture sanad in the name of Har Dutt Singh and

(5) the Oudh Estates Act and amending Act

(a) because of a declaration having the force of a will alleged to have been made by Madho Prasad Singh in favour of Har Dutt Singh,

(b) because of the entry of the name of Madho Prasad Singh in lists I and III prepared under the Oudh Estates Act, and

(c) because Har Dutt Singh was the heir of Madho Prasad Singh before the Act came into force.

3. If there was a joint Hindu family holding ancestral property were either Inder Bikram Singh or Jai Narain Singh or both and their descendants excluded ?

(a) by partition by consent between Narendra Bahadur Singh and them, and

(b) by Narendra Bahadur Singh depriving them of their rights for more than 12 years ?

4. If Madho Prasad Singh was not a Taluqdar did the estate nevertheless pass absolutely to Har Dutt Singh by virtue of the will alleged to have been executed by Madho Prasad Singh in his favour ?

5. Did the exclusion of Gopal Saran Singh result in the application of the Oudh Estates Act to the estate then in the possession of Har Dutt Singh ?

6. Was Babu Jai Narain Singh born in 1868 and did he by birth acquire an interest in the movable and immovable property in suit which could not be divested by Act 1 [I] of 1869 or otherwise ?

7. Were Babu Jai Narain Singh and the plaintiffs members of a joint Hindu family with the late Babu Narendra Bahadur Singh and was all or any of property in suit movable and immovable ancestral joint family property of Babu Jai Narain, the plaintiffs and Babu Narendra Bahadur Singh at the time of the latter's death ?

8. Are the plaintiffs not entiled to the movable property because succession thereto on the deaths of Madho Prasad Singh, Har Dutt Singh and Narendra Bahadur Singh was governed by the custom of single heir succession as alleged by defendant 1 ?

9. In view of the decisions of the preceding issues to what relief, if any, are any or all of the plaintiffs entitled as regards (1) landed property, (2) houses, and (3) movable property."

[18] After the issues had been framed the suit was transferred to the Additional Civil Judge, Fyzabad who disposed of it by a long and elaborate judgment, dated 31st May 1940. Some of his findings are somewhat confused and inconsistent but his principal findings are as follows :

"1. That the second summary settlement was made with Madho Prasad Singh in respect of the property entered in Ex. A-2 separately from the other Birhar Taluqdars and he executed a separate kabuliat. By reason of the Governor-General's letter of 10th October, 1859, he became the sole and absolute proprietor of this property and must be considered to be a Taluqdar within the meaning of Act 1 [I] of 1869.

2. That Kishen Prasad Singh attended the Governor-General's Darbar on 26th October 1859, on behalf of the four Birhar Taluqdars and received a Taluqdari sanad on their behalf.

3. That this sanad was subsequently revised on 9th November 1860, by the addition of a clause providing for succession according to the rule of primogeniture.

4. That the question of granting a separate sanad to each of the four Birhar Taluqdars, as distinct from their conjoint sanad was under the consideration of the authorities from before November, 1860, and the sanads were acually granted in 1873.

5. That, by reason of the entry of the name of Babu Madho Prasad Singh in list III, there is a presumption that a primogeniture sanad was granted to him although the presumption may be rebutted.

6. That, in the present case the presumption arising from entry in list III has not been rebutted and it has not been shown that the entry was made by mistake.

7. That on the death of Madho Prasad Singh, Har Dutt Singh alone succeeded to the estate and Gopal Saran Singh and Suraj Bali Singh did not get any share.

8. That, by reason of the application of the Act, the sanad and the custom of single heir succession, there was no joint family property.

9. That, if there was any such joint family then Inder Bikram Singh, Jai Narain Singh and their descendants were not excluded by Narendra Bahadur Singh.

10. That the plaintiffs had themselves set up a custom of impartibility and defendant 1 had only to prove that succession was according to the rule of primogeniture.

11. That the course of devolution for over 700 years proves that the estates always descended to a single heir and whenever there was any departure from this rule it was due to extraneous causes and was not in recognition of any right existing in others.

12. That the custom of single heir succession according to the rule of male lineal primogeniture is proved.

13. That, in spite of the fact that his name is not mentioned in it, Ex. A-8 operates as a will in favour of Har Dutt Singh.

14. That even if unamended Act 1 [I] of 1869 did not apply, Act 3 [III] of 1910 made it applicable.

15. That Madho Prasad Singh's name having already been entered in the joint sanad, the sanad in favour of Har Dutt Singh, Ex. A-126 did not have the effect of depriving any one of title and consequently, the whole title being vested in him, it was open to Har Dutt Singh to surrender his estate and accept it under new conditions relating to succession.

16. That out of the property entered in list A of schedule B, villages Bhitaura, Bhagwanpur, Manjharia, Parsauli, Chak Makraha, Rasulpur Dargah and Paharpur are not Taluqdari but all the 'Manjhas' entered in list "A" must go with the villages to which they appertain."

[19] As a result of these findings the learned Additional Civil Judge held that none of the plaintiffs was entitled to claim any share of the property left by Narendra Bahadur Singh and dismissed the suit. The plaintiffs have come up in appeal and they, and respondent 2, contend that no portion of the property is governed by Act 1 [I] of 1869 or by any custom of single heir succession. The appellants claim half the property to the exclusion of respondent 2, the widow, on the ground that Narendra Bahadur Singh was a member of a joint Hindu family while respondent 2 claims that Narendra Bahadur Singh died as a separated member and she alone is entitled to the property left by him.

[20] The appellants' learned counsel supports his contention that the Act does not apply on two grounds:—(a) that Madho Prasad Singh did not in fact receive a primogeniture sanad and the entry of his name in list III is ultra vires; and (b) in any case the effect of applying the Act in this particular case would be to divest Gopal Saran Singh, Suraj Bali Singh and other members of the family of rights which they had acquired on the death of Madho Prasad Singh in 1862 and this cannot be allowed.

[21] The learned counsel for respondent 1 on the other hand contends that the Act has retrospective effect even if it does divest rights and secondly that in the present case no rights are divested because Har Dutt Singh alone the heir under Act 1 [I] of 1869, had succeeded to Madho Prasad Singh under: (a) a primogeniture sanad governing succession; (b) a will executed by Madho Prasad Singh in his favour; and (c) a custom of lineal primogeniture prevailing in the family.

[22] In view of these contentions, the first thing which we are called upon to determine is whether Act 1 [I] of 1869 can be given retrospective operation so as to govern the property left by Madho Prasad Singh, even if the effect of this would be to divest rights which had already vested.

[23] The general rule is that "it is not, however, in accordance with sound principles of interpreting statutes to give them retrospective effect" vide 31 I. A. 30[3] at p. 37 or in other words :

"It is a maxim that affirmative words in a statute without any negative expressed or implied do not take away existing rights :" vide 1 I. A. 282[2] at p. 306.

What has, therefore, to be determined is whether there is anything in Act I of 1869 which takes it out of this general rule and gives it retrospective effect.

[24] The first case which has an important bearing on this point is the Maurawan case, 3 I. A. 259.[3] There the estate of one Chandan Lal had been exempted by the Proclamation of Lord Canning from confiscation but since he had died before the Proclamation was issued, it was held that the name of Chandan Lal was used as a generic term to denote the joint family composed of his descendants. The summary settlement of this property was, however, made only with one of his sons, Gauri Shankar, and a sanad was granted to him. Gauri Shankar died before the Act was passed but, after the Act had come into force, his sons claimed the whole property as belonging to their father. Their Lordships of the Judicial Committee said (at pp. 269-270) :

"As regards, therefore, the estates which were exempted from confiscation, the sunnud and summary settlements were a mere grant by Government to one member of the family of property which belonged to the family jointly. They could not of themselves affect the rights of the family."

Their Lordships then proceed, on page 271, to consider the effect of the Act upon the rights of the parties and they say that, since summary settlements were made with Gauri Shankar between the dates specified in S. 3, and a talookdari sunnud was granted to him before the passing of the Act, he must

"in consequence of the Act, be deemed to have acquired a permanant, heritable and transferable right in the estates to which the suit relates."

Their Lordships proceeded further and held that though Gauri Shankar had died in 1865 before the Act was passed he possessed a power of alienation by virtue of Ss. 11, 14 and 15 of the Act and that he had exercised this power in favour of the joint family. Thus, in the result, although the rights of the joint family were held to have ceased by reason of the Act, they were also held to have been restored to it by reason of the action of Gauri Shankar under the Act, and the position was the same as if no retrospective effect had been given to the Act.

[25] The next case to which we will refer is that in 4 I. A. 178.[4] The suit was commenced in August 1865 against Jawahir Singh, whose name was subsequently entered in the lists prepared under S. 8 for a share of Taluqa Basaidih, the summary settlement in respect of which had been made with him and a sanad had been granted to him. The suit remained pending till 1869 when, besides the letter of 10th October, 1859, Act I of 1869 was also pleaded as a bar. This plea was accepted by the Settlement Officer. In appeal their Lordships of the Judicial Committee, after commenting adversely on the irregularity of the proceedings of the Settlement Officer in not deciding the case earlier, say, at page 192 :

"If the Settlement Officer had acted at once upon his own judgment, instead of referring for instructions or orders, the probability is that his judgment would have been given before Act 1[I] of 1869 was passed, and in that case he might have come to a different conclusion. Be that as it may, their Lordships must deal with the case as they now find it. The question is : Is the plaintiff entitled to any and what share or beneficial interest in the estate, or is his claim barred by Act No. 1[I] of 1869 ?"

Upon this point their Lordships held that, by reason of the Act, Jawahir Singh had become the absolute owner but they further held that he could by reason of the provisions of the Act, have transferred a beneficial interest to Hardeo Bux Singh and others and consequently the case was remitted to the Courts in India for a determination of the question whether he had done so. Thus in this case again, though their Lordships gave retrospective effect to the Act, the same result would have followed by accepting the letter of 10th October 1859, as conferring title upon sanad-holding Taluqdars, as has been done in so many other cases.

[26] The two cases to which we have just referred appear to support the argument of the learned counsel for respondent 1 but, in subsequent cases, their Lordships of Judicial Committee have not accepted the proposition that these cases in fact held that Act I of 1869 applies retrospectively so as to divest vested rights.

[27] In 31 I. A. 30[1] the name of Murtaza Bakhsh who had died in 1865, admittedly without having received a sanad of any sort was entered in lists I and III prepared under S. 8 of Act 1[I] of

1869. After the death of his widows, a contest arose between his heirs if Act 1 [I] of 1869 had been in force at the time of his death and the successors of the persons who claimed to have succeeded on the basis that the Act was not applicable. The Subordinate Judge held that the entry of Murtaza Bukhsh's name in the lists was ultra vires and of no effect, that Murtaza's mother on succeeding to the estate held it as absolute owner that, on the mother's death, the two widows held equal halves as absolute owners and that on their death the estates descended to their heirs under the Islamic Law. On appeal the Judicial Commissioners upheld this decision and on further appeal their Lordships of the Judicial Committee say :

"Their Lordships have no hesitation in affirming it. The whole case turns on the entry of Murtaza Bakhsh's name in two of the lists ordered to be made by the Act of 1869. Section 10 of the Act compels the Courts to regard such lists as conclusive evidence that the persons named therein are taluqdars or grantees within the meaning of the Act. When the lists referred to are looked at, it will be found that there are six lists : See S. 8. Murtaza Bakhsh's name is in the first and third. The entries, therefore, by Ss. 8 and 10 are conclusive evidence (1) that he is to be considered as having been a taluqdar within the meaning of the Act: see Ss 2, 8, list I; and (2) that he was a taluqdar to whom a sanad had been made declaring that the succession to the estates comprised in it should be regulated by the rule of primogeniture: see Ss. 2, 8, list 3. These enactments are clear and peremptory, and would be decisive if they applied to this case.

It is not, however, in accordance with sound principles of interpreting statutes to give them a retrospective effect. The Court cannot construe Ss. 8 and 10 so as to deprive the successors of the estates of a person who had died before those sections came into operation of rights which they acquired on his death. Entries of the names of deceased persons in the lists mentioned in S. 8 do not appear to have been contemplated by the Act, but such entries have no doubt been made and they are practically harmless if the names were already in former lists made under the Order in Council, or if the entries do not alter the previously acquired rights of any one. This was the case in 11 I. A. 51.[5] But no decision has been referred to which supports the contention that the entry of the name of a person who died before the Act came into force can divest rights previously acquired on his death. In this case the death occurred in 1865, and the successors then acquired their right under the ordinary Mahomedan law. The Oudh Estates Act did not come into operation until 1869; and to construe its provisions as altering the succession would be not only unjust but plainly contrary to well-settled legal principles."

[28] The report of the arguments shows that the case in 3 I. A. 259[3] was placed before their Lordships and yet their Lordships say :

"But no decision has been referred to which supports the contention that the entry of the name of a person who died before the Act came into force can divest rights previously acquired on his death."

Thus this case is clear authority for the proposition that Act 1 [I] of 1869 will have retrospective operation if it does not have the effect of divesting rights which had already vested, although it will have no retrospective effect if there is divesting. The distinction drawn in this case has subsequently been maintained : vide 60 I. A. 103[6] at p. 111 and 65 I. A. 137.[7]

[29] There are other cases too in which although the person whose name appeared in the lists prepared under S. 8 had died before the commencement of the Act, it was held that the Act continued to govern succession to the property: vide 11 I. A. 51,[5] 20 I. A. 77[8] and 1935 O. W. N. 178[9] at p. 181. The view of their Lordships was very clearly stated in 43 I. A. 269[10] at pp. 276-277 in the following words :

"As already observed, a summary settlement of the Government revenue had been made with Jamshed Ali Khan on 22nd Jaunary 1859, a taluqdari sanad had been granted to him on 17th October 1861, and his name was entered as a taluqdar in the first of the lists. He had acquired, as declared by S. 3, 'a permanent heritable and transferable right' in his estate and was unquestionably a taluqdar within the meaning of the Act. His death before the Act was passed into law makes no difference in his status or in his right."

Their Lordships not only held succession to be governed by the Act but also raised the presumption as to a custom of single heir succession on the basis of an entry in list II.

[30] Basing himself on some remarks of the Judicial Committee in 31 I. A. 30[1] contained in the passage we have quoted the learned counsel for the appellants contended that the entry of the name of a person who had obtained no primogeniture sanad in list III prepared under S. 8 was ultra vires. Those remarks cannot be read apart from the context and the rest of the report shows that in spite of the fact that it was agreed that a sanad had been refused in that case, their Lordships would have considered themselves bound to presume the grant of a primogeniture sanad if the Act had in fact applied to the case. They say :

"The entries, therefore, by Ss. 8 and 10 are conclusive evidence (1) that he is to be considered as having been a taluqdar within the meaning of the Act: see Ss. 2, 8, list I; and (2) that he was a taluqdar to whom a sanad had been made declaring that the succession to the estates comprised in it should be regulated by the rule of primogeniture; see Ss. 2, 8, list 3. These enactments are clear and peremptory, and would be decisive if they applied to this case." : see 31 I. A. 30[1] at pp. 36-37.

[31] Reliance was also placed upon 16 I. A. 71[11] and 54 I. A. 5.[12] In the former case the name of the father to whom a primogeniture sanad had been granted and who had died before Act 1 [I] of 1869 was passed was entered although the summary settlement had been made with the sons, who had originally received the sanad. Thus even if the father, Dariao, was assumed to be a Taluqdar, there would be no property of which he would be owner and the entry of his name in lists prepared under the Act would

have no practical result. It was in these circumstances that their Lordships said that they would attach no importance to the proceedings by which the name of Dariao was entered in the lists. In the second case mentioned, in view of the words of S. 10 and of other decisions of their Lordships to which we will hereafter refer, we are constrained to hold that their Lordships, when they say : "In the absence of any evidence to show that Bhagwant's name was wrongly inserted in list III his inclusion in that list is ..... conclusive evidence that the sanad he obtained was a primogeniture grant," had in mind a case of the nature of 16 I. A. 71.[11]

[32] We have already pointed out that their Lordships held in 31 I. A. 30[1] which was a case relating to an entry in list III, that the entry in the lists prepared under S. 8 Act 1 [I] of 1869 is conclusive evidence if the Act applies. In 43 I. A. 269[10] at p. 280, in which case also the person entered in the lists had died before the Act 1 [I] of 1869 was passed, their Lordships say :

"This does not mean that they shall be conclusive merely as to the fact that the persons entered therein are taluqdars as defined in S. 2. In their Lordships' opinion the provision of S. 10 goes much further; it means that the Courts shall regard the insertion of the names in these lists as 'conclusive evidence' of the fact on which is based the status assigned to the persons named in the different lists. For example, in list 2 such Taluqdars alone are included whose estate, according to the custom of the family 'on and before 13th February 1856' (the date of the first annexation of Oudh), 'ordinarily descended upon a single heir.' their title to have their names inserted in that list is based on the specific family custom set out in the section. Under S. 10 the Courts are bound by the statute to regard as conclusive the fact that there was such a pre-existing custom attaching to these estates on which their inclusion in list 2 was based."

In the same way in the case of an estate entered in list III if the Act is applicable, the Courts must presume that a primogeniture sanad had been granted and it is not open to them to hold that the entry was ultra vires. See also 26 I A. 194,[13] 55 I. A. 303[14] and 59 I. A. 1[16] at p. 6 which were all cases relating to list II estates.

[33] A consideration of the decisions of their Lordships of the Judicial Committee leads us to the conclusion that Act 1 [I] of 1869 is given retrospective effect unless the effect of doing so would be to divest rights which had already vested in some person other than the person entitled to get them by virtue of the provisions of Act 1 [I] of 1869 and that, in case the Act is applicable, a conclusive presumption arises not only that the person entered in the lists is a Taluqdar but that the fact upon which his entry in the lists is based also exists that is to say in this case that Madho Prasad Singh was a Taluqdar to whom a primogeniture sanad was granted. This brings us to the second part of respondent 1's argument, namely that the effect of applying the Act in the present case would not be to deprive any one of rights which were already vested in him. We shall first take up for consideration the question whether there did in fact exist any sanad which governed succession to Madho Prasad Singh in 1862 The presumption arising out of the entry in list III will not stand in the way of such an enquiry in this case any more than it stood in the way of their Lordships not relying upon any primogeniture sanad in 31 I. A. 30[1] since this enquiry is directed to ascertain whether any rights are divested or not by the application of Act 1 [I] of 1869 or in other words, whether the Act has application to this case or not.

[34] The appellants maintain that no sanad of any sort was granted whilst respondent 1 contends, not that Madho Prasad Singh obtained any separate sanad for himself but that he obtained a conjoint sanad with Kishen Prasad Singh and the other Birhar Taluqdars to which a primogeniture clause was subsequently added.

[35] The first objection taken by the appellants' learned advocate is that a departure has been made from the position adopted by respondent 1 in his pleadings with regard to the grant of a joint sanad. In the pleadings it was stated, "a joint Taluqdari sanad and later a primogeniture sanad was granted" (vide paragraph 18 of defendant 1's written statement and the proceedings of 27th January 1939), while at the time of opening his case, and throughout thereafter the position taken has been that "in the joint Taluqdari sanad which had been given to Babu Kishen Prasad Singh a primogeniture clause was added as a supplementary clause. The original sanad was revised on 9th November 1860." It is contended that this is a material departure from the pleadings since the allegation that two sanads were granted was changed to one that one sanad only was granted and that that was later revised. Consequently, it is argued, the Court should, in view of O. 6, R. 7, Civil P. C., not allow this departure and should ignore the subsequent plea. The learned Additional Civil Judge overruled this objection.

[36] In the present case the nature of the respondents' defence was made perfectly clear and it was not a very material fact whether there were two different sanads or one to which a clause was added. The respondent could have no personal knowledge of the facts and whatever information he had was derived from the documents which are all now before us. The issue framed No. 2 (3), was sufficiently wide to cover the case now set up and all the documents relating to the grant of sanads are before the Court so that no prejudice has been caused to

the plaintiffs. Thus the objection was rightly overruled.

[37] We may, in support of our view, advantageously refer to the decision of the Judicial Committee in 32 I. A. 203.[16] In that case the appellant had based his title upon a custom excluding females and upon the application of ACT 1 [I] of 1869. Both these points were decided against him by the Courts in India and before their Lordships he set up a third case, namely, that succession was regulated by a primogeniture sanad. Their Lordships overruled the objection that this was setting up a new case and allowed the appeal on the new plea. They say at page 212 :

"With regard to the case as now presented on behalf of the appellant it was objected in the first place that this was a new case ..... that in his written statement in this suit no sanad to Girwar is mentioned; and that no specific issue was settled as to such a sanad. And all this is true. But the issues as settled were sufficiently wide to cover the case now presented. And what is of more moment from an early stage of the case down to the latest, all parties appear to have been alive to the importance of such a document if it was in fact granted, and if its contents could be ascertained..... Each Court considered both the question of the grant of the alleged sanad and its legal bearing upon the rights of the parties.

Their Lordships are satisfied that the respondents are not unfairly taken by surprise by the manner in which the case is now presented and that there is no danger of doing injustice by disposing of this appeal upon that footing."

[38] We come then to the merits of the question and it becomes necessary to determine, (a) whether a taluqdari sanad was issued to Babu Madho Prasad Singh conjointly with the three other Birhar Babus and (b) whether the joint sanad was subsequently transformed into a primogeniture sanad. In support of his case that no sanad at all was issued to Babu Madho Prasad Singh, the appellants' learned advocate relies upon EXS. 24, 25, 148, A-66, 26 and A-101.

[39] Madho Prasad Singh died on 12th November 1862 and proceedings for the mutation of names took place. On 24th January 1863 the Deputy Commissioner ordered mutation in favour of Har Dutt Singh as *talukdar*. A copy of this order was forwarded to the Commissioner and on 5th February 1863 the Commissioner, Mr. Simson, approved of mutation being made but wrote :

" ..... You should not have recorded Har Datt Singh as a Taluqdar and you are now clearly to give him and all concerned to understand that he is not yet recognised as such."

He also says, in paragraph 3 :

" ..... You could have ascertained from your office that the Chief Commissioner deferred giving him a sunnud with the Taluqdars of the District because there are doubts how far 'this is a Taluqa: vide Ex. 24.'"

A copy of this letter was forwarded to the Chief Commissioner (Ex. 25) and it does not appear to have elicited any comments from him—at least none have been filed in this case. This letter clearly indicates that not only had Madho Prasad Singh not received any sanad so long as he lived but that it was even considered doubtful whether his estate was taluqa.

[40] The next document to which reference is made is EX. 148. From this it appears that in 1863 a sanad was forwarded to the Deputy Commissioner for delivery to Kishen Prasad. The Deputy Commissioner, Mr. Carnegy, considered that this had been done by an oversight and pointed this out to the Commissioner, Mr. Simson who acknowledged the mistake and wrote :

"(2) Whether the Birhar estates are or are not Taluqas is a question of tenure which must be enquired into and settled in the Settlement Department as no further correspondence exists on the subject in this office.

(3) I am inclined to think that the Chief Commissioner's doubts on the subject were raised by the frequent partitions of estates between members of the same family which has occurred in Birhar, which is not ordinarily an incident of the tenure of Taluqdaree estates in Oudh.

(4) But other proprietors in Fyzabad and elsewhere in whose family partitions of inherited land have occurred have been recognised as Taluqdars, and I consider the question an open one to be enquired into and reported on in the Settlement Department for the Chief Commissioner's orders."

This letter supports the Commissioner's remarks in EX. 24 and it also shows that although the sanad in the name of Kishen Prasad Singh had been prepared to be issued, it had not been issued till April 1863, i. e., the date of the sanad is not necessarily the date of its issue (vide also Chief Commissioner's Circular NO. 154/3431, dated 26th September 1860 —EX. A-155) and 16 I. A 71.[11]

[41] The next series of papers relates to proceedings in the settlement Courts in a suit instituted by Seetal Parsad against his brother, Sheo Prakash Singh, for a share in the estate settled with him. From EX. A-66 it appears that the case took a very tedious course but at no stage did Sheo Prakash Singh set up any sanad as a bar to the claim nor did the settlement officer in accordance with the directions contained in Circular NO. 2 of 1851, dismiss the suit summarily as being barred by a sanad. At one stage it had been ordered that Sheo Prakash Singh and his two brothers should each get 1/3rd of the estate but this order was set aside by the Commissioner and the Chief Commissioner on the ground of limitation. No sanad is mentioned as a bar. This would also indicate that although a sanad had been prepared for him on 15th March 1861 (vide EXS. 205 and 206) it had not been delivered to him till May, 1863 i. e., the grant of the sanad to him had been deferred. In the proceedings

of 16th May 1863 we also find the following remarks by the Settlement Officer:

"Parties present, also the three other Birhar Babus. As the case involves the question whether all these Babus are Taluqdars or not it is well that they should all be heard."

Thus not only did the Settlement Officer categorically state that a sanad was not granted but he acted on this basis and was making an enquiry as to whether the Birhar estates were taluqas.

[42] On appeal from the order in this case, the Settlement Commissioner, Mr. Charles Currie, made enquiries from the Settlement Officer with regard to the following among other points (*vide* EX. 26):

"1st Has Babu Sheo Prakash Singh respondent a Taluqdaree sanad for his share of the Birhar estate or not? If he has, how came Settlement Officer to admit any claim to the proprietary right in villages settled with the Taluqdar?"

In reply the Settlement Officer stated (*vide* EX.26):

"*No sanad has* been given *vide* Mr. Secretary Currie's" (the same gentleman who was the Settlement Commissioner) "No 3956 of 9th November, 1860 with tabular statement of Taluqdars, on which the Birhar sanads were ordered to be deferred.

Case taken up under Chief Commissioner's order 2356 of 6th September 1862, referring it to Settlement Department, as quoted in my notes."

It was only after this suit had been decided by the settlement Courts that the question of the grant of sanads to the Babus was taken up again. Exhibit A-137/D. W. 1, which is the copy of an extract from the Despatch Register of the Settlement Commissioner's office shows that on 4-9-1863, letter NO. 2392 was sent to the Chief Commissioner, the subject of which was as follows:

"Taluqdari sannads. Babus of the Birhar Estate.

With reference to No. 3906, dated 9th November 1860, to Commissioner, Fyzabad forwards copy of letter No. 92, dated 7th August from the Settlement Officer of Fyzabad urging for a final decision as to whether the 4 Birhar Baboos are Taluqdars or not. Details particulars and gives as his opinion that they should get sanads and be declared Taluqdars of their respective estates."

[43] The reply of the Chief Commissioner was conveyed by letter NO. 2741, dated 16th September 1863 and it was to the effect that each of the Baboos "will receive a sanad." (*vide* EXS. A-104 and A-133/D. W. 4). The correspondence fully supports the statement that no sanads had been granted to any of the Birhar Baboos till then.

[44] Exhibit A-101 is the certified copy of an extract from the list of sanads issued by the Chief Commissioner in which in the column headed "Date of original sanad" against Kishen Prasad Singh's name the words "none issued" are entered. It is worthy of note that if a sanad had been issued to Madho Prasad Singh, his name would also have found a place in this list yet no entry relating to him has been filed. The appellant's learned advocate stated that Madho Prasad Singh's name was not entered in the list and hence no copy of any entry relating to him could be filed; but no reason appears why respondent 1 did not file any extract, if any such entry did exist.

[45] The appellant's learned advocate also referred to the fact that a separate summary settlement had been made with each of the Birhar Babus—EXS. 17, 18, A-5, A-6, 155, A-87 and A-2—and that they had executed separate kabuliats: *vide* EXS. A-1, 20, 22 and 23—as showing that it was not likely that one sanad would have been granted. Sanads do not give a list of property but refer to the list attached to the kabuliat executed by the taluqdar and give the land revenue payable by him. In the present case the lists were separate and the land revenue was separately assessed. The fact that the settlement file of all the four cases was one, a fact upon which respondent 1 relied, would not affect the matter. There is considerable force in this argument which is further supported by the fact that, in the course of official enquiries as to primogeniture the letter of the Deputy Commissioner, Fyzabad, EX. A-161, expressly mentioned the case of those taluqdars who held under one sanad and did not mention the fact that Kishen Prasad Singh and others also held under one sanad.

[46] The next fact to which the appellants' learned advocate referred was that, when lists came to be prepared under Act I of 1869, taluqdars who held under one sanad were shown jointly under one number: *vide* the entries in list I at NOS. 17, 28, 30, 101, 114, 131, 133, 147, 194, 196, 197, 218, 229, 231, 258, 259 and 262. This is in accordance with the direction contained in paragraph 3 of the Chief Commissioner's letter NO. 158, dated 19-1 1869, which initiated the preparation of the lists of taluqdars under S. 8. The Chief Commissioner directed:

"If an estate for which a sanad has been granted is held in shares, the name of each sharer will be entered in the list and they will be joined by a bracket, the rest of the entry being one."

Yet in the case of the Birhar Babus all the four taluqdars are separately entered. Further when the lists were being prepared under S. 8 of the Act it was stated that there was no doubt as to Kishen Prasad's right to be called a taluqdar but sanads had not been distributed to several taluqdars, including, Sheo Prakash Singh, because the "biswas" question (i. e., the extent of shares) with regard to their estates had not been decided and Madho Prasad Singh's name was entered as a taluqdar who had not received a sanad. Mahip Narain Singh is not entered at all (*vide* EX. 27). In this document the date of the sanad granted to some taluqdars is given as 25-10-1859, which was

the date on which sanads were granted to these taluqdars who attended Lord Canning's Darbar, but the date of the sanad to Kishen Prasad Singh is 15-3-1861, which is the date of EXS 205 and 206, copies of a sanad granted to Kishen Prasad Singh and Sheo Prakash Singh jointly. This also indicates that Kishen Prasad Singh either did not attend the Governor-General's Darbar or if he did he did not get a sanad.

[47] There can be no doubt that all this evidence substantiates the appellants' case that no sanad of any kind was granted to Madho Prasad Singh. Respondent 1's learned counsel, however, contends that some confusion has crept in and that there is a substantial amount of evidence —EXS A-15, A-16, A-94, A-98, A-101—to show that a joint sanad was issued. He contends that the history of the grant of the sanads makes it certain that Madho Prasad Singh would have received a sanad and he suggests that whenever it is said that no sanad was issued it means that no separate sanad was issued. In order to understand the force of his arguments and the true import of the evidence produced by the parties it has become necessary for us to go back to the history of the period during which sanads were granted to taluqdars.

[48] It is well known that, on the annexation of Oudh, Lord Dalhousie directed the exclusion of taluqdars whom he classed as mere middlemen. Engagements for the revenue were to be made with the "actual occupants of the soil." The result of this policy was that, in the disorders of 1856 to 1858, the taluqdars with very few exceptions, took a leading part against the British and the "actual occupants of the soil" did not fulfil expectations and failed to support the power to which they owed so much.

[49] When the policy to be pursued on a reconquest of Oudh was under the consideration of the Government, Major-General Outram, then holding the office of the Chief Commissioner of Oudh, suggested :

"The lands of men who have taken an active part against us should be largely confiscated, in order, among other reasons to enable us to reward others in the manner most acceptable to a native. But I see no prospect of restoring tranquillity except by having recourse for the next few years to the old Talookdari system.

The Talookdars have both power and influence to exercise either for or against us. The village proprietors have neither" (*vide* Oudh Papers 1865 Cal. page 40).

[50] Lord Canning, who was now at the head of affairs, agreed with this policy and in order to create a *tabula rasa* for its enforcement he directed the issue of his famous Proclamation of 15-3-1858, confiscating to Government all proprietary rights in the soil of Oudh. This proclamation, stated :

"To those amongst them" (i. e., the Taludars) "who shall promptly come forward and give the Chief Commissioner their support in the restoration of peace and order this indulgence will be large and the Governor-General will be ready to view liberally the claim which they may thus acquire to a restitution of their former rights."

[51] General Outram, in forwarding a copy of the proclamation, wrote a letter to each taulqdar stating:

"If you at once come in, ready to obey his orders, none of your lands will be confiscated and your claims to lands held by you prior to annexation will be heard." (*See* 6 I. A. 63)[17].

Thereafter further letters containing similar promises, were sent to taluqdars, the last being dated 23-6-1858 (*vide* Ali Hasan's Commentary on the Oudh Estates Act, Appendix D, page 53). In this letter it was stated :

"the object with which this letter is written to you is to assure you that the Government will preserve to you your life and property and confirm you in the estate possessed by you during the Nawabee."

This letter also authorised taluqdars to send agents if they could not appear in person.

[52] The second summary settlement was commenced to effectuate this new policy but before the regular operations commenced in the winter season of 1858, the Governer-General had sent a detailed letter of instructions to the Chief Commissioner (NO. 3502 dated 6-10-1858, Oudh Papers relating to the Revenue Settlement 1865 Cal., page 24). In this letter it was laid down that, for the reasons which it gave, it had been decided to make a taluqdari settlement and that the taluqdars were to be called upon to help in restoring peace. At the same time it was directed that the village occupants were to be protected from extortion. The details were, however, left to the Chief Commissioner and his officers to work out.

[53] Madho Prasad Singh avoided appearance before the Deputy Commissioner of Fyzabad in spite of repeated directions to appear : *vide* EXS. 4, 7, 10, 12, 13 and 15. He, however, kept on writing letters explaining the reasons for his absence and even sent an agent : *vide* EXS. 5, 6, 3 and 14. Eventually, on 10-8-1858, a proclamation was issued notifying that unless the taluqdars named therein including Madho Prasad Singh and the other three Birhar taluqdars, appeared within fifteen days, their estates would be settled with others (*vide* EX. 8). Madho Prasad Singh failed to appear even then and it was notified that his estate would be settled with others : *vide* EX. 11. It was only after this that he appeared. On the basis of these facts, the appellants' learned advocate contended that Madho Prasad Singh was a refractory and rebellious individual who is not likely to have been recognised as a taluqdar or to have got a sanad.

[54] The conduct of Madho Prasad Singh was, however, not more refractory or hostile than that of practically all the other taluqdars. Indeed it is clear that he was considered worthy of special approbation in having saved the lives of English men and women in the early days of the mutiny: *vide* Exs. 12, 16, 158 and A-103. Further the letter of 22-6-1858, from which we have quoted in an earlier portion of this judgment and Ex. 8 itself indicate that a very large number of taluqdars were behaving in exactly the same manner as Madho Prasad Singh. In a letter dated 17-10-1859, the Secretary to the Chief Commissioner wrote to the Secretary of the Government of India (*vide* para 30):

"The Chief Commissioner here takes the liberty of recording that one great difficulty of re-settlement in the province in 1858 lay in the grave incredulity of the taluqdars....."

And again in the Report on the Administration of Oudh for 1859-1860 it is stated in para. 129:

"It is certain that many of the less intelligent attended the Darbar" (of the 26-10-1859) "with serious fears for their personal safety" (*vide* Oudh Paper No. 426 of 1861).

[55] Whatever may have been his conduct at an earlier period, Madho Prasad Singh did appear eventually, summary settlement was made with him and in January 1859, he executed a kabuliat. Thus by the time that the occasion for the grant of sanads arose, he had already got back his estate: *vide* Exs. A-86, 17, A-5, A-6, A-87, 155 and A-1.

[56] The next step in the Government policy was the issue, on 28th January 1859, of Circular No. 31 of 1859, by the Special Commissioner of Revenue under the orders of Mr. (later Sir Robert) Montgomery and it provided (*vide* Oudh Papers relating to the Revenue Settlement 1865, Calcutta page 42):

"3.....In making the settlement of lands every case has been carefully examined by the Deputy Commissioners and the Special Commissioner of Revenue and has also rigidly been scrutinised by the Chief Commissioner. The rights which he now confers on *each holder of land* are free and incontestable grant from the paramount power and cannot be called into question by subordinate officers.

4.....The rights and claims of all parties have been duly weighed, their conduct during the rebellion and their position as regards the taluqdars, fully considered and the decision in each case which has received the confirmation of the Chief Commissioner's approval, is to be considered final and lasting.....

6. Whether right or wrong certain principles have been laid down by the supreme Government and they are to be acted upon, and landholders are to be encouraged to feel that what they receive now they will retain for ever."

[57] It appears that, in spite of the numerous letters from the Chief Commissioner to the taluqdars which promised them a restoration of their rights, supported by Circular No. 31, no class of people in the province believed in the permanency of the settlement. Accordingly Major Barrow, the Special Commissioner of Revenue proposed that sanads should be issued to the *principal* taluqdars and on 7th May 1859, he submitted a list of taluqdars to whom he recommended that sanads should be given (*vide* letter No. 2815, dated 21th June 1859, from Major L. Barrow to the Chief Commissioner—Oudh Papers relating to the Revenue Settlement, 1865, Calcutta, p. 46, paragraph 12). Thereafter the new Chief Commissioner, Mr. (later Sir Charles) Wingfield, addressed a communication to the Government of India asking for an early recognition of the finality of the settlement (*vide* letter No. 1091, dated 4th June 1859—Oudh Papers 1865 Cal., page 94). He followed this up by letter No. 1377 dated 15th July 1859 in paragraph 10 of which he sought permission to send up a list of taluqdars to whom he wished sanads conferring proprietary rights in perpetuity to be granted. (*vide* Oudh Papers 1865, Cal., page 95).

[58] In reply to the Chief Commissioner's communication the Governor General wrote on 6th October 1859 as follows:

"The Governor-General agrees with you generally with regard to the absolute title conferred on the Taluqdars by the summary settlement. Sunnuds will be given to the Taluqdars not by the Governor-General in Council but by the Chief Commissioner under authority from the Governor-General in Council. The sanads should be prepared so as to be ready for issue when the Governor-General is at Lucknow."

[59] This message was followed by the letters of 10th and 19th October 1859, which have been incorporated in Act I of 1859 as Schedule I. In the first of these letters the Governor-General approved of the proposal to grant sanads and asked the Chief Commissioner to have ready a list of taluqdars to whom it was proposed to grant sanads. The letters added:

"5. I am directed to add that as regards zamindars and others not being Talookdars with whom a summary settlement has been made the orders conveyed in the limitation circular No. 31 of the 28th January 1859, must not be strictly observed. Opportunity must be allowed at the next settlement to all disappointed claimants to bring forward their claims, and all the claims must be heard and disposed of in the usual manner."

[60] By the second letter the form of sanad to be issued was, with some modification, approved. Lord Canning held his Darbar at Lucknow on 26th October 1859, and the sanads were issued on the previous day to those taluqdars who were present. It is unfortunate that neither the list forwarded by Major Barrow nor that which the Chief Commissioner was directed to prepare is available either in the records of the province or of the Government of India. It is thus not possible to say whether the name of Babu Madho Prasad Singh or of any of the Birhar Babus

appears in either of the lists. It is, however, agreed that Madho Prasad Singh did not attend the Governor-General's Darbar but it is contended that Kishen Prasad Singh did and obtained a joint sanad for all the four Birhar Babus.

[61] The learned counsel for respondent 1 contends that although, in view of Circular No. 31 it was not necessary to differentiate in making the summary settlement between those who held on the taluqdari tenure and those who held under other tenures, yet such a distinction was made as is clear from the letter of Major Barrow, dated 24th June 1859 to which we have already referred and the statements attached to it. These statements show that figures were given separately for the land revenue payable in respect of those estates which were held on taluqdari tenure and those which were not so held. Other official papers also show the same thing. The argument proceeds that the papers relating to the second summary settlement indicate that it was made with the Birhar Babus, including Madho Prasad Singh, as taluqdars and that the estate was settled as a taluqa. The file itself is called the file "in respect of Taluqa Chandipur Birhar of Babu Madho Prasad Singh, Babu Mahip Narain Singh, Babu Sheo Prakash Singh and Babu Kishen Prasad Singh Taluqdars. . . . ."—*vide* Exs. 2, 3, 4, 5, 6 and numerous other documents taken from the file. Then there is a considerable amount of evidence which establishes that at that period Madho Prasad Singh and the other Birhar Babus were referred to as taluqdars and their estates were called taluqas—*vide*, for instance Exs. A-87, 155, 18, 17, 8 and A-86, A-5, A-6, A-1, 20, 22 and 23.

[62] From this it is contended that Madho Prasad Singh must get the benefit of the provisions of the letter of the Governor-General, dated 10th October 1859, relating to taluqdars, and must be deemed by operation of that letter, to have acquired full heritable and transferable rights in the property entered in the list attached to his kabuliat and he would in due course get a sanad. It cannot, however, be said that the authorities understood the letter of 1859 as operating in favour of all persons who had been designated in the records of the summary settlement as taluqdars. We find that, as late as the 29th January 1861, when the Chief Commissioner was issuing instructions for the regular settlement of the province he stated in paragraph 7 of Circular No. 2 of 1861 (*vide* Settlement Circulars, page 4 at page 13):

"The above observations refer to villages settled with talooqdars. With regard to zamindars and all other parties not being taluqdars with whom the summary settlement has been made the orders of Government No. 6268 of the 18th (sic 10th) October are that the last Chief Commissioner's Circular No. 31 of the 28th January 1859, must not be strictly enforced; and that "These instructions are too clear to need comment. All who are not talooqdars will be known by their not having received a sunnud. . . . ."

[63] It was the Governor-General's letter of 10th October 1859 that for the first time drew a distinction between the rights conferred upon taluqdars and those conferred upon persons who were not taluqdars. Accordingly it only became necessary to determine who were in fact taluqdars after this letter had been written. Circular No. 165-2715, dated 1st December 1859 (Oudh Papers 1865 Cal., page 89) directed that whenever there were two interests in the land the holder of the superior interest was to be deemed to be a taluqdar. This was construed to mean that there could be no taluqdar unless there were two interests in the land and on this being brought to the notice of the Chief Commissioner, his instructions were modified and it was directed "every opulent landlord paying revenue direct to the Government whether there be holders intermediate between him and the actual cultivator of the soil or not" was to be deemed to a taluqdar; (*vide* letter No. 1560 dated 25th April 1860 from the Secretary to the Chief Commissioner to the Commissioner, Lucknow Division, Oudh Papers 1865 Cal., page 89). The approval of the Government of India was conveyed by letter No. 4060 from the Secretary to the Government of India to the Chief Commissioner of Oudh, dated 12th September 1860 paragraph 19 (Oudh Papers-1865, Cal., page 92 (94)).

[64] Later, on 14th December 1861 the officiating Chief Commissioner issued Circular No. 19 of 1861 (*vide* Settlement Circulars, p. 24) which stated in paragraph 3:

"The officiating Chief Commissioner desires me to observe, that several attempts have been made to define the term 'taluqdar' but not one of them can be said to be altogether successful. The restriction of the word to estates paying Rs. 5,000 annal revenue was made for convenience sake only: it did not alter the meaning of the word. Whenever there are two rights, superior and inferior, in an estate the superior one must be taluqdaree, though the property may be so small as not to entitle the holder to a sunnud or to be reckoned as a taluqdar in popular opinion. . . .and the Chief Commissioner thinks it better to retain the word taluqa to express the superior right whenever two rights exist and the properitor of that right must be styled as taluqdar and so addressed in all official documents. The practice will present confusion and do no injury to any one and the present rules ordering that the smaller landed proprietors are not to receive sanads, or *be exempt from enquiry* into the validity of their titles at the approaching settlement will not be affected."

[65] Thus it came about that a large number of persons were classed as taluqdars whom it had never been intended to put in that position (*vide* letter dated 31st December 1868, from Major I. F. MacAndrew, Secretary to the Chief Commissioner of Oudh to the Government of India,

Home Department, being paper NO. 1 relative to the Bill to define the rights of taluqdars).

[66] These documents indicate that every one who was classified as a taluqdar at the time of the second summary settlement or even afterwards, was not to get the benefit conferred upon taluqdars by the letter of 10th October 1859, i. e. the privilege of not having his title enquired into again at the time of the regular settlement. Even however, if we were to accept the respondents' contention that that letter did confer permanent hereditary and transferable rights upon Madho Prasad Singh, it does not follow that he necessarily got a sanad. Exhibit A-16 states in clear and specific terms that there was at least one taluqdar in the Fyzabad District Hakim Shefa-ud-daula with whom a summary settlement was made but who got no sanad. There is no reason to hold that evidence which shows that Madho did not receive a sanad as inaccurate.

[67] In 1859 there were considered to be 690 taluqdars in Oudh (*vide* Mr. (later Sir Robert) Montgomery's report on the Administration of Oudh for 1858-1859, Oudh Paper NO. 74 of 1859), but out of them only 150 of the principal taluqdars were present at Lord Canning's Darbar held on 26th October 1859 and it was only to those that sanads were issued at that time (*vide* paragraph 129 of the Report on the Administration of Oudh for 1859-1860—Oudh Paper NO. 426 of 1861, page 130). Moreover, even initially, Major Barrow had recommended the grant of sanads not to all the taluqdars but only to the "principal taluqdars." Mr. Wasim contends that Madho Prasad Singh must be deemed to be one of the principal taluqdars since he paid a considerable sum as Government revenue—about RS. 25,000—and was considered worthy of "being noticed" by the Government (*vide* EX. A-103). Further, he was not only referred to in the Government papers as a taluqdar but he and the other three Birhar Babus were actually invited to, and attended, a Darbar held by Lord Canning at Lucknow on 5th NOVEMBER 1861; (*vide* Notification NO. 7 in the Foreign Department published in the Calcutta Gazette (Extraordinary) dated 5th NOVEMBER 1861). It is argued that all these facts lead to the inference that a sanad must have been granted to Madho Prasad Singh. We cannot accept this contention.

[68] The circumstances narrated are by no means decisive and it is not even the case of respondent 1 that Madho Prasad Singh did in fact attend Lord Canning's Darbar of 1859. It was only to persons that attended that Durbar that sanads were issued at that time, though, in the case of a joint sanad, it was not necessary that all the persons entered in it should have attended. It was for that reason that the respondent contended that Kishen Prasad Singh did attend the Durbar and that he obtained a sanad for the benefit of all the Birhar taluqdars. We come then to a consideration of the evidence on the question of the grant of a sanad to Kishen Prasad Singh at the Darbar.

[69] Neither the original nor a copy of the sanad said to have been granted to Babu Kishen Prasad Singh as respresenting all the Birhar taluqdars is available. Mr. Wasim urged that the original sanad must be with the heirs of Kishen Prasad Singh, who are deliberately withholding it. He refers to certain proceedings in the trial Court which would indicate that Babu Kamlapat Prasad Singh, grandson and successor of Babu Kishen Prasad Singh, is supporting the plaintiffs. However true his complaint might be, we cannot hold that the sanad is being withheld until it is proved that one ever existed: merely from the fact of the partiality of Babu Kamlapat Prasad Singh it cannot be presumed that a sanad existed and is being withheld.

[70] In proof of the grant of sanad to Kishen Prasad Singh, reliance is placed principally upon two documents, EXS. A-15 and A-98. The admissibility of these documents has been vehemently attacked by the appellants and it has been argued that even if they are admissible their value is practically nil. The documents must, therefore, be closely examined.

[71] Exhibit A-98 is a book compiled by one Kishori Lal, who was the reader of the President of the British Indian Association of the Taluqdars of Oudh. It was published in 1879. Exhibit A-15 is the copy of an extract from a list of taluqdars of the Fyzabad District, obtained from the office of the Board of Revenue, U. P. This document was originally a part of file NO. "1964 General" but in 1938, when an officer was deputed by the Government to re-arrange the papers in the office of the Board of Revenue it was removed from that file and brought on to file NO. 459, relating to "Talukdari lists under Act I of 1869, Fyzabad District" on which it is now to be found. The latter file has been brought before us and we have examined it carefully but file NO. "1964 General" is no longer traceable. Thus though this document is to be found in the record maintained in the office of the Board of Revenue, it does not appear from these records who prepared it or when or why it was prepared. The file on which it is now placed is the file relating to the preparation of list under Act I of 1869 and it is contended by respondent 1 that it was compiled for the purpose of preparing those lists. Further, although it does not appear from anything contained in EX. A-15 itself as to who prepared it, it is in reality an English translation of EX. A-98 and

the author of EX. A-98 tells us that in his remarks regarding each estate

"he had entered those very particulars of each estate which His Highness Maharaja Sir Man Singh.....in obedience to the orders of General L. Barrow, former Chief Commissioner of Oudh, during the preparation of the lists of Act I of 1869, had in a Committee of the British Indian Association collected from the Government records and presented before the said General and according to which the list of Act I of 1869 was prepared."

If this statement is accepted at its face value EX. A-15 is a translation of the list prepared by Maharaja Man Singh.

[72] The file on which the papers at present exist was summoned before us by the parties in order to assist us in determining the exact nature of the documents and on the third page of the file we find the following entry "Remarks from Maharaja's report". This entry indicates that Maharaja Man Singh did prepare a report containing remarks about various persons. Moreover a reference to official documents shows that the Maharaja had a great hand in the preparation of the lists under Act I of 1869. By his letter dated 31st December 1868, Major I. F. Macandrew submitted to the Government of India some comments on, and proposed amendments to the Oudh Estates Bill after a discussion with the leading taluqdars. In para. 5 of that letter, it was stated that :

"The Chief Commissioner, therefore, proposes that the list shall be drafted by the Financial Commissioner and a taluqdar in whom others have confidence and finally submitted for his approval."

In his letter NO. 158, dated 19th January 1869, addressed to the Financial Commissioner, which directed the preparation of the list under Act I of 1869 the Chief Commissioner, wrote :

"2. The lists will be made in the first instance by the Deputy Commissioners who should take the orders of the Commissioners regarding any name, the claim to the entry of which seems doubtful. The lists will be revised most carefully by yourself in conference with Maharaja Man Singh and compiled for the whole province and will be submitted for the orders of the Chief Commissioner by the 1st June next."

[73] It would, therefore, appear that EX. A-15 is an extract from a list prepared by or under the directions of, Maharaja Man Singh as is stated in the preface to EX. A-98 for the purpose of assisting in the preparation of the lists under Act I of 1869. There was, however, no duty imposed upon Maharaja Man Singh to prepare such a list : he had merely to assist in revising the lists prepared by the Deputy Commissioners. Nevertheless he could not be expected to have personal knowledge of the claims of all the taluqdars in Oudh and the list, of which EX. A-15 is an extract, appears to have been prepared to assist him. That also explains why, although that list was kept with the official records by the Board of Revenue in the same way as some other files of the British Indian Association relating to judicial matters are kept in the record room of this Court, it was kept as a separate file and not incorporated in the file of which it now forms a part. It obviously cannot be treated as an official paper and consequently is not admissible under S. 35, Evidence Act.

[74] From what we have said, it does not follow that the document is not admissible in evidence: it does not stand on any worse footing than statements made in awards given by the British Indian Association with regard to maintenance of relatives of taluqdars which do not fall within the scope of S. 33, Oudh Estates Act. Such statements made in an award signed by the same Maharaja Man Singh relating to a custom, the grant of a sanad and the execution of a kabuliat, were admitted in evidence and considered by their Lordships of the Judicial Committee in 25 I. A. 161[18] at pp. 168-169. Thus EX. A-15 is admissible in evidence though not as an official document. It is, however, a different matter as to what weight should be attached to it.

[75] Although Maharaja Man Singh was considered by the Government to be a taluqdar who had greater knowledge than his other brethren as to the claims of various individuals to be treated as taluqdars it cannot be supposed that he had personal knowledge of the details of all the cases with which his notes dealt. Kishori Lal would have us accept the position that the Maharaja's remarks were called from official papers. It is, however, impossible to believe that, in the short time at his disposal from the end of December 1868 to 1st June 1869 he could possibly have carried out an investigation into the official records of 12 districts as well as of the various Commissionerships and of the Chief Commissioner's and Financial Commissioner's offices. Not much weight can, therefore, attach to his remarks in each case, particularly when it relates to such knowledge as might be derived from official records but does not tally with the remarks of the Deputy Commissioners.

[76] With regard to the particular entry with which we are concerned we cannot attach much weight to it. It is to be noticed that the remarks are made opposite the name of Sheo Prakash Singh. The name of Kishen Prasad Singh who according to the remarks was the actual recipient of the sanad was not even entered in the list and his name was subsequently inserted by someone in pencil with a note of interrogation after it. Further the names of Madho Prasad

Singh and Mahip Narain Singh came much later in the list and were also inserted by someone in pencil and no remarks are made against them although having regard to the scheme of the rest of the list their names ought to have all been given together at the same place if they held under one sanad. Further although it is mentioned that Kishen Prasad Singh got a sanad at the Darbar the column meant to indicate the sanad and the language in which it was issued is left blank while in the case of every other Taluqdar mentioned in the list it is filled in.

[77] The learned advocates for the parties referred us to a large number of decisions as to the admissibility of such books as Ex. A-98 in evidence as being books of reference on matters of "public history", and as to whether the history of individual taluqdars could be considered as "public history." It is not, however, necessary for us to decide this point because Ex. A-98 does not claim to be anything more than the Urdu edition of Ex. A-15, and it stands or falls with it. We have already held that, though Ex. A-15 is admissible in evidence, very little weight can be attached to it in the present instance in so far as it states that Kishen Prasad Singh attended the Darbar of 1859 and got a kabuliat for all the four Birhar Babus. The same considerations apply to Ex. A-98.

[78] These two documents constitute the only evidence in support of the assertion that Kishen Prasad Singh was present at the Darbar and got a sanad for all the four Birhar Taluqdars, but respondent 1 seeks corroboration of his case of a joint sanad from a remark made by some officer, either the Settlement Commissioner, or, more probably some Assistant Settlement Officer that the names of the four Babus "are entered as proprietors in the Birhar Pargana Sunnad" —Ex. A-94.

[79] The appellants' learned advocate contests the admissibility of this document also. Firstly he urges that it is sought to utilise it as evidence of the contents of a document containing a grant namely the sanad inasmuch as it shows that the grant was in favour of four persons. He urges that, under S. 91, Evidence Act, the grant can only be proved by the production of the sanad itself or by secondary evidence. He referred to a large number of authorities in support of this proposition but it is not necessary for us to consider them because the learned counsel for respondent 1 concedes it but he contends that he can prove the fact of a grant to Madho Prasad Singh and others as distinct from the terms of the grant by such evidence which is admissible as a copy of an entry in a public record. This argument is fully supported by 61 I. A. 286[19] at p. 306 in which a statement in a decree that a pedigree had been filed was relied upon, 5 O. W. N. 299,[20] in which a statement in a wajib-ul-arz that a village was covered by a sanad was held to be admissible, to prove this fact, 1947 O. W. N. 168[21] at p. 171; 18 O. C. 122[22] at p. 124; 41 Bom. 466[23] at p. 470 and A. I. R. 1922 Pat. 222.[24] The whole position has been summed up in Basu's Commentary on the Evidence Act at page 1056 (third edition) which clearly brings out the distinction between proof of the terms of a contract or grant and proof of the fact that a grant was made or a contract was entered into. Monir in his "Law of Evidence," quoting Best on Evidence, says at pages 487 and 488:

"Where the contents of any document are in question, either as a fact in issue or a subalternate principal fact, the document is the proper evidence of its own contents, and all derivative proof is rejected until its absence is accounted for. But where a written instrument or document of any description is not the fact in issue and is merely used as evidence to prove some fact independent proof aliunde is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment of money may be given by any person who witnessed it. . . . . So, although where the contents of a marriage register are in issue, verbal evidence of those contents is not receivable yet the fact of the marriage may be proved by the independent evidence of a person who was present at it."

[80] The second objection to the admissibility of Ex. A-94 is that, though it was written by an official, it was not written in the performance of of an official duty and consequently S. 35 does not make it admissible. It is true that no enquiry as to whether there was a sanad or not was entrusted to the official who wrote Ex. A-94, nevertheless it was his duty to ascertain under proprietary rights, and the first step that he had to take in the performance of that duty was to ascertain how far the taluqdar admitted those rights. The letter was written to the Settlement Officer setting out the circumstances in which the enquiry was delayed and asking for further instructions. The object of mentioning a sanad was to show that while the persons who were classed by the rules as taluqdars had been sent for, a fifth person had claimed to be interested and it was necessary to ascertain his rights before statements could be called for from the superior proprietors. The statement which is contained in the letter was germane to his duties and is admissible as such under S. 35, Evidence Act.

[81] We will now consider the value to be attached to the remark in Ex. A-94. As we have already stated, all that was necessary to ascertain was whether the four Babus were the superior proprietors of the villages in respect of which the enquiry was being made. The original grant

was not before the officer who wrote EX. A-94. There is nothing to indicate that there was any copy of it on the file of the case in which the letter was written. Further, the other papers from this file reveal that the Settlement Officer, the Deputy Commissioner, the Settlement Commissioner and the Commissioner were not aware of the existence of any such sanad. In the face of the other evidence on the record, this document can, therefore, not be accepted as showing that there was only one sanad for the whole of pargana Birhar. Incidentally we may note that 16 out of the 392 villages comprising pargana Birhar were held by other taluqdars (*vide* Fyzabad Settlement Report, page 207, paragraph 581) and consequently the description 'Birhar Pargana Sanad' is not accurate.

[82] The next set of the evidence upon which respondent 1 relies for the proposition that sanads must have been granted to Madho Prasad Singh and others is that enquiries were made from them as to whether they desired sanads in the primogeniture form or not and that replies were sent by them and their names were thereafter inserted in the list of taluqdars who desired primogeniture sanads: *vide* EXS. A-157, A-158 and A-8 read with EX. A-156/D. W. 7, A-7, A-11, A-155, A 161, A-153, A-162, A-10, A-12 and A-9. These documents are no doubt evidence of the fact that Babu Madho Prasad Singh and all the four Birhar Babus were considered to be taluqdars and enquiries were made from them with a view to grant them primogeniture sanads but then again this is no indication of the fact that a taluqdari sanad in the ordinary form had previously been granted to them.

[83] As has already been seen, all persons who were entitled to the privilege of being considered taluqdars had not been summoned to the Governor-General's Darbar. Consequently the Chief Commissioner had called upon the district authorities toforward to him lists of taluqdars who had not been so summoned so that sanads might be granted to them (*vide* Chief Commissioner's Circular NO. 7/217, dated 18th January 1860 which is EX. A156/D. W. 7 on the record). Before, however, these lists could be supplied (indeed even before the lists had been asked for) the Chief Commissioner had raised the question of entail and the grant of primogeniture sanads (*vide* Circular NO. 143/2281, dated 11th October 1859,—Oudh Papers 1865 Cal., page 326) and the Commissioners of divisions were accordingly informed that the Chief Commissioner had decided to suspend the grant of any further sanads until those questions had been finally settled : *vide* EX. A156/D. W. 7. This circular, therefore, did not call for declaration only from those taluqdars to whom sanads had already been granted but from all "taluqdars *entitled* to receive sanads" (*see* paragraph 4). Thus the utmost that the documents, to which reference has been made, prove is that Madho Prasad Singh was considered to be a taluqdar *entitled* to receive a sanad.

[84] The question of primogeniture and entail was not finally decided by the Government of India till 17th July 1860 when the Governor-General authorised the Chief Commissioner to issue new sanads containing the primogeniture clause to all such as accepted the condition which the Chief Commissioner sought to impose (*vide* letter NO. 2729 from the Secretary to the Government of India to the officiating Chief Commissioner of Oudh—Oudh Papers, 1865, Cal. pp. 331-333). Even this did not satisfy the Chief Commissioner and further correspondence ensued but the Governor-General was adamant and so on 26th September 1860, the Chief Commissioner issued his Circular NO. 154/3431 (EX. A-155) informing Commissioners of divisions of the Governor-General's decision and directing :

"2. Every Taluqdar in whose family the rule of primogeniture has not heretofore prevailed, must be called upon to declare in formal terms whether he is desirous that this rule shall henceforth be applicable to his estate or not. To all who answer in the affirmative sanads will be issued containing this condition, in addition to the conditions already sanctioned by the Governor-General.

3. A revised form of sanad in English and vernacular with this additional condition inserted, is forwarded for adoption.

4. Some of the Taluqdars in whose families the rule of primogeniture has not heretofore prevailed and who now desire the adoption have already received sanads *these they will give up and they will receive sanads in the new form in exchange.*

5. Some Commissioners have already sent in lists of the Taluqdars in their divisions who desire the adoption of this rule of primogeniture and sanads will be prepared in this office for delivery to them.

6. *Blank forms of sanads will be sent to other* Commissioners to be filled up and delivered to those who desire the adoption of the above rule.

7. To those Taluqdars who reply in the negative to the enquiry sanads in the original form will be presented from this office, if their names have been submitted to the Chief Commissioner and if not, through the Commissioner.

8. Cases in which doubts may arise whether the parties under engagements are to be considered taluqdars and as such entitled to a sanad should be referred to the Chief Commissioner ....."

[85] This correspondence discloses the fact that it only became possible to issue sanads after September 1860, and it is quite possible that the date which the fresh sanads bore was somewhere about 9th NOVEMBER 1860, which is stated in EX. A-101 to be the date of the revised sanad in favour of Kishen Prasad Singh. At this time Mr. Wingfield was the Chief Commissioner and no sanad bearing his signature, dated 9th NOVEMBER 1860, has been produced but there is a sanad

in Urdu bearing his signature : it is dated 15th March 1861, and is in favour of both Kishen Prasad Singh and Sheo Prakash Singh (*vide* Exs 205 and 206). In that sanad the names of the other two Birhar Babus are not entered. As we have already seen, the date of the sanad is, however, no indication of the date on which it was actually given to the taluqdar: *see* 16 I. A. 71.[11] Thus it cannot be said that Mr. Carnegy was wrong when he reported on 14-7-1863, that "no sanad has been given" (*vide* Ex. 26) or that he was under misapprehension owing to a confusion between joint and separate sanads.

[86] A reference to some other papers of the period would indicate that there was reason for stopping the issue of sanads to the Birhar Babus until it had been ascertained what their rights were. In the confusion as to the meaning of the word 'taluqdar' that then prevailed the Chief Commissioner in his record of rights, Circular No. 2 of 1861 (*vide* Settlement Circulars Page 4 at page 13) ordered "all who are not taluqdars will be known by their not having received a sunnud . . . ." Thus if no sanads were issued to the Birhar Babus an enquiry into their rights during the course of regular settlement would not be barred while if sanads were issued such an enquiry would be barred and, as indicated in Ex. 148, the Chief Commissioner entertained doubts as to whether Birhar was a taluqa. The reason for this doubt is a matter of surmise and the Commissioner made a surmise in Ex. 148 but there is other evidence to show that there was cause for doubt.

[87] Exhibit 48 is a petition of Seetal Prasad dated 21-1-1859 by which he made a claim to one-third of the taluqa very shortly after the summary settlement with Sheo Prakash and long before any question of the grant of sanads arose. Further, Ex. A-66 shows that his claim was considered to be valid and was eventually decreed by one Settlement Officer. Moreover, at one time, as early as February 1859, the correctness of the claim had been acknowledged even by Sheo Prakash Singh himself (Ex. 50). Then before September 1860, the Chief Commissioner had received information which made him doubt what the real status of the Birhar Babus was. In the draft of Circular No. 2 of 1861 which he sent for the approval of the Government of India under cover of letter No. 3203 dated 7-9-1860 (*vide* Oudh Papers, 1865, Cal. page 105 at page 106), he wrote in paragraph 9 :

" Instances have been brought to the Chief Commissioner's notice where the intermediate holders have never paid the Taluqdar more, and sometimes not so much as the present Government demand, and the cause is not that the demand is high, but because being of the same family as the Talookdar and of independent and turbulent character, and he really no more than *primus inter pares* they have merely paid the revenue through him. (The Chief Commissioner, in these remarks, has more particularly in view the Birhar and Kapradah Taluqdars)."

Other remarks in the Circular show that the Chief Commissioner was of the opinion that, in such cases, the settlement ought never to have been made with the taluqdars. These remarks, which were allowed to remain in the Circular that was actually issued (*see* Circular No. 2 of 1861, Settlement Circulars page 4), clearly showed that the doubts of the Chief Commissioner arose from this knowledge and it is extremely probable that, when the question of the grant of sanads to the Birhar Babus arose, he preferred that an enquiry in the Settlement Courts should be allowed so that their true position might be determined before sanads were issued. The remarks of Mr. Carnegy and Mr. Simson, far from being based upon a misapprehension, find full corroboration from the papers of the period.

[88] The argument that the remarks of Messrs. Carnegy and Simson in Exs. 24, 148 and 26 refer to separate sanads as distinct from a joint sanad is wholly unsupportable. When the Settlement Commissioner desired to know whether a sanad had been issued it was with a view to ascertain whether the Settlement Courts had any jurisdiction at all to enterain Seetal Prasad's claim in view of the orders barring enquiry into titles in respect of lands held under sanads. When Mr. Carnegy gave his reply he intended to show that the Settlement Courts had jurisdiction. If a joint sanad existed that would have been as efficacious to bar enquiry as a separate sanad. Further it is said that there were doubts as to whether Birhar was a taluqa. A joint sanad would have constituted it a taluqa just as much as a separate sanad. It cannot, therefore, be held that in Exs. 24, 26 and 148 reference was to separate sanads as distinct from joint sanads.

[89] It was next argued that there were a large number of orders of Settlement Courts and Rubkars akbir, containing a summary of all the proceedings, prepared and kept on the settlement files in accordance with the directions of the Chief Commissioner, which indicate that claims were dismissed on the basis of the villages to which they related being covered by sanads. It is argued that all those orders and Rubkars were prepared before 9-1-1874, on which date the sanad to Har Dutt Singh was granted (Exs. A 126 and A-140). Consequently the reference must be to some other sanad. The argument proceeds that none of the sanads, or their copies, produced in this case is in favour of Madho Prasad Singh or Har Dutt Singh (*vide* Exs. 203, 204, 205, 206 and 207), and con-

sequently the reference is to some other sanad. The orders and rubkars may be divided into two categories:

A. *Cases in which Har Dutt Singh was a party with one or more of the other Babus.*

Exhibits A-226, A-227 and A-228 are orders of Settlement Officers passed between 1864 and 1866.

Exhibits A-92, A-223, A-232 to A-243 and A-245 are Rubkars akhir bearing dates between October 1871 and July 1873.

B. *Cases in which Har Dutt Singh was not a party.*—

Exhibit A-224	Rubkar Akhir dated	12-8-1871.
Exhibit A-244	do.	10-6-1873.
Exhibit A-231	do.	28 5 1869.

The Rubkars were prepared under Circular No. 23 of 1864, dated 25-4-1864, and paragraph 13 of that Circular directed they should give a *resume* of all cases decided (*vide* Settlement Circulars page 98 at page 102).

These documents are no doubt admissible to show that a sanad was granted to the persons named: *vide* 3 Luck. 326[20] at p. 340, 1947 O. W. N. 168 [21] at p. 171, 1 Luck. 583 [12] at p. 597. Further it is not necessary to prove on what enquiry these entries were based: *vide* 1947 O. W. N. 5.[25] They are, however, by no means conclusive and cannot outweigh the positive assertion of Messrs. Carnegy and Simson that no sanad had been granted.

[90] The object of mentioning the sanad was to show that the claim must be summarily rejected. The record of rights Circular (No. 2 of 1861) had made it clear that enquiry in Settlement Courts against taluqdars was barred. The possession of sanads was evidence of the persons' status as taluqdars but it was not the only evidence. The real title arose out of the summary settlement and the Governor-General's letter of 10-10-1859, coupled with recognition of the status of taluqdar. Thus, if there was evidence before the Settlement Officer that Madho Prasad Singh had been recognised as a taluqdar, all claims against him or his successor would have to be summarily rejected even though no sanad was issued. In the present case there was such evidence available because, on the termination of the case of Seetal Prasad against Sheo Prakash the Settlement Officer had himself written on 7-8-1863, asking for a final decision as to whether the four Birhar Babus were taluqdars or not: *see* Ex. A-137/D. W. 1. In reply to this the Chief Commissioner ordered that the Birhar Babus should each receive a sanad: *vide* Ex. A-104. This decision was conveyed to the Settlement Officer by letter No. 2741 of the Chief Commissioner, dated 16-9-1863, which was on the Settlement Officer's file: *vide* Ex. A-148/D. W. 7. Thus, although sanads were actually not issued, the Settlement Officer was well aware that it had been ordered that they should issue and had consequently summarily rejected all claims. It is significant that Seetal Prasad's claim against Sheo Prakash was not rejected on the ground that it was barred by a sanad as it should have been if a sanad had been issued either at the Darbar of Lord Canning in 1859 or even on 9th November 1860. Exhibit A-67 is the only order on the record which was passed before the order of the Chief Commissioner directing the sanads to issue and it says nothing about any sanad. The subsequent orders of Settlement Officers are thus obviously based upon the Chief Commissioner's order conveyed in his letter No. 2741 dated 16th September 1863 when they say of any claim that it is barred by sanad. It may be noted in connection with Rubkars Akhir that, when the petition of Har Dutt Singh for the issue of a sanad was being considered in 1873 the Settlement Officer said:

"if a man's name is entered in the general list of taluqdars prepared under that Act he does not require a sanad" (*vide* Ex. A. 148/ D. W. 7.)

[91] The next set of documents are the papers relating to the preparation of lists under S. 8 of Act I of 1869 and the actual entry in those lists. Exhibit A-16 is a copy of an extract from a list of taluqdars not included in list II having or *entitled to* primogeniture sanads kept in the office of the Financial Commissioner. In this list the names of Madho Prasad Singh and the three other Birhar taluqdars are entered under the heading "16 Sanad Taluqdars" and there is only one name, that of Hakim Shafa-ul-daula, entered under the heading of taluqdars with whom summary settlement was made but who got no sanads. This entry does not tally with the entries contained in the lists prepared in the Deputy Commissioner's office of which Ex. 27 is a copy. In this latter list Kishen Prasad Singh is the only one of the four who is shown as having been granted a sanad. Then comes a heading "Taluqdars whose biswas have not been decided in the settlement department and consequently sanads not distributed." Under this heading, the name of Sheo Prakash Singh is entered and in the column of remarks it is stated "Vernacular sanad of Kishun Prasad Singh and Sheo Prakash Singh is the same, i. e., a joint sanad. The English sanad is in favour of Kishun Prasad Singh." There is also a heading "Taluqdars who have not received sanads" and the name of Madho Prasad Singh is entered under this heading. The name of Mahip Narain Singh is not entered at all.

[92] The original list is that prepared by the Deputy Commissioner according to the instructions contained in the Chief Commissioner's

letter No. 158, dated 19th January 1869 to the Financial Commissioner. The Financial Commissioner with the assistance of Maharaja Man Singh was to revise the lists and Ex. A-16 is a copy of that list since we find that the lists eventually published tally with it: *vide* Exs. A-100, A-99 and A-82. It is, however, not difficult to understand how all the four Birhar Taluqdars came to be entered as sanad taluqdars because, although no sanad was in fact issued, orders had been passed by the Chief Commissioner as early as 1863 that sanads should issue to them and it was not thought proper to penalise them because of the failure of the authorities to carry out the orders of the Chief Commissioner. Moreover, the list was to contain the names not only of persons who had actually received sanads but also of those to whom sanads might be issued till the date fixed for the closing of the lists (*vide* S. 8 of Act I of 1869). Since orders had already been passed six years earlier that sanads should be granted the entry was made in anticipation of sanads being issued within the time limited. This view is also supported by the fact that though they are entered as Sanad Taluqdars, the date, language and nature of the sanad granted to them is not mentioned as it is in the case of every other taluqdar, including Kishen Prasad Singh, entered in this list: no sanads existed in the case of Madho Prasad, Sheo Prakash Singh and Mahip Narain Singh and so no particulars could be given.

[93] Mr. Wasim also wished to raise a presumption that a primogeniture sanad had been granted because the name of Madho Prasad Singh is entered in list III and S. 10 directs that a conclusive presumption shall be raised. We have discussed this matter in an earlier portion of this judgment and cannot agree with this contention. If the Act applies, the presumption is conclusive: if it does not apply there is no presumption at all: *vide* 31 I. A. 30.[1] In the present case there is no scope for any presumption as to the correctness of the entry by reason of the principle "*omina præsumuntur rite esse acta*" because evidence is available and this establishes that no sanad of any kind was granted to Madho Prasad Singh.

[94] The learned Additional Civil Judge has relied upon certain applications made by or on behalf of Jai Narain Singh for copies of sanads, as admissions that sanads were in fact granted. He has clearly erred in so construing the applications and Mr. Wasim has not attempted to support his reasoning. A consideration of all the evidence on the record establishes that no sanad, either joint or separate, either ordinary or primogeniture was granted to Madho Prasad Singh.

[95] Some reference was also made to the grant of a primogeniture sanad to Har Dutt Singh in 1874. There is no doubt that such a sanad was granted. Copies of it have been produced and they are Exs. A-126 and A-140. But the grant of this sanad is immaterial for this part of the case. If Har Dutt Singh was not the sole successor of Madho Prasad Singh the grant to him of a sanad relating to the property of others would give him no title : *vide* 3 I A. 259.[3] If, on the other hand, he was the sole successor of Har Dutt Singh then Act I of 1869 would govern succession and whether Har Dutt Singh had or had not a sanad would be wholly immaterial.

[96] We come then to a consideration of the question whether Madho Prasad Singh left any will by virtue of which Har Dutt alone succeeded to the property left by his father to the exclusion of his brothers. The document upon which reliance is placed as a will is Ex. A-8, a letter addressed by Madho Prasad Singh to the Chief Commissioner. The learned advocate for the appellant contends:

"(1) That Ex. A-8 is not a will at all, because.
(a) it has no reference to the death of the testator; and
(b) it only purports to state a custom and any one who gets the property would succeed under the supposed custom and not by virtue of any bequest contained in Ex. A-8.
(2) That, even if Ex. A-8 is held to be a will, it is invalid and cannot take effect, or be construed in such a way as, to confer title upon Har Dutt Singh alone, because
(a) it only expresses a wish that the estate should remain indivisible generation after generation according to the custom "of Raj ya Gaddi" and does not go further to bequeath the estate to any person or persons;
(b) the words "Raj" and "Gaddi" are of uncertain signification and do not necessarily mean succession by the eldest — they may mean the succession of the fittest, or tanistry. Hence the will fails for uncertainty under S. 89, Succession Act;
(c) the heirs-at-law cannot be excluded from inheritance by vague and uncertain words and Ex. A-8 does not exclude them either expressly or by necessary implication;
(d) Madho Prasad Singh must be taken to have been guided in his expression not by the views of the English authorities, but by his own notions as a Hindu. Consequently when he speaks of a custom of "Raj ya Gaddi" he is only referring to a joint Hindu family impartible estate in which all the members of the family retain an interest. Thus the bequest does not exclude other members of the family."

[97] The learned counsel for respondent 1 on the other hand, contends that, at the time Ex. A-8 was executed no technical rules of construction or rules relating to the manner in which the desires of the testator were to be expressed existed. The second proviso to S. 19 of Act I of 1869 makes it clear that even those sections of the Succession Act, which were made applicable by it to the wills of taluqdars, were

not to be considered in judging wills executed before the commencement of ACT I of 1869. He, therefore, contends that, in determining whether EX. A-8 is a will, all that has to be ascertained is whether it amounts to a legal declaration of the intentions of the testator with regard to his property which he desired to be carried into effect after his death (*see* definition of "will" in S. 2 of ACT I of 1869). He urges that whatever may be said about such documents when executed by other persons they have, when read in the light of the enquiries to which they were replies, always been held by their Lordships of the Judicial Committee to be wills.

[98] Since one of the principles laid down for the interpretation of wills is that the terms of the document must be "read in the context in which they occur, and the circumstances in which the document came into existence" (*vide* 21 Luck. 463[26] at p. 487), we will first of all consider how EX. A-8 came into existence.

[99] On 18th January 1860, the Chief Commissioner of Oudh issued his Circular NO. 7/217 of 1860 to all Commissioners (EX. A-156/D. W. 7) in which he asked them to impress upon all taluqdars the desirability of single heir succession to their estates. In paragraph 3 it is stated:

"The Chief Commissioner thinks the objects we have in view may be attained if the present taluqdar who holds the property by gift of the British Government (for all estates are held by no other title in Oudh) were to file a written declaration expressing his desire that his estate should not be sub-divided at his death or in any future generation. The observance in all ages of this desire being inserted in the sanad as one of the conditions of the grants."

[100] With this circular in order to secure uniformity, the Commissioner enclosed a form which was to be used by the taluqdars as a sample for conveying their desires. This form was in the following terms:

"The British Government having conferred on me the full proprietary and hereditary rights in the Ilaqa of . . . . . It is my desire and will, that on my death, my Ilaqa descend entire by the rule that governs succession to landed property where there is a gaddi in the family. The younger brothers being supported by the head of the house."

[101] Copies of this Circular were sent to the Deputy Commissioners with direction to communicate their contents to all taluqdars and to send a translation of the sample declaration form to them (*vide* EX. A-7). Letters appear to have been issued in pursuance of this direction to, among others, Madho Prasad Singh, Kishen Prasad Singh and Sheo Prakash Singh, and their replies are EXS. A-8, A-158 and A-157, respectively. The learned advocate for the appellants concedes that EXS. A-158 and A-157, being in accordance with the sample sent may be treated as wills of taluqdars—they refer to the death of the writer and to the grant of guzara to the younger sons which indicates succession of the eldest son. He, however, contends that since EX. A-8 does not refer to the death of the taluqdar and does not say anything about maintenance of the younger sons, there is a deliberate departure from the sample and the document cannot be construed as a will in favour of the eldest son.

[102] At the time when EX. A-8 was written, neither Act X of 1865 nor Act I of 1869 had been enacted. There were thus no particular rules applicable to the wills of taluqdars. In the statement of "Objects and Reasons" attached to the Oudh Estates Bill of 1867 (which subsequently became the Oudh Estates Act of 1869) Mr. (later Sir) John Strachey stated:

"The unlimited power of disposing of their property by will having been given to the Taluqdars and wills being hardly known to the Hindu or Mahomedan, or local law acknowledged in Oudh, it has become a matter of great importance to provide by law how this power of bequest is to be exercised, and to afford some security that the real intentions of the testators shall be carried out."

In moving the Bill in the Governor-General's Council for making laws and regulations on 17th July 1867, Mr. Strachey elaborated his argument further by giving an example and he made it clear that even the oral expression of her wishes by a pardanashin lady made to a Tahsildar from behind the pardah amounted to a will as the law then stood.

[103] It is clear, therefore, that no particular form was required and all that it is necessary to ascertain is whether, having regard to the terms of the enquiry made from him, EX. A-8 was meant by Madho Prasad Singh to express his desires with regard to the devolution of his estate after his death. The circulars and the letters to which we have referred make it clear that that is what it was intended to ascertain from him and that he gave the reply, like other taluqdars with a view to having a condition inserted in sanad to be granted (or even granted) to him *regulating succession*. There was no question of his restricting his own powers and it is not contended that, by the letter Madho Prasad Singh intended to constitute himself the holder of a joint Hindu family impartible estate. The absence of reference to his death in specific words is, therefore, immaterial. That Madho Prasad Singh did not use the exact words of the sample makes no difference. He says that "I also wish that my illaqa may remain intact and indivisible generation after generation." The word "also" refers us back to the Circular and

the letter which were sent to him and its signification is that he desired the estate to remain undivided when succession to him opened after his death as those two documents contemplated. We may also note that the authorities accepted this declaration, EX. A-8, as being tantamount to a declaration according to the sample : *vide* EXS. A-161, A-153, A-162 and A-10.

[104] In 3 I. A. 259,[3] in reply to the same Circular Raja Gauri Shankar of Maurawan wrote :

"I, Rajah Gouree Shunkur, —— do hereby declare that the British Government has conferred on me, in perpetuity, the proprietary right in the estate of Jubroulee etc., within the jurisdiction of Gosheen Gung Tehseel, and has asked for a statement *regarding the custom of primogeniture,* with a view that the estate may not be divided. In my family *the custom for generations past has been* that the eldest member of the family has been considered by all the sharers as the head to whom the other sharers in the family have been subject but at the same time have possessed their right to share in the estate. Any sharer wishing to have his share separated on any account, can do so under the custom of the family. The eldest member of the family, who is regarded as the chief, cannot, according to the custom of the family, transfer the estate to another, without consulting all the sharers in the family. *I therefore wish that the custom which has hitherto prevailed in my family may be adhered to,* and not that of a single member succeeding to the whole estate."

[105] The High Court, in a case instituted at Cawnpore, with regard to the property of the family outside Oudh, held that this document did not operate as a will. They said :

"We have no hesitation in assenting to the contention that neither the reply as to custom of primogeniture, nor the tabular statement which followed it, can be regarded as testamentary. They contain no devise, or bequest, nor any language from which a devise or bequest can be inferred."

And again :

"It cannot be supposed that in replying to the inquiries made by the Deputy Commissioner the talooqdars of Oudh set themselves to make their wills. It appears to us that the *Raja Gouree Shunkur intended no more than to inform the authorities of the custom of inheritance prevailing* in the family of which he was a member, and to indicate the persons interested as sharers of the family property. Moreover, whatever may have been the power of disposal of which the Rajah possessed over the property in Oudh, which point it is not necessary for us to determine, he neither had nor does it appear that he assumed to have, any power to dispose of the property in suit,"

that is, the property in the North-Western Provinces.

[106] Their Lordships of the Judicial Committee quote the above extracts from the judgment of the High Court and continue :

"These remarks were very appropriate in the case before the High Court in the Cawnpore case. It is clear that the documents had no reference to property in the North Western Provinces, and that they did not contain a bequest or testamentary disposition of any part of such property. But with regard to that part of the property in Oudh, to which they related, the case is very different. That which was not a will in the ordinary sense of the word, might in their Lordships' opinion, have amounted to a will within the definition of Act I of 1869. By S. 2 of that Act it is declared that the word 'will' means 'the legal declaration of the intention of the testator with respect to his property affected by this Act, which he desires to be carried into effect after his death.' It appears to their Lordships that the document of 14th February 1860, and the other documents which were very similar did declare the intention and wishes of Gouree Shunkur, which he wished to be carried into effect after his death with respect to all the estates which the Government had assumed to confer upon him by the sunnud etc. including that part which was ancestral, as well as that which was granted to him for the first time. Gouree Shunkur, as an honest and just man, and as a conscientious Hindu, did not wish that after his death the property which belonged to the family jointly should pass to his eldest son as his heir, and continue to descend according to the rules of primogeniture. He wished things to go on as before, and that that which had been joint family property should continue joint family property.

It appears, from the judgment of the Judicial Commissioner that documents, such as those which have been called the will of Rajah Gource Shunkur, have been treated and spoken of by the Talookdars of Oudh as their wills.

He says :

'In ordinary cases this could hardly be construed as a 'will' for there is no direct allusion to the death of the executor nor can it be said that there is a distinct direction as to the devolution of his property after his death.'

But in Oudh it is a matter of notoriety that the letter to which these documents are answers were expressly intended to elicit and register the wishes of each talookdar as to the bequest of his landed estate after his death, and the replies are to this day spoken of by talookdars as their will when no other has been made.

Its form is immaterial, as it was made prior to the passing of Act I of 1869, and the power of Hindus to make even nuncupatory wills has been decided in repeated judgments submitted by the Lords of the Privy Council.

I find that this document correctly describes the intention of the Rajah in respect to the devolution of his talooka after his death and that it is correctly described as a 'will'.

Their Lordships concur in his view.

[107] This decision of their Lordships of the Judicial Committee thus clearly negatives the arguments advanced by the appellant's learned advocate and supports the contention that EX. A-8 operates as a will of Madho Prasad Singh, and we accordingly hold it to be a will. Similar replies sent in answer to the same circular have also been held to be wills in 17 I. A. 82[27] and 65 I. A. 137[7] but the facts of those cases were different—the person who was to succeed was named quite apart from an indication of the succession being derived from a statement as to custom. Also see 14 O. C. 133[28] at p. 135.

[108] We come then to consider the construction to be placed on EX. A-8 and to ascertain whether it is possible to determine the legatee under it. With regard to the first point all that we need say is that, we are bound to hold in

view of their Lordships' decision in 3 I. A. 259[3] that such a declaration made by a taluqdar in reply to Government enquiry as to custom operates as a will. Exhibit A-8 does not therefore fail as a will on the ground that it only expresses Madho Prasad Singh's views as to custom and does not go further.

[109] As to the argument that Ex. A-8 infringes the provisions of S. 89, Succession Act (corresponding to S. 76 of Act X of 1865) and there is no specific exclusion of the heir at law we must first of all point out that although by S. 19 of Act I of 1869, S. 76 of Act X of 1865 has been specifically made applicable to the wills of taluqdars, the second proviso contained in S. 19 states: "Provided also that nothing herein contained shall affect wills made before the passing of this Act." Thus S. 89 itself is inapplicable to the present case but that does not mean that the principle contained in it is not applicable as a general principle of law. If the will is framed in such uncertain language that it is not possible to determine in whose favour it operates it must fail. Before, however, it can be allowed to fail every effort must be made to ascertain in the legatee.

[110] The following passage to be found in Jarman on Wills, 7th edition, Vol. I, at page 428 is instructive:

"In the construction of wills" Mr. Jarman remarks, "the most unbounded indulgence has been shown to ignorance unskilfulness and negligence of testators: no degree of technical informality or of grammatical or orthographical errors: nor the most perplexing confusion in the collocation of words or sentences will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will and the whole carefully weighed together, but if, after every endeavour he finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence. Conjecture is not permitted to supply what the testator has failed to indicate for as the law has provided a definite successor in the absence of disposition it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness. The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication."

[111] Thus it is only if all attempts to discover the intention of the testator fail that the heir at law will succeed: *vide* also I. A. Sup. Vol. 47.[29] Further, although it is the words of the will which are primarily to be considered to ascertain the intention of the testator, his surroundings and the circumstances in which he came to execute the will may also legitimately be called in to assist in determining his meaning. The will was executed before 1869 and consequently S. 81, Succession Act (corresponding to S. 68 of Act X of 1865) cannot be applied. It is thus permissible to consider even extrinsic evidence to resolve a patent ambiguity and indeed extrinsic evidence—the correspondence with the Chief Commissioner—has been considered in 3 I. A. 259[3] and the other cases to which we have referred.

[112] In 6 M. I. A, 526[30] at pp. 550-551 their Lordships of the Judicial Committee say:

"The Hindoo law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes, *but the meaning to be attached to them may be affected by surrounding circumstances*, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. *If that law has attached to particular words a particular meaning or to a particular disposition a particular effect*, it must be assumed that the testator in the dispositions which he has made, had regard to that meaning or to that effect unless the language of the will or the surrounding circumstances displace that assumption."

In A. I. R. 1938 P. C. 228[31] at page 229, their Lordships reiterate this position and quote the words which we have quoted.

[113] We have already referred to several cases decided by their Lordships of the Judicial Committee in which having regard to the fact that the letters in question were written in reply to a particular circular, their Lordships held them to be wills. If we consider Ex. A-8 in the same way, there can be no doubt that the testator in accepting the Government policy, desired the succession of his eldest son. Exhibits A-7 and A-156/D. W. 7 with the form attached and all the correspondence of the period relating to the grant to primogeniture sanads : *vide* Sykes' Compendium of Taluqdari Law, pages 82 *et seq*—indicate the great anxiety of the Chief Commissioner to prevent the division of Taluqas and to enforce the rule of primogeniture. It was in reply to these letters that Ex. A-8 was written and when Madho Prasad Singh writes that he *also* wished the custom of Raj Gaddi to be applicable to his estate he can only have meant that he agreed to the proposals made by the Chief Commissioner and desired the rule to which he referred to be applied to his estate. In the language of the time the word "Raj Gaddi" was held to connote the rule of primogeniture or the rule applicable to the "majorats" of continental Europe (*vide* Ex. A-154). Madho Prasad Singh was made aware of this signification by Exs. A-7 and A-156/D. W. 7 read with the sample declaration form. In accordance therefore, with the rule laid down in 6 M. I. A.

526,[30] when Madho Prasad Singh used the words "Raj Ya Gaddi" he must be taken to have meant the succession of his eldest son. It will not be out of place to remark that in paragraph 8 of the plaint the plaintiffs themselves stated that Babu Har Dutt Singh had been nominated as his successor by Madho Prasad Singh though it was added that he held the estate as head of a joint Hindu family. This is a position which had never been modified by any subsequent pleading.

[114] This was also the sense in which the authorities to whom EX. A-8 was addressed understood it: *vide* EX. A-161. In this document paragraph 3 mentions all the taluqdars who desired the custom of Raj Gaddi to prevail in their families: Madho Prasad Singh's name is among them. Out of this list only three are mentioned as desiring the rule of primogeniture not to be applicable: the Raja of Hussunpur and Meer Karamat Husain of Kutharia desired the most deserving to succeed and Mahip Narain Singh desired his second son to succeed. We have thus come to the conclusion that EX. A-8 operated as a bequest in favour of Har Dutt Singh.

[115] What we have already said would indicate that when he referred to the custom of Raj Ya Gaddi it was not to the customs applicable to Hindu joint family impartible estates that Madho Prasad Singh referred. He was the absolute owner of the property and possessed full rights of transfer in it freed from all the restraints imposed upon members of a joint Hindu family, and he was asked to elect for the succession of one member only—not a joint Hindu family—so that the property might be impartible for generation after generation. Moreover, as we shall presently show the rule of inheritance in his family was not controlled by any custom of impartibility though the normal position as in the case of many other Hindu families was that the family remained joint under one karta, unless disputes between them led to a partition. It cannot thus be said that Madho Prasad Singh desired to transform his estate into a Hindu joint family impartible estate by the use of the words "Raj Ya Gaddi", without any right of transfer being left to the holder as the Hindu law was then understood to be: *vide* 4 Mad. 250[32] at p. 267.

[116] Indeed on the basis of the absence of a custom of single heir succession the appellants' learned counsel advanced another argument derived from the Tagore case, I. A. Supp. Vol. 47,[29] in which it was laid down that a subject cannot create a line of inheritance not known to law and he contended that EX. A-8 even if it is treated as a will failed for this reason also. (*See* also 11 O. C. 256[33] upheld in 45 I. A. 134.[34]) In I. A. Supp. vol. 47[29] however, their Lordships at page 66 also laid down the proposition that, in such a case the first taker would get the estate "because the giver had at least that intention". If, therefore, it is held, as we have held, that a bequest to the eldest son was intended he would get the estate. In I. A. Supp. vol. 47[29] the first taker took only a life interest: in the present case there are no words to curtail the interest of the first taker and he accordingly gets an absolute estate.

[117] Har Dutt Singh thus became solely entitled to the estate left by his father and no one else had any interest in it. In this view of the case, it is not necessary for us to enter into a discussion of the rights of the holders of Hindu joint family impartible estate or of the cadets of the family. Had we, however, come to the conclusion that the bequest was to Har Dutt Singh as the head of a joint family with all the rights of the holder of an impartible estate we would have held in view of the decision of their Lordships of the Judicial Committee in 68 I. A. 155[35] at page 168, that whether the junior members were entitled to receive maintenance or not and even assuming that the holder had full powers of transfer and bequest the joint family was the owner of the property. If this had been so, Har Dutt Singh would not be sole owner of the property and consequently Act I of 1869 could not have been applied so as to divest rights which had already vested in the joint family.

[118] Since we have held that EX. A-8 is a will which operates in favour of Har Dutt Singh alone it follows that when Act I of 1869 came into force the person who would have been the heir under S. 22 of Act was the person actually in possession under an exclusive title. The effect of giving retrospective operation to the Act would therefore, not be to divest any title which had already vested in others. It might, however, be objected that, in view of the decision of their Lordships of the Judicial Committee in the *Mahewa case*, 32 I. A. 203,[16] since the bequest came into operation before Act I of 1869 became law, Har Dutt Singh was not "legatee" within the meaning of the Act and consequently the Act did not govern succession to him. The facts of the *Mahewa case*,[16] were, however, very different because S. 14 of the Act was not applicable to it while it is applicable to the present case.

[119] Section 14 of Act I of 1869 as it then stood provided :

"If any Taluqdar or grantee shall heretofore have transferred or bequethed or if any Taluqdar or grantee or his heir or legatee shall hereafter transfer or bequeath the whole or any portion . . . . to a person who would have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property to which he or they may have

become entitled under or by virtue of such transfer or bequest and shall hold the same subject to the same conditions and to the same rules of succession as the transferor or testator."

[120] It will be seen that if a bequest was made not by the taluqdar but by his heir before the commencement of Act I of 1869, S. 14 would not operate to place the legatee in the same position as the testator. In the *Mahewa case*[16] the man whose name was entered in the list prepared under S. 8 was Gajraj Singh, who died in January 1860 and was succeeded by his brother, Girwar. Girwar executed a will in favour of his nephew Balbhaddar and he also died in 1865. Thus, when the Act came into force the person in possession was not the legatee of a taluqdar but the legatee of the heir of a taluqdar. He could, therefore, not get the benefit of S. 14.

[121] In the present case Har Dutt Singh took under a bequest from the taluqdar himself and accordingly he held the estate subject to the same rules of succession as Madho Prasad Singh. By the retrospective operation of the Act the rule of succession to Madho Prasad Singh must be deemed to be that laid down in S. 22 of the Act: *vide* 65 I. A. 137.[7] In this view of the law also succession to Har Dutt Singh and his heirs must be held to be governed by S. 22 of Act I of 1869.

[122] In view of our finding that Act I of 1869 governs succession to the estate it is no longer necessary for us to determine whether any custom governs succession in the family for the purpose of ascertaining whether the Act applies or not or for finding out the heir to Narendra Bahadur Singh to the taluqadari estates. There is, however, also property which is admittedly not governed by Act I of 1869 and it is necessary for us, in order to find the heir to this property to determine whether the custom exists. Before proceeding to consider the evidence adduced by the parties, it is necessary for us to consider the pleadings since great emphasis has been placed upon them by the learned Additional Civil Judge as admission by the plaintiffs.

[123] The parties in particular the plaintiffs have changed their position considerably as the trial proceeded. When the case was before the revenue Courts in mutation proceedings Jai Narain Singh set up a custom under which the proprietor nominated his successor and in the absence of such nomination, the eldest member would succeed. He also claimed that he had been nominated and claimed succession on both grounds: *vide* EX. A-60. This position was modified in appeal and there he pleaded that the other members of the family were "co-owners" (*vide* EX. A-45). When the present suit was instituted he pleaded that B. Narendra Bahadur Singh was the last holder of the estate and he succeeded by survivorship as a member of the joint family with Narendra Bahadur Singh. He then, in paragraph 9 of the plaint, reiterated the position which he had adopted in EX. A-60.

[124] Babu Jai Narain Singh died before the suit had proceeded very far and there was a contest between the eldest son and the other two sons for substitution, the former claiming to be the sole heir of his father under custom and the latter claiming under the ordinary Hindu law. Finally the names of all the three sons were brought on record but each group reserved its rights for future determination. In September 1938, however, all the three substituted plaintiffs applied jointly for amendment of pleadings. This application was allowed by an order, dated 17th October 1938, and the pleadings were actually amended on 16th November 1938. These amendments are very material; two fresh paragraphs were added and the eighth paragraph (renumbered tenth) was considerably altered by the addition of the following words :

"....and plaintiff 1, Babu Parbhu Narain Singh, being the eldest son and otherwise suitable, has similarly succeeded to the rights of his father under the *custom of impartibility* and the rule of succession prevailing in the family and hereafter mentioned."

As a result of the seamendments the first relief claimed was a decree for possession in favour of Babu Parbhu Narain Singh alone, though in the alternative, possession was claimed for all the brothers. In the replication the plaintiffs maintained this position but they pleaded that their knowledge as to impartibility was based solely on a declaration by Babu Har Dutt Singh which the defendants characterised as a forgery. At the time of the oral pleadings, preceding the framing of issues, the plaintiffs completely abandoned any custom and relied upon the Hindu law "unchanged by any custom" though they allowed the plaint to remain unamended. Issues were framed on this basis and no issue was framed to try the question of the custom originally alleged by the plaintiffs.

[125] The appellants' learned advocate contends that the statements of Babu Jai Narain Singh are not admissions since the plaintiffs do not claim through him but as members of a joint Hindu family in their own right and that the original pleadings in this respect having been amended by the oral pleadings and the allegation as to custom having given up, those original pleadings cannot be considered at all. He also contended that, even if there was any admission by anyone, it was gratuitous and could always be—and has been—withdrawn since there are no circumstances in this case which would involve the application of the doctrine of

estoppel. At the best, therefore, they are only pieces of evidence against the plaintiffs (*vide* S. 31, Evidence Act) and they have, in the present case, been shown to be wrong.

[126] There can be no doubt that, by their oral pleadings the plaintiffs change the whole basis of their title and the defendant might well have objected to their being allowed to do so but the defendants did not protest and the issues were framed on the basis of the altered pleadings. All that the oral pleadings amounted to was an abandonment of the plea as to custom which naturally let in the ordinary law. Indeed this is exactly what the defendants thought that the plaintiffs were doing and perhaps that is why they did not object. In the course of the proceedings on 23-2-1940, when defendant 1 wished to withdraw a statement made by his counsel earlier his learned advocate stated :

"I have the right to give up any plea or statement that was made orally and not in the written statement of defendant 1 in the same way as the plaintiffs have orally given up certain pleas taken in their plaint."

Leaving out of consideration for the time being the statements made in the course of mutation proceedings, we must take the pleadings in the case as they stand and leave out of consideration the pleadings as they stood before the amendment. It is too late a stage for the defendants to object to the new pleas. In A. I. R. 1930 P. C. 205[36] at p. 208 their Lordships laid down the proposition that if a case is embodied in an issue, absence of a plea in the plaint is immaterial. In the present case it was the reverse and a plea contained in the plaint was not embodied in any issue. Apart, therefore, from the specific statement contained in the oral pleadings, it must be deemed to have been given up.

[127] As to the statements made in the cas of mutation proceedings the position is different. The plaintiffs' cannot say that they are not statements made by their predecessor-in-interest because in this suit, the plaintiffs have come in only as the legal representatives of Jai Narain and any statements made by Jai Narain Singh were as much admissible against them, as they would have been against Jai Narain himself were he alive, and they have the same value—*vide* note 16 to O. XXII, R. 3 contained in Chitaley's Commentary on the Code of Civil Procedure which summarises the authorities. Very little vlaue can, however, be attached to all these statements of the plaintiffs and of Jai Narain, since it is apparent that they did not have any scruples in changing their pleadings so as to suit the exigencies of their case : 63 I. A. 397[37] at p. 403. They are nevertheless statements which must be weighed with other evidence in determining whether any family custom exists.

[128] We will next consider the decision of their Lordships of the Judicial Committee in 23 I. A. 147[38] on which the learned counsel for respondent 1, greatly relied because it provides a valuable guide on the question of custom in the present case. In the case one Bhairon, produced a book containing the genealogy of the Umargarh family "which professes to show the heads of the family and some younger sons for 27 generations." Their Lordships set out the last six steps in this pedigree in their judgment. In these six steps there were three cases in which the last holder left only one son and three in which he left more than one son. In that case their Lordships relied upon the following facts in holding the custom established (a) The family property has never been the subject of partition, (b) the heads of it ascertained by primogeniture had been installed on the Gaddi with public ceremonies, (c) a claim for partition made by a younger son was resisted and defeated and thereafter the property in suit was enjoyed by the head of the family as sole owner, (d) all the members of the family, with the exception of the actual claimants to partition, and a substantial body of kinsfolk deposed to custom and (e) there was no substantial evidence in rebuttal. Mr. Wasim contends that all the above kinds of evidence are present in this case also. It will, therefors, be convenient to divide the evidence produced in this case under the same heads as those under which their Lordships divided it in that case.

[129] The first and most important point which arises for our consideration is whether any inference can be drawn from the paucity of divisions of the estate during the course of some 25 generations. Before we come to consider the facts bearing on this part of the case it will be as well to review some of the rules which their Lordships of the Judicial Committee have laid down for the determination of the question of custom. These rules have so often and so clearly been enunciated that it is not necessary for us to consider them in any detail : we will content ourselves by referring to a few only of the pronouncements of their Lordships.

[130] In 55 I. A. 45,[39] in which their Lordships held that descent of an estate without division for five generations over a period of 67 years was not enough to establish such a custom, they say at pages 48 and 49 :

"There are certain propositions of law by reference to which this case must be decided, and their Lordships consider that they can all be taken as well settled.

(a) When there is a dispute with respect to an estate being impartible or otherwise the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such not liable to partition. In order to establish that any estate is impartible, it

must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom.

(b) Any such special custom modifying the ordinary law of succession must be ancient and inveriable and must be established to be so by clear and unambiguous evidence. To use the words of James L.J. in 13 M. I. A. 542[40] at p. 549 : 'The custom must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back.'

"(c) That if an impartible estate existed as such from before the advent of British rule, any settlement or re-grant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom."

See also I. A. Supp. Vol. 1[41] at p. 3 and 3 I. A. 259[3] at p. 285.

[131] In 45 I. A. 10[42] in which a custom of exclusion of daughters was under consideration their Lordships say at page 19 :

"In every case of this kind the burden of proof lies heavily upon the plaintiff and though his evidence may consist of a number of striking instances in support of his case, it receives a severe blow when prominent members of the families concerned deny that the custom exists."

Accordingly they held that, although several instances of the exclusion of daughters were proved they were referrable to other causes and did not substantiate the plea of custom.

[132] In the same case, however, their Lordships relax the strict rule of English law relating to proof of antiquity. At page 14 they say :

"Their Lordships have carefully considered the difficulty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here. Custom binding inheritance in a particular family has long been recognized in India (*see* 12 M. I. A. 81[43]) although such a custom is unknown to the law of this country, and is foreign to its spirit."

[133] In the recent case in 68 I. A. 1[44] their Lordships follow the principles laid down by them in 45 I. A. 10[42] and at pages 30 and 31, they say :

" Their Lordships are not convinced that Young C. J.'s reference to the English rule, stated in Blackstone's Commentaries, that 'a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary' was either apposite or useful, when applied to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man-still less, that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. Having regard to the circumstances under which local customs have arisen, and do arise in India, both with reference to Muslims and Hindus and the case and frequency with which people migrate from one district or Province to another it would, in their Lordships' opinion, create great perplexity in the already uncertain character of customary law to require that, in every case, the antiquity of a custom must be carried back to a period which is beyond the memory of man."

[134] While insisting on the invariability of the custom their Lordships say, at page 30 that the custom as contained in the riwaj-i-am would not be overruled by recent instances in which it had not been observed. Similarly in 41 I. A. 275,[45] 43 I. A. 269,[10] 55 I. A. 303[14] it has been laid down that an occasional departure from custom will not negative the custom. The appellant's learned advocate urges that, in the last two cases, it was so held because the estates were entered in list II of the lists prepared under S. 8 of Act 1 of 1869 and that section provides that list II was to be a list of persons whose estates "ordinarily" as distinct from "invariably" devolved upon a single heir. He relied upon the decision of the Judicial Committee in 1 Cal. 186[46] for the proposition that even one departure from custom terminated the custom, so that, in the present case, even if such a custom had existed it came to an end on a partition occurring.

[135] In 1 Cal. 186[46] their Lordships say at pages 188 and 189,

"there is, undoubtedly, evidence which leads reasonably to the belief that, formerly, the estate was held, from time to time, by individual male members of the family; but the evidence leaves in obscurity the character and nature of the estate, and the tenure by which it was held under Mahomedan rule."

Their Lordships then refer to certain firmans of the Emperors under which successive holders came into possession and quote an extract from the judgment of the High Court in which the following passage occurs :

" This succession, however, was not regulated by any family custom, but by the will of the sovereign power."

Their Lordships state facts which show that it was not only one instance in which the custom was departed from but there were several such instances, the first being that on which stress is laid by the appellants' learned advocate. Their Lordships then say at pages 194 and 195:

" It has already been stated that the acts of Bishonath and his brothers, on his father's death, afford strong ground for the belief that they did not regard the manner of succession, if it ever prevailed, in the light of a family custom, but as an incident or condition of tenure which had been determined by the settlement and consequently assumed that thenceforth the succession would conform to the ordinary law. Their conduct, indeed, goes far to disprove that a family custom, properly so called, ever existed; but

assuming it to have once existed, their Lordships think it was of a nature which could, without any violation of law, be put an end to, and that it was, in fact discontinued."

The facts of the case clearly show that the decision of their Lordships was based on the facts that, at one stage in the succession, all the members of the family agreed to take according to ordinary law, unaffected by custom, and thereafter the devolution of property was according to that law.

[136] While, therefore, it is true that an occasional deviation will not affect the invariability of the custom, the Court must find that there is other evidence to justify it in holding that there exists a well-established custom and in considering whether any such custom has, in fact, been established, the deviations must receive due consideration:*vide* 1945 O. W. N. 267.[47]

[137] In 5 M. I. A. 169[48] it was held that proof that an estate had descended undivided for eight generations in three or four of which there could have been a partition but it did not take place leads to an inference that the estate is governed by a custom of single heir succession. At page 186 their Lordships say:

"One very remarkable case is this, that Rawat Kurn Rai having adopted a son, that son proceeded to deal with the property as an undivided estate, and excluded an afterborn natural son of Rawat Kurn Rai."

[138] In 1 I. A. 1[49] on the other hand there had been no division for six or seven generations though there had been partitions earlier. Their Lordships at page 8 say:

"In the present case, there was no evidence of enjoyment by a single member of the family during six or seven generations; all that was found was that during that period the estate had never been divided. That fact alone cannot control the operation of the ordinary rule of Hindu law, or deprive the parties, if members of a joint and undivided family, of the right to demand a partition when they are so minded."

[139] In 27 I. A. 238[50] at p. 241 also their Lordships placed emphasis upon a custom of Gaddinashini and they also relied upon proof of a similar custom in allied branches of the same family.

[140] In 41 I. A. 275[45] at P. 287 it was laid down that custom may be established by "general evidence" of exclusion of females, even though there may have been very few occasions for its actual enforcement. In that case a custom by which females were excluded from inheriting to males who died in a state of jointness was extended to exclude females from succeeding to property left by separated males.

[141] Coming now to a consideration of the evidence adduced by the parties in the light of the above principles the first thing that attracts our attention is the history of the acquisition and devolution of the property in the light of the family pedigree. Patraj Deo, it is agreed, was the founder of the family fortunes and it is not disputed that, on his death, the estate which he left was divided among all his sons. He and his sons were, therefore, not subject to any custom of single heir succession. Thereafter five steps intervened between Nar Singh Deo, with whose branch we are concerned and Ram Deo, each represented by a single son. Even if we were to assume with respondent 1 that there was more than one son at each step and still the property remained undivided this period of time would not be sufficient to establish a well-recognised custom of impartibility. Thus when Gohraj Deo laid the foundations of the present Birhar estates he was not subject to any custom of single heir succession which he might have brought with him, even supposing such a thing were possible in the case of a custom not governing succession to all the property of the family but only attaching to a particular estate in that family. It is by no means clear that Gohraj Deo himself acquired the whole estate—there is evidence to show that he and his descendants built it up—but again assuming with respondent 1 that the estate had come into existence in the time of Gohraj Deo, we are confronted with the fact that for the next nine generations the family was maintained by only one son at each step. The non-partition of the estate would, therefore, not be due to any custom but to the law 'since in the presence of the son no one else could succeed.

[142] In order to meet this objection the learned counsel for respondent 1 contends that the pedigree is not complete since it only traces the descent of the property and consequently gives the names only of those persons who held the estate. He further urges that it is impossible to believe that for so many generations there should be only one son in the family and he relied upon the following remarks of their Lordships of the Judicial Committee in 48 Cal. 997[51] at p. 1018:

"The judgment" (of the Judicial Commissioner) "omits from consideration in the appraisement of the case the existense of the family as an entity through so many centuries which could only survive destruction and disintegration with the help of such a family custom."

[143] In that case, however, as well as in 23 I. A. 147[38] the evidence showed that there were younger sons who had only received maintenance while the head of the family obtained the whole estate and that, at one stage, when a dispute arose between three brothers as to succession and the property was divided the villages which "belong to the Raj" were left undivided and were assigned to the eldest son. In the present case, it is not a fact that only those who

held the estate are shown: the younger sons of of Patraj Deo, Ram Deo and Bharat Deo, who did not hold the estate and lived before the estate was acquired are all shown and even some steps in pedigree of Har Deo are shown. The fact that the descendants of those branches of the family exist is also indicated, though the whole pedigree of those descendants is not given. Coming down to later times, even the descendants of Mani Ram and Horal Singh are also shown. Thus whenever there existed another branch of the family it is indicated though the pedigree of that branch is not given (*vide* EX. A-20.) If there had in fact been any descendants of Gohraj Deo in lines other than those shown in EX. A-20 it should not have been difficult for respondent 1 to produce evidence on this point. He did, in fact, produce a body of witnesses on the question of custom, who claimed to be Palwars, but all of them claim either that Patraj Deo or Rahman Sah was the common ancestor: none of them claims descent from any intermediate common ancestor between Gohraj Deo and Rahman Sah. Moreover, we must remember that the period during which Gohraj Deo and his descendants up to Rahman Sah lived was before the reign of the Emperor Akbar, when every petty family had to maintain its possessions by force of arms and the scions of the family had, like the Barons of medieval Europe, to lead the forces of the family to battle. It is not at all surprising, therefore, to find that many families of warrior chieftains exhausted themselves, nor is it surprising that such of those families as continued to exist would have very few male members left to them. This is not pure surmise or conjecture on our part but is borne out by history and, in the case of this very family, in its lower steps, we find the same forces at work at a later time when there was a weak sovereign power. Thus EX. A-20 shows that, in Ain Singh's branch, though there were cadets, they all exhausted themselves, having been killed in fighting as the Fyzabad Settlement Report in paragraph 566 at pages 201 and 202 tells us, until in six generations only the branch of Munna Singh survived. Similarly in Lashkar Singh's branch through 6 generations only Sheo Parkash Singh and his brothers, and Mahip Narain Singh survived at the time of annexation.

[144] It must be remembered that the burden of proof rests heavily on the plaintiffs to prove custom and that this burden cannot be discharged by the production of ambiguous evidence. In the present case the utmost that can be said with regard to succession down to Rahman Sah is that it might be due to custom: on the other hand, it might equally have been in accordance with law. Such evidence is not sufficient to prove custom, particularly when it is considered in the light of what followed.

[145] We have a detailed account of the succession to the family property in the last nine generations and this is wholly inconsistent with the alleged custom. From Rahman Sah in the direct line to Madho Prasad Singh there are nine steps in the succession, in four of these there was an only son, in three, viz., between Bali Ram and Mani Ram, Ain Singh and Lashkar Singh, and Madho Prasad Singh and Kishen Prasad Singh, the estate was divided. In the remaining two there was no partition. Out of these two in the first instance there were only two brothers, of whom one died childless and in the second there were four brothers of whom two were childless, and third left two sons both of whom were childless and only one survived and left descendants. There are indications in the evidence that as a matter of fact these four brothers and their children died in a state of jointness: *vide* EXS. 2, 3. The branch of Lashkar Singh reveals a similar state of affairs. It certainly cannot be said that the property of the family has passed undivided through a long period of years extending over centuries. Rather the evidence shows that it had always been divided whenever there were more sons than one.

[146] The learned Additional Civil Judge has assumed, as the learned counsel for respondent 1 wishes us to assume, that the divisions were not brought about under the law but by extraneous causes, chiefly force. We may note at once that there is no evidence on record to support this contention. The learned Additional Civil Judge has placed great reliance on the misgovernment which prevailed in Oudh during the last years of the Oudh monarchy but he has omitted altogether from consideration the fact that the first two partitions, those between Bali Ram and Mani Ram and between Ain Singh and Lashkar Singh, took place at the height of the Moghul power when law and order were rigidly enforced. The fact that, at the break up of the Moghul Empire, the descendants of Bali Ram once more seized the property in the hands of the descendants of Mani Ram would not nullify the effect of the partition. At such a time partitions of family property could not have been effected by force. Moreover, it would be surprising if force caused a division of the estates in exactly the shares to which the parties would be entitled under the law. The third partition took place just before the annexation when, undoubtedly, disorders prevailed but the evidence on the record establishes that it was amicably done and equal shares were allotted to

each brother practically in each village: *vide* Exs. A-20, A-2 and 138.

[147] Succession to the estate of Birhar since the annexation of Oudh is no evidence either for or against custom, since succession has been under the rule laid down in S. 22 of Act I of 1869 to a single heir. Kishen Prasad Singh, Mahip Narain Singh and Sheo Prakash Singh were all alive when Act I of 1869 came into force and that Act was undoubtedly applicable. Even with regard to the branch of Madho Prasad Singh, before the present suit, it was understood by all concerned that the Act applied and that Har Dutt Singh and Narendra Bahadur Singh were Taluqdars: *vide* Exs. A-16, A-100, A-99, A-82, A-147, A-126/D. W. 3, A-17, A-18, A-106, A-90, A-42, A-160, A-45 and page 91 of the Fyzabad Gazetteer. Thus the evidence relating to the succession of Har Dutt Singh and Narendra Bahadur Singh, one after the other, as sole owners has no bearing on the question of custom. We may note, however, that, in the branch of Kishen Prasad Singh, the descent is confined to a single line since there is only one line in existence; but that both Sheo Prakash Singh and Mahip Narain Singh divided their estates which were split up into several fragments.

[148] Thus, in the present case, the course of descent of the properties through generations negatives the alleged custom but we still have to consider whether the actions and statements of the members of the family are such as to lead to an inference that they believed in the existence of such a custom.

[149] Respondent 1's learned counsel contends that the conduct of all the principal members of the family at the time of the first regular settlement, when titles were being enquired into and the rights of Taluqdars and others were being finally determined, leads to the inference that they were convinced of the existence of such a custom in the family.

[150] The second summary settlement of the various portions in their possession were made with Madho Prasad Singh, Kishen Prasad Singh, Sheo Prakash Singh and Mahip Narain Singh, Exs. A-1, 20, 22 and 23. At the same time, however, on the 15th January 1859, an order was passed directing the entry of the name of Sital Prasad Singh, younger brother of Sheo Prakash Singh in respect of a 1/3rd pattidari share (*vide* Ex. A-47). Thereafter, on 21st January 1859, Sital Prasad Singh applied for partition of his share (Ex. 48). Sheo Prakash Singh denied the claim (*vide* Ex. 49), and opposed partition, but, on 28th February 1859, the three brothers entered into an agreement to divide the property, through the intervention of arbitrators, into three equal shares (Ex. 50). Nothing happened in pursuance of this agreement and it seems that Sheo Prakash Singh began interfering with Sital Prasad Singh who again applied on 11th September 1860, asking that Sheo Prakash Singh should be directed not to interfere with his collections. In the meanwhile the Governor-General's letter, dated the 10th October 1859, conferring title on Taluqdars with whom summary settlement had been made, had been issued and Sheo Prakash Singh opposed all claims made by his brother and the Tahsildar supported his opposition on the basis of that letter : *vide* Exs. A-72, A-73, A 74 and A-68. The matter was entrusted to Raja Rustam Sahi, Taluqdar of Dera, who held the post of Honorary Assistant Commissioner, for disposal by an order dated 22nd October 1860, (*vide* Ex. 51). The Raja held an enquiry and called for statements from all persons who could be expected to know. Both Kishen Prasad Singh and Mahip Narain Singh wrote letters (*vide* Exs. 56 & 55) saying that all the three brothers were entitled to the property but they lived jointly and there was no disunity among them. Raja Rastam Sahi, being well aware that the Chief Commissioner attached great importance to the enforcement of the rule of single heir succession (*vide* Exs. A-7. A-156/D. W-7 etc.) thereupon directed that "this rubkar be sent to the Deputy Commissioner, Fyzabad, for the purpose of informing him of the present custom prevailing in the family of the parties and it be submitted that the family custom of the parties being such Your Honour might inform them of your views in respect thereof ....." (Ex. 51)

[151] The Deputy Commissioner was not satisfied with this and on 20th August 1861, he returned the case for further report on, among other things, the custom prevailing in the family (*vide* Ex.52). Thereupon Raja Rustam Sahi reported: "Now from the handwriting of the said Babus and neighbouring Taluqdars and looking (at) the papers of the misil (it) is clearly known that the family custom of this Taluqa depends upon distribution," and he proceeds to give instances of divisions but he says that, although all the members of the family are co-sharers, the kabuliat has always been executed by one member only and so the arrangments made by the Chief Commissioner (i. e. the effecting of the settlement with one member) should not be disturbed (*vide* Ex. 57 dated 16th January, 1862). This order was interpreted as awarding 1/3rd to each of the brothers and it was concurred in by Mr. Bradford the Settlement officer, but on appeal the Commissioner and the Chief Commissioner held the claim barred by time. The claim was left, by an order dated 6th Sep-

tember 1882, to the Settlement Officer for final disposal (*vide* EX. A-66).

[152] When the regular settlement operations began, the case was again taken up by the Settlement Officer Mr. Carnegy, who recorded the evidence of the parties and other members of the family (*vide* EX. A-66) and finally held that the Gaddi System had always been the rule applicable to this estate and he accordingly dismissed the claim of Sital Prasad except to the villages of which he had been in possession as maintenance holder: *vide* EX. A-67.

[153] It will appear that, so long as the matter was before a brother Taluqdar, all the members of the family except Sheo Prakash Singh deposed to succession according to Hindu Law and against any custom of impartibility. This was not in accordance with the views of the authorities (*see* the Introduction to Sykes Compendium of Taluqdari Law, page 81 *et. seq.*) and a decision on those lines was not accepted by them. When, therefore, the case came back and the other Taluqdars of the family learnt that their own recognition as Taluqdars depended on the result of these enquiries (*vide* EX. A-66), they acceded to the wishes of the authorities and deposed to the custom of single heir succession. No value can be attached to the statements made by the four Birhar Babus in such circumstances before the Settlement Officer.

[154] The learned advocate for the appellants has argued that these statements are inadmissible in evidence because they were made after the controversy had arisen, *vide* S. 32 (4), Evidence Act. Mr. Wasim, on the other hand, relied upon Ss. 48 and 49 of that Act for their admission and he sought support for his argument in 52 I. A. 379,[52] 8 O. W. N. 6[53] at pp. 15 and 16 and 1939 O. W. N. 157[54] at p. 162. These authorities are, however, of no assistance to him. They were cases in which the persons expressing the opinions had come into the witness box to depose to them. Sections 48 and 49, Evidence Act, do not deal with the statements of dead persons or persons who cannot be found. Such cases are dealt with by S. 32. In 27 I. A. 238[50] at p. 251, their Lordships of the Judicial Committee held :

"By section 49 when the Court has to form an opinion or (inter alia) the usages of any family, the opinions of persons having special means of knowledge thereon are relevant. By S. 60, if oral evidence refers to an opinion or the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on these grounds."

See also 8 Luck. 445[65] at p. 461. The record of the depositions of Har Dutt Singh, Mahip Narain Singh, Sheo Prakash Singh and Kishen Prasad Singh contained in EX. A-66 is thus not admissible in evidence. In any case, even if they are admissible, they are of no value.

[155] One more fact in connection with the conduct of those persons must be borne in mind and that is that, when the lists came to be prepared under S. 8 of Act I of 1869 the names of all the four Birhar Taluqdars, as well as those of the two Taluqdars in Har Har Deo's branch, namely, the owners of the Tigra and Murhera Taluqdars (*vide* Pedigree attached to the Fyzabad Settlement Report opposite page 201) were entered in list III and not in list II, the latter being a list of those Taluqdars in whose families succession was governed by a custom of single heir succession. This is all the more significant when it is realised that these lists were prepared in consultation with the Taluqdars and each Taluqdar could choose the list in which he desired his name to be entered.

[156] In his letter NO. 158 dated 19th January 1869, the Chief Commissioner wrote to the Financial Commissioner, in para 7 as follows:

"Great care must be taken in ascertaining the wishes of the persons whose names are entered in the lists in regard to the lists in which they desire their names to be entered. As names can only be changed from one to the other to correct a bona fide mistake: the election shall be final."

See 18 O. C. 289[66] at p. 318. We have no reason to suppose that the Financial Commissioner and the Deputy Commissioner did not carry out their duties in respect of such an important matter properly; particularly when we find that in the *Gangwal Case*, 5 O. W. N. 299,[20] after the lists had actually been prepared the following letter was sent to the Taluqdar :

"My dear Raja Sitla Baksh Singh, Taluqdar of Gangwal Estate.

According to Act I of 1869 relating to estates in Oudh, the lists of Taluqdars being appendices 1, 2, 3, 4, 5, and 6 having been prepared under S. 8, have been sent for sanction and publication in the Gazette and your name has been shown in lists I and II. Hence you are hereby informed that if you have any objection you should try early. Be it known that the lists can be corrected so long as they are in the office of the Financial Commissioner but as soon as the order for publication in the Gazette is passed by the Chief Commissioner correction will be impossible. The reply is awaited by return of post."

[157] The fact that, in spite of all the efforts to ascertain the wishes of the Taluqdars in this respect the Birhar Babus chose list III and not list II is very significant and indicates that, at that time at least they were not conscious of a well ascertained family custom of single heir succession. Thus, the conduct of the principal members of the family is also inconsistent with the existence of a family custom of single heir succession.

[158] The next fact upon which Mr. Wasim relied was that partition had been demanded by Sital Prasad Singh during the course of the first regular settlement operations and refused

We have already seen the circumstances in which the demand was refused: the parties had actually agreed to an equal division when the letter of the 10th October 1859 came to be known. Thereafter Sheo Prakash Singh refused to accede to the demand for a partition and his sole title was upheld by the officers, who were most desirous of preventing division of Taluqas. Not much importance can be attached to such a refusal of partition as evidencing a well-recognised rule of single heir succession.

[159] Reliance was then placed by defendant 1 upon the custom of Gaddinashini. The only evidence on this point relates to the installation of Narendra Bahadur Singh on the Gaddi and to the holding of Darbars by him at Dasehra and Holi. We are not told whether any such custom existed in any earlier generation or whether it exists in any of the other branches. With regard to Narendra Bahadur Singh, it was rightly or wrongly, recognised on all hands, that he was a Taluqdar entitled to succeed to the exclusion of all others and it is not surprising that he was installed on the Gaddi as such and held Court thereafter twice a year, on occasions of ceremony. From proof of Gaddinashini on one occasion, namely, when Narendra Bahadur Singh succeeded a long-established custom of Gaddi cannot be inferred.

[160] Respondent 1 also referred to the evidence of D. W. 10 Bhawani Bakhsh Singh, D. W. 11, Man Bahal Singh, D. W. 12, Bindeshwari Bakhsh Singh D. W. 13, Bhola Singh, D. W. 14 Janki Prasad Singh, D. W. 16 Badri Prasad Singh, D. W. 17 Basdeo Singh, D. W. 18, Rudra Bahadur Singh D. W. 19, Baz Bahadur Singh, D. W. 26, Inder Dutt Singh, D. W. 28 Lal Hari Har Saran Singh and D. W. 29, Bhagwati Prasad Singh, in support of his plea of custom. This evidence has been carefully examined by the learned Additional Civil Judge, who himself recorded it and it has been found by him to be unworthy of credit. He has, however, relied upon it for what it is worth, since it is according to him in conformity with the inferences which he has drawn from the documentary evidence and the admissions contained in the pleadings. We have examined this evidence and have come to the conclusion that the criticisms of the learned Additional Civil Judge, which we will not repeat, are fully justified and that this evidence is of no value.

[161] On a consideration of all the evidence we have come to the conclusion that the alleged custom of single heir succession has not been established. The question whether succession is by the rule of male lineal primogeniture or whether the nearer heir excludes the more remote, therefore, does not arise.

[162] This brings us to the question whether Narendra Bahadur Singh was, at the time of his death, a member of a joint Hindu family with Jai Narain Singh, the present plaintiff, defendant 1 and Rajendra Mohan Singh, or whether he had separated from them or had, at least, excluded them for over 12 years from possession. If separation or ouster is proved neither the plaintiffs nor defendant 1 has any title to the non-Taluqdari property during the lifetime of the widow, defendant 1. On the other hand, if jointness is established and it is not shown that there was any exclusion then the plaintiffs and defendant 1 will share the immovable property half and half. The movable properties would, as we shall presently show, even in this eventuality, go to the widow. In the present suit, there has at no stage been any controversy between the defendants inter se, though each of them has put forward his or her title to defeat the plaintiffs' claim. The disputes between the two defendants were settled by a compromise but the validity of this compromise has been challenged and is the subject of a separate litigation between the defendants. Whatever we may say in the course of this judgment will not affect that litigation or any further litigation that may arise between the two defendants nor will the rights of Rajendra Mohan Singh or of the descendants of Gopal Saran Singh, if they have any, be affected by these proceedings since they are no parties to them.

[163] On the question of jointness or separation the pleadings of the plaintiffs and defendant 1 have undergone a change during the course of the suit. In the initial stages Jai Narain Singh and, after his death the plaintiffs claimed the whole estate on, among others, the ground that Jai Narain Singh and they had been joint with Narendra Bahadur Singh while Inder Bikram Singh and his sons had not. Thus a partial separation was alleged. Later, in the proceedings of 27th January 1939, their learned advocate stated that he "does not allege 'that Inder Bikram Singh or his sons separated from the rest of family.' The counsel for respondent 1, on the other hand, stated in the proceedings of the same date that "Inder Bikram Singh ..... was on excellent terms with Narendra Bahadur Singh, was living with him and was supported by him and treated as a member of a joint Hindu family." Later, however, he applied to withdraw this statement vide proceedings of the 22nd to 26th February 1940. As remarked by their Lordships of the Judicial Committee in A. I. R. 1938 P. C. 189[67] at p. 190 no importance can be attached to such a pleadings.

[164] The appellants' learned advocate, however, objects that his clients have been seriously

prejudiced by the change in attitude of defendant 1 after plaintiffs had closed their evidence and contends that he ought not to be allowed to withdraw his previous statement which clearly showed that there was a joint family in existence though the composition of that family was in dispute. His objection on this point is without any real foundation because defendant 2 had all along alleged the separation of Narendra Bahadur Singh from all the other members of the family and the real contest on the question of jointness and separation, on the assumption that the Act did not apply and that there was no custom of single heir succession, was between the plaintiffs and defendant 1 on one side and defendant 2 on the other though, if the compromise between the two defendants is upheld, defendant 1 could also claim under defendant 2. The plaintiffs were thus all along aware that they had to meet this case and they have not been prejudiced.

[165] The rules as to what constitutes separation in the case of an ordinary joint Hindu family are well settled. In 59 I. A. 331[58] their Lordships of the Judicial Committee summarise the position in the following words :

"Generally speaking the normal condition of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption': *Tipperaha Case* (12 M. I. A. 523[59] at p. 540). Separation from commensality and joint worship does not necessarily effect a division of a joint undivided Hindu family. Such a separation may be due to various causes, and the family may yet continue joint in estate: 40 I. A. 40[60] at p. 46. To constitute separation there must be a clear and unambiguous declaration by a member of his intention to separate himself from the family : 43 I. A.151[61] at p. 158 ; 44 I. A. 159.[62]"

[166] It is also settled law that it is not necessary that all the parties should agree to a separation: "the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate" : *vide* 44 I. A. 159[62] at p. 161, 58 I. A. 220[63] at p. 224, 49 I. A. 168[64] and 27 O. C. 114[65] at p. 117. See also Mulla's Hindu Law, paragraph 325.

[167] In A. I. R. 1938 P. C. 189[67] at p. 190 it was said :

"It is by no means a rare thing that a person makes a statement that he is a member of a joint family with his relative, but has reasons of his own for making that statement. *It is not his statement but his actings and dealings with the estate, which furnish a true guide to the determination of the question of the jointness* or otherwise ..... There is no proof of actual partition of the joint estate at any time but there is no doubt that there can be a partition of the joint property without an actual division of the property by metes and bounds." *vide* also 1 I. A. 9.[66]

[168] It is further settled that if one member separates there is no presumption either that all have separated or that the others have remained joint. This must be proved like any other fact: *vide* 58 I. A. 220[63] at p. 226. See also Mulla's Hindu Law, paragraph 328 (3). Property may be coparcenary with regard to some members but the other members of the family may have no interest in it : *vide* Trevelyan's Hindu Law, 3rd edition, pages 267 and 268 and A. I. R. 1938 Nag. 7[67] at p. 11.

[169] Further, even if we were to hold that Narendra Bahadur Singh remained joint with his brothers, there would still arise the question whether he had excluded them and their descendants from the joint family property. Mr. Wasim contended that it was not a question of exclusion to which Art. 127 of Sch. I, Limitation Act, might apply but of adverse possession under Art. 144. His argument was that Art. 127 only applies when the family is joint at the date of the suit. In the present case we are considering the state of affairs as it existed in the lifetime of Narendra Bahadur Singh and it is only if it is found that the family was then joint that the question of exclusion becomes material. It is thus a case of exclusion and not of adverse possession. Moreover, at no stage of the case, was adverse possession pleaded. Defendant 1's counsel clearly stated, at the time of the framing of issues : "Jai Narain and his sons, the present plaintiffs have been excluded because, for more than 12 years, Jai Narain was not given profits or otherwise treated as a member of a joint family by Narendra Bahadur Singh." Defendant 2 took the same plea though in different words. A new plea of adverse possession cannot be allowed to be raised in appeal.

[170] As to what amounts to exclusion has been laid down in a large number of decisions which are not all consistent. The law is summarised by Rustomji in his Commentary on the "Law of Limitation", 5th edition, vol. II at pp. 1104 and 1105. It is not necessary to set it out in detail, nor it is necessary for us to go into all the cases cited by the parties. At this stage we would only say that the question as to what amounts to exclusion depends upon the facts of each particular case but that an intention to exclude is essential : *vide* 56 I. A. 316.[68]

[171] We will first consider the position with regard to the movable property. There is no evidence as to whether this is ancestral or was acquired by Narendra Bahadur Singh. In the case of an ordinary Hindu family possessed of joint property it would be presumed that the acquisitions would also be joint property, but in the present case Narendra Bahadur Singh derived a very large income from his exclusive property and only a small income from his non-taluqdari property— the only property which

might be said to be joint family property. It cannot be presumed that the movable property was acquired from one source or the other or that it was ancestral and not self-acquired : see 12 I. A. 112[69] at pp. 114, 115. Further the nature of most of the property indicates that it was the personal property of Narendra Bahadur Singh alone. List E consists of jewellery and articles of gold and silver and in list J are entered such articles of display as are usually found in the bands of owners of large estates. List F consists of articles of apparel and bedding (mostly described as new) and similar other articles and list H consists of utensils. These are not such articles as could date back to before 1892. All the articles in these lists will, therefore, in any case, go to the widow. List G consists of papers and documents and list I of houses : these will go with the villages to which they relate or in which they are situated.

[172] As to the immovable property, the first thing to notice is that the parties agree that the whole of it has come down from the time of Madho Prasad Singh and that Gopal Saran Singh and his descendants whose names will be found in the pedigree have been excluded from all share in it, although it is in evidence that some of them at least live in the family house at Haswar and receive occasional assistance out of the income of the property. Further there is no allegation that this branch of the family is joint with the branch fo Har Dutt Singh. It is also to be remembered that Ex. A 8 does not operate as a will with regard to this property.

[173] Next it is agreed that the income of the non-taluqdari property is not kept separate from the income of the Taluqdari property; that all of the properties are under one management and control : and that one set of accounts has been kept for the whole income and expenditure without any distinction. Indeed none of the parties have made any differentiation between the two classes of properties at any stage of the case : no evidence has been led which might have a bearing on the taluqdari as distinct from the non-taluqdari property and even in the arguments before us, no distinction was drawn between the two kinds of property. It seems to have been assumed by all the parties that if the taluqdari properties were joint the non-taluqdari were also joint and that if Narendra Bahadur was owner of the taluqdari properties he was also exclusive owner of the remaining properties.

[174] It is also agreed that since the death of Har Dutt Singh, Jai Narain Singh and his sons were in possession of two villages and similarly Inder Bikram Singh and his sons were in possession of two villages for their maintenance. The four villages are admittedly part of the taluqdari estate. Out of the savings of the income of these villages the two younger brothers built up a banking business which carried on the work of lending money on a fairly large scale. Money was lent by it to Narendra Bahadur Singh at high rates of interest and it is not disputed that Narendra Bahadur Singh had no interest in this business which was the exclusive property of the two younger brothers and their sons.

[175] It is clear that on the death of Madho Prasad Singh, Har Dutt Singh alone entered into possession of all the property, Taluqdari and non-Taluqdari, left by his father. This is inconclusive, because Gopal Saran Singh and Suraj Bali Singh were, at this time both minors but it is agreed that Suraj Bali Singh died issueless at a young age and Gopal Saran Singh and his descendants were excluded. Further it is important to note that Har Dutt Singh was considered by all, the authorities as well as members of the family to be the sole owner *vide* Exs. A-126/D. W. 3 (Sanad granted to Har Dutt Singh), A-17, A-18 and A-106 (lists of taluqdars in which Har Dutt Singh's name is entered), A-108, in which Gopal Saram Singh refers to him as Taluqdar and admits his ownership while calling himself the brother of the Taluqdar: more over Har Dutt Singh always dealt with all the property as his own exclusive property : *vide* Exs. A-66, A-63 and A-20. All the documents which we have mentioned refer to the status of Har Dutt Singh as Taluqdar and his property as Taluqdari but as we have already noted no one at any time drew any distinction between the Taluqdari and other properties.

[176] Thereafter Narendra Bahadur Singh was treated in the same way and he continued to be in charge of all the properties. Even in the plaint of this suit he was referred to as the last person in possession of all the properties in schedule (B) in which schedule the non-taluqdari properties are also mentioned and the basis of the claim is succession to Narendra Bahadur Singh. Further the conduct of Jai Narain Singh and all the other members of the family shows that they considered to him to be separate from themselves. Plaintiff 1, as P. W. 4 admits that the mess of Inder Bikram Singh and Jai Narain Singh so long as both of them were alive was joint but that of Narendra Bahadur was separate the latter deriving his grain from the estate *sir* and the other two from their own *sir* and from the profits of their banking business in which was also included the income of the four guzara villages. Separation in mess is by itself of not much value but the importance of it in the present case lies in the fact that the two younger brothers and their children continued joint in mess and it was only the eldest brother, who according to plaintiffs' case,

held the joint family property that was separate. In EX. A-38, a statement made by him in 1930 in a criminal case instituted by his nephew (cousin) Girdhariji against Jitendra Mohan Singh, defendant 1, Babu Jai Narain Singh stated that he had no hand in the management of the Haswar estate except the four villages which had been granted to him and his brother for guzara. He considered that Narendra Bahadur Singh was the owner and he did even know who would succeed him. Again, while giving evidence, in a case between Babu Narendra Bahadur Singh and the Oudh Commercial Bank, he clearly stated on 26th November 1932: "I am separate in business from the objector" (Babu Narendra Bahadur Singh) *vide* EX. A-90.

[177] In 1934 very shortly before the death of Babu Narendra Bahadur Singh, Jitendra Mohan Singh and his brothers and son instituted a suit against Jai Narain Singh the present plaintiffs and their sons for partition. The documents relating to this suit indicate that all the members of the family considered themselves to be separate from Narendra Bahadur Singh. Exhibit A-42 is the plaint. Paragraphs 1 and 2 show that it was claimed that the parties were members of a joint Hindu family owning the property in suit with which Narendra Bahadur Singh, who was the Taluqdar, had nothing to do. Exhibit A-89, the written statement filed on behalf, among others, of the present plaintiffs, is very significant. The allegations about Babu Narendra Bahadur Singh and the joint family given in paragraphs 1 and 2 were admitted and it was pleaded that after the grant of the guzara villages "the estate ceased to meet their domestic expenses and Babu Inder Bikram Singh and defendant 1 used to maintain themselves and the members of their family from the income of the said villages" (paragraph 14). It was also said that the entire property of the family had not been included in the suit and so the suit was liable to be dismissed (paragraph 28). This was explained as meaning twenty head of bullocks and household articles but no mention of any villages is made (see EX. A-159). It was further stated that some houses (in which the parties resided) belonged to Narendra Bahadur Singh and were not liable to partition (paragraph 33). In the course of proceedings of 23rd May 1935 (EX. A-159) Jitendra Mohan Singh's counsel stated that the sons of Har Dutt Singh acquired an interest in the non-taluqdari property by birth and on Har Dutt Singh's death the sons separated, Inder Bikram Singh and Jai Narain Singh getting the non-taluqdari property jointly and Narendra Bahadur Singh the Taluqa. He further specifically stated that Narendra Bahadur Singh "ceased to remain a member of the joint family on his father's death." The advocate for plaintiffs and their father on the other hand, stated that Har Dutt Singh did not possess any non-Taluqdari property. He further stated "Inder Bikram Singh and defendant 1" (Jai Narain) were members of a joint Hindu family but I cannot say who (what)others were members of the family joint with them."

[178] The documents to which we have just referred clearly indicate the conduct of the members of the family, the persons who would be in the best position to know the status of the family, and they show that Narendra Bahadur Singh was not considered in 1934 as forming a member of the joint family. This becomes all the more significant when we find that, though he was himself no party to the ligitation, Narendra Bahadur was assisting Jai Narain Singh and was defending the case for him—*vide* P. W. 4 Parbhu Narain Singh. Further P. W. 4, Parbhu Narain Singh plaintiff 1 tells us that, shortly before his death Babu Narendra Bahadur Singh intended to execute a will, had had a draft prepared and had called the Commissioner of Lucknow to attest it. All this was done with the knowledge of Jai Narain Singh and the witness without protest. This is certainly not consistent with Narendra Bahadur's position as head of a joint Hindu family. We consider that the only inference which can be drawn from all this evidence is that Narendra Babadur Singh had separated from his brothers shortly after the death of his father having allotted to them two villages each for their support, while the other two brothers and their families remained joint till 1934 —when they also effected a partition by means of a suit. Thus there was no joint family in existence when Narendra Bahadur Singh died.

[179] In this view of the matter the question of exclusion does not really arise but on this point also we must hold, on the evidence that there has in fact been an exclusion. It is no doubt true that Narendra Bahadur Singh very often made presents to the various members of the family with whom he was on the most affectionate terms: *vide* EXS. 104, 106, 126, 127, 129, 115, 116, 117 and 120. He also paid for the education of the boys and girls (though it is not proved that he paid for them all) and contributed towards the expenses of the marriages of the daughters: *vide* EXS. 161/P. W. 1 to 170 and 187 to 202, as well as the report of the commissioners appointed to examine the accounts. It is, however, equally true that all the domestic expenses, as well as the expenses of the sons' marriages and a part of the expenses of the daughters' marriages were borne by Inder Bikram Singh and Jai Narain Singh out of the income of their guzara villages and their business: *vide* EXS. B-31

to B-44, the reports of the commissioners and Ex. A-37 and A-38. The question that arises is whether in this state of affairs it can be said that the brothers were excluded from the joint family property.

[180] Mr. Wasim relied on 2 A. L. J. 225[70] and 18 Cal. 341[71] for the proposition that payments made out of the income of the property in the possession of a member of a joint family does not create any rights in the persons to whom they are made since they are "payments made gratuitously and out of his mere bounty" and "it would not be reasonable or conducive to the peace and welfare of the families to construe acts done out of kindness and affection to the disadvantage of the doer of them." Those cases have, however, no application. In the first case the property was found to be the separate property of the person in possession and in these circumstances payments made by him to other members of the joint family were held not to constitute it a joint family property. In the second case one of the two brothers was deaf and dumb from birth and as such excluded from inheritance under the Hindu law. His elder brother nevertheless treated him as a co-owner with himself for a long time. It was held that this did not create any title in the younger brother since none existed in law. In the present case the property would but for exclusion be the joint family property of all the parties.

[181] The cases cited by the appellants' learned advocate are equally inapplicable to the facts of the present case because in those cases the sole property in the possession of the person who was said to have excluded others was property which was joint family property and the excluded member was in possession of a part of it. In the present case it is admitted that the guzara villages are a part of the Taluqdari estate they are not, therefore, any part of the joint estate and yet they and the business built out of their income were the principal means of livelihood for the younger brothers and their families. Possession of them by the younger brothers is, therefore, not possession of any part of the joint family property. Further even the payments that were made by Narendra Bahadur Singh were made out of income by far the larger portion of which was derived from his sole exclusive property. It was, therefore, not payment made in recognition of any subsisting right but "gratuitously and out of his mere bounty" and it was accepted as such: *vide* Exs. A-37 and A-38.

[182] We will now refer to two cases upon which the appellant's learned advocate laid special emphasis. In 24 I. A. 118[72] by argeement between two members of the family, brought about by a misapprehension that the estate was impartible, one of them obtained possession of the principal estate and the other obtained twovillages in lieu of maintenance. Their Lordships held: "There has been no denial of the title of Janardana and his family or exclusion of them from the estate. On the contrary the possession has been under and in accordance with the agreement of 1871, by which a provision was made for the junior branch." Their Lordships so held because: (a) the mistaken impression was that the estate was a joint Hindu family impartible estate, i. e., that the position that all the members of the family continued to have title to it was accepted by the agreement; (b) the allotment of the two villages as guzara was in recognition of the right of the younger branch in the estate; (c) the villages of which possession was given to the younger branch were villages belonging to the joint family estate and consequently possession over them was possession over a part of the family estate. In the present case the allotment of the Guzara villages was not based on recognition of the title of the joint family in the estate: it was based on recognition of the rights of Narendra Bahadur Singh to the whole estate and Guzara was accepted merely as an act of favour on his part. Secondly the Guzara villages are not part of the property which might be joint family property, i. e. the non Taluqdari property and consequently possession over them was not possession over a part of the joint family property.

[183] In 53 I. A. 220[73] also it was considered that the property was an impartible estate and the younger brothers were in receipt of considerable sums as cash maintenance and were in possession of lands forming part of the estate in lieu of the same. Their Lordships approved of the judgment of the Subordinate Judge who followed the decision in 24 I. A. 118.[72] This case is also distinguishable from the present case on the same grounds as 24 I. A. 118.[72]

[184] The respondent on the other hand relied upon the case in 12 I. A. 112.[69] This case is very closely analogous to the present case. It also related to the property in the possession of one cousin as taluqdar which included, it was alleged, some non-taluqdari joint Hindu family property and the question was of exclusion from the latter. Their Lordships say:

"It has indeed been contended that there was some joint possession on behalf of the plaintiff, on the grounds, first, that he lived in the family house though not in the same apartments with his cousin; secondly that he obtained an allowance of some Rs. 90/- either per mensem or per annum,—it does not clearly appear which. The first of these grounds does not appear to their Lordships to establish joint possession; *the second goes some way to negative it.*"

The last words which we have underlined (here italicised) are significant and they indicate that the

receipt of maintenance as such by a cadet of a taluqdar's family is acceptance of the fact that he has no interest in the estate itself and amounts to his exclusion from the estate by the grant of the maintenance. This case fully supports the argument of the respondent on the question of exclusion.

[185] We are conscious of the fact that in 53 I. A. 220[73] the Subordinate Judge, whose judgment their Lordships quote, relied upon this case and said:

"The last mentioned case in 12 I. A. 112[69] makes it clear that even where the person actually holding the property of a joint family believes that it is impartible property, and another member of the family sharing that belief accepts maintenance it does not amount to the exclusion of the latter and upholds the authority of the Privy Council in 20 Mad. 256[72]"

(which is the same as 24 I. A. 118.[72]) It seems to us that the judgment of their Lordships in 12 I.A. 112[69] is wholly incapable of the interpretation placed upon it by the Subordinate Judge. We have already quoted the relevant passage of their Lordships' judgment and that makes it clear that their Lordships held the reverse of what the Subordinate Judge thought they had held. The facts of that case were, however, not analogous to the facts in 53 I. A. 220[73] to which 24 I. A. 118[72], was fully applicable. Since the respondent in 53 I. A. 220[73] and the later case, 24 I. A. 118[72] fully supported the conclusion at which the Subordinate Judge had arrived, it is probable that 12 I. A. 112[69] was not placed before their Lordships. In the present case the position is different. 24 I. A. 118[72] is not analogous while 12 I. A. 112[69] is and we must follow the latter decision.

[186] A consideration of the evidence on this part of the case leads us to the conclusion that Narendra Bahadur Singh was not joint in estate with Jai Narain Singh and his descendants and the descendants of Inder Bikram Singh at the time of his death and that he had, in any case, excluded them from possession of the ancestral property.

[187] The learned advocate for respondent 2 urged that over and above the property which the learned Additional Civil Judge has held to be non-taluqdari he ought to have held other properties also to be, in any event, non-taluqdari. He first of all contends that the properties known as the "Manjhas" are non-taluqdari. The "Manjhas" are those portions of village which have been added to the lands of the village by the process of alluvion. They are an integral part of the villages to which they had been added and partake of the same nature. The decision of the Additional Civil Judge on this point is thus quite correct.

[188] The next set of villages about which there is controversy are Eqbalpur, Udharanpur, Baraipur, Seraiya and Hiraiya. The learned Additional Civil Judge has gone into the matter carefully and we have also considered the entries in the vernacular document on the record and we consider that all these villages are entered in Ex. A-2, the kabuliat of the second summary settlement, though there are some slight differences as to the spelling. These differences are immaterial and the identity of the villages is not in doubt.

There remains a group of 5 villages Gharwarpur, Lakhimpur, Lalmanpur, Lonedhee and Muzzaffarpur. These villages are not mentioned in Ex. A-2 and on a reference to the original list of which Ex. A-2 is a copy, the learned Additional Civil Judge found that the place where villages at Nos. 282 to 286 of the list occurred is so torn that it cannot be read. He has assumed that these villages were entered at the place because the list is arranged in alphabetical order and according to that arrangement villages beginning with the letters "gaf", "Lam" and "Meem" should occur at this place. In the absence of an entry in the list the fact that the villages were taluqdari was capable of proof by the production of other evidence, e.g., the Rubkar Akhir and the wajib-ul-arz :see 5 O. W. N. 299.[20] No other document relating to these villages, except a kabuliat executed by Har Dutt Singh on 28th June 1878, at the first regular settlement, Ex. A-19, has been produced. Exhibit A-19 does not establish the Taluqdari character of the property because the definition of estate read with S. 3 of Act I of 1869 only makes the property decreed at the regular settlement to a Taluqdar (and not to the heir or legatee of a Taluqdar) an "estate" subject to Act I of 1869. The learned Additional Civil Judge was not justified in drawing an inference when he had no material before him to justify that inference and the matter was capable of proof by the production of other documentary evidence. These villages must, therfore, be considered to be non-taluqdari property.

[189] As a result of our finding we hold that the property entered in list (A) of Schedule (B) attached to the plaint, apart from the villages which have been held by the Additional Civil Judge and by us not to be taluqdari, is governed by Act I of 1869 and defendant 1 is entitled to succeed to it under S. 22 of Act I of 1869. The plaintiffs have no claim to it and their suit must fail with regard to it. As to the non-taluqdari properties also the plaintiffs have no claim during the lifetime of the widow, defendant 2, and the appeal fails with regard to this also. We accordingly dismiss the appeal with costs.

R.G.D. *Appeal dismissed.*

A. I. R. (35) 1948 Oudh 349 *[C. N. 109.]*

KIDWAI J.

Shanti Prasad Shukla and others—Applicants v. *Mt. Bachchi Devi and others—Opposite Party.*

Application No. 55 of 1943, Decided on 6-1-1948, from order of Dist. Judge, Gonda, D/- 30-11-1942.

(a) U. P. Agriculturists' Relief Act (27 [XXVII] of 1934), S. 12—Applicability—Mortgage by occupancy tenant is void — Mortgagor cannot claim redemption under S. 12—T. P. Act (1882), S. 6 (i).

Section 12 applies only to valid mortgages and not to mortgages which are void *ab initio*. An occupancy right is by its very nature not transferable and by reason of the provisions of S. 6 (i), T. P. Act, interest of an occupancy tenant cannot be assigned. Hence a mortgage by an occupancy tenant is void in law and the mortgagor cannot apply for its redemption under S. 12 of the Act: 27 A. I. R. 1940 Oudh 263 and 34 A. I. R. 1947 Oudh 228, *Rel. on*; 31 A. I. R. 1944 All. 25 (F.B.) and 32 A. I. R. 1945 All. 204, *Not foll.* [Paras 2, 7 and 8]

(b) Interpretation of Statutes—Statute conferring jurisdiction if particular conditions are satisfied cannot be taken to confer jurisdiction also in cases which do not fall within ambit of the conditions laid down but merely within the basis of an analogy. [Para 5]

Annotation: — ('44-Com.) C. P. C., Pre. N. 7, pts. 65 & 66.

Cases referred:—

1. ('40) 1940 O. W. N. 352 : 27 A. I. R. 1940 Oudh 263 : 15 Luck. 535 : 187 I. C. 434, Sant Ram v. Putti Lal.
2. ('43) 1943 R. D. 565 : 31 A. I. R. 1944 All. 41 : 212 I. C. 370, Babu v. Mahadeo Baba.
3. ('44) 31 A. I. R. 1944 All. 25 : I. L. R. 1944 All. 166 : 211 I. C. 495 (F. B.), Ghassu v. Babu Ram.
4. ('45) 1945 R. D. 280 : 32 A. I. R. 1945 All. 204 : I. L. R. 1945 All. 301 : 220 I. C. 151, Lal Behari Kurmi v. Mahadeo Singh.
5. ('47) 1947 O. W. N. 362 : 34 A. I. R. 1947 Oudh 228 : 22 Luck 403, Lachman v. Ali Bux.

K. P. Misra—for Applicants.

M. P. Srivastava—for Opposite Party.

Order.—On 20-7-1915 Mt. Prag Dei mortgaged 6. 13 acres of occupancy land situated in Pure Shankar, hamlet of Subhagpur district Gonda, to Govind Dat in lieu of a sum of Rs. 614. On the death of Mt. Prag Dei, there was some dispute as to succession to the property left by her but eventually Mt. Bachchi Dei her daughter obtained title to the mortgaged land and the responsibility to pay off the debt devolved upon her by virtue of a compromise Ex. 3 between her and another claimant. She accordingly made an application under S. 12, Agriculturists' Relief Act for redemption of the mortgage against the applicants who are the successors-in-interest of Govind Dat, the mortgagee. Various objections were taken to redemption being allowed but we are no longer concerned with most of them. Among the objections taken was the objection that there was no valid mortgage in existence and that consequently no application under S. 12 was maintainable. It was also pleaded that at any rate the U. P. Debt Redemption Act did not apply because the liability for the payment of the debt had been transferred to the applicant by a contract and therefore there was no loan within the meaning of the definition given in S. 2 clause (10) of that Act in existence. The trial Court held that in spite of the fact that the holding was an occupancy tenancy an application for redemption under S. 12, Agriculturists' Relief Act was maintainable and it also held that the applicant was not a transferee of the liability for the repayment of the debt and that consequently the provisions of the Debt Redemption Act were also applicable. On an account being taken in accordance with the provisions of the Debt Redemption Act it was found that the sum of Rs. 50-4-9 only was due from the applicant to the opposite parties towards the mortgage. Consequently the trial Court passed a decree for redemption on payment of this sum. The opposite parties went up in appeal and the District Judge of Gonda upheld the decision of the trial Court on both the above mentioned points. He accordingly dismissed the appeal. The opposite parties have now come up in revision to this Court.

[2] Mr. Misra the learned counsel for the applicants in this Court, has contended that there being no valid mortgage in existence, the Courts have no jurisdiction to proceed under S. 12, Agriculturists' Relief Act. In 1940 O. W. N. 352[1] it has been laid down by a Bench of this Court that S. 12, Agriculturists' Relief Act applies only to valid mortgages and not to mortgages which are void '*ab initio*'; it was consequently held in that case that a statutory tenant who has mortgaged his holding cannot avail himself of the provisions of S. 12, Agriculturists' Relief Act. There was also a decision of the Allahabad High Court reported in 1943 R. D. 565[2] in which a Single Judge of that Court took the same view. In that case the question of an occupancy tenancy was involved. Subsequently however the Allahabad High Court has taken a different view and it has been laid down by a Full Bench of that Court in A. I. R. 1944 ALL. 25[3] that it is open to a tenant of an occupancy holding which has been mortgaged with possession to apply under S. 12, Agriculturists' Relief Act for redemption. This decision was followed by a learned Single Judge of the same Court in 1945 R. D. 280.[4]

[3] In the first of these decisions the view of this Court in 1940 O. W. N. 352[1] was considered but it was pointed out that in the matter of the rights of the mortgagees of tenancy holding there has been difference of opinion between the views of the Allahabad High Court and of this Court.

The learned Judges preferred to follow the view which was consistent with the previous decisions of their own Court. It is significant, however, that they stated in so many words that they were applying S. 12 to transactions "which are not strictly legal mortgages but which are analogous to mortgages and in substance partake of their nature."

[4] In the second case also the learned Judge held that there was no legal mortgage in existence but he considered that by reason of principle of equity in accordance with which the Court refused to assist a mortgagor of occupancy land in getting possession of the land unless he made restitution the case was

"to all intents and purposes of the same effect as a suit for redemption and for this reason such a mortgagor might be allowed to invoke the provisions of S. 12, Agriculturists' Relief Act."

The learned Judge clearly indicates that he was proceeding on the principle of equity in coming to this decision.

[5] The view in both these cases is directly opposed to the view prevalent in Avadh and with all respect to the learned Judges who decided those cases it is not possible to hold that a statute conferring jurisdiction, if particular conditions are satisfied, would be taken to confer jurisdiction also in cases which do not fall within the ambit of the conditions laid down (but?) merely within the basis of an analogy. Further there would be no question of equity not being done if a properly constituted suit for possession is brought by the tenant. When that is done it will be open to the Court before which the matter came up to protect rights of mortgagor and the mortgagee both. This would be a ground for extending the jurisdiction of a Court beyond that which is specifically conferred upon it by the statute.

[6] These two cases came up before me for consideration in 1947 O.W.N. 362.[5] In that case also I preferred to follow the view of this Court in 1940 O. W. N. 352.[1] The learned advocate for the opposite party has not brought to my notice anything which might induce me to alter the opinion which I then took.

[7] The learned advocate for the opposite-party contended that in the present case, although his client's predecessors possessed an occupancy right there is nothing to indicate that that right was not transferable. The term occupancy right is well understood in Avadh as indicating a heritable but not transferable right. It is not confined to the cases referred to in Ss. 5 and 7A, Oudh Rent Act, and may be created by grant by the landlord (*vide* S. 6, Oudh Rent Act) or by means of a decree. If the decree or the grant confers a heritable and transferable right, it has always been held by the Courts in Avadh that under-proprietary rights are conferred and there is no question of the right being an occupancy right in such a case. It is only if the grant is of a heritable but non-transferable right that it comes within the meaning of occupancy right. Thus by its very nature an occupancy right is not transferable and by reason of the provisions of S. 6 (i), T. P. Act, interest of an occupancy tenant cannot be assigned. Thus a mortgage by an occupancy tenant is void in law and cannot have effect.

[8] In the present case, therefore, the mortgage of which redemption was sought has in law no existence and, therefore, there can be no application under S. 12, Agriculturists' Relief Act, for its redemption.

[9] The first contention of the learned counsel for the applicants must, therefore, prevail and in this view it is not necessary to consider any further objection that he has taken. The result is that this application is allowed and the application of Mt. Bachchi Dei under S. 12, Agriculturists' Relief Act, will stand dismissed. The applicants will get their costs throughout.

K.S. *Application allowed.*

A. I. R. (35) 1948 Oudh 350 *[C. N. 110.]*

MISRA AND WALFORD JJ.

Lachhman Singh and others — *Appellants* v. *Lachhman Prasad and others* — *Respondents.*

Second Civil Appeal No. 267 of 1943, Decided on 20-2-1948, against order of District Judge, Hardoi, D/- 2-4-1943.

U. P. Temporary Postponement of Execution of Decrees Act (10 [X] of 1937), S. 5—Scope—Limitation cannot be saved for taking proceedings for final decree in mortgage suit under O. 34, R. 5, Civil P. C.

Section 5 leaves suits which had already been instituted untouched and such suits are allowed to proceed in the ordinary way. The proceedings for final decree in a mortage suit are clearly proceedings in a suit. They neither mark its commencement nor do they constitute proceedings in execution of a mortage decree. They cannot, therefore, be given the benefit of S. 5, so as to save limitation under Art. 181, Limitation Act for applying for making the preliminary mortgage decree, absolute under R. 5 of O. 34, Civil P. C., by exclusion of time during which the Act remained in force: 31 A. I. R. 1944 Oudh 102 ; 31 A. I. R. 1944 Oudh 298 and 31 A.I.R. 1944 All. 59, *Rel. on.* [Para 3]

Cases referred :—

1. ('44) 31 A. I. R. 1944 Oudh 102 : 211 I. C. 122, Swami Dayal v. Durga Prasad.
2. ('45) 20 Luck. 271 : 31 A. I. R. 1944 Oudh 298, Niaz Ali v. Badri Singh.
3. ('44) 31 A. I. R. 1944 All 59 : I. L. R. (1944) All. 185 : 212 I. C. 7, Babu Ram v. Aflatoon.

S. C. Das and Suraj Narain—for Appellants.

H. Hussain—for Respondent 1.

Judgment.—This second appeal is directed against the appellate order of the learned District Judge, Hardoi, reversing the decision of

the learned Additional Civil Judge and granting to respondent 1, Lachhman Prasad, a final decree for sale on the foot of a mortgage dated 4-12-1923.

[2] Lachhman Prasad obtained his preliminary decree under O. 34, R. 4, Civil P. C., on 2-6-1936. He did not apply for the making of a decree absolute till 12-11-1942. The application was obviously beyond the period of limitation prescribed by Art. 181, Limitation Act, and the applicant in order to save limitation invoked the aid of S. 5, Temporary Postponement of Execution of Decrees Act (10 [X] of 1937). The section provides that in computing the period of limitation prescribed by the Limitation Act, 1908, or any other law for the time being in force, for "the institution of a suit in a Civil Court against an agriculturist for money or for foreclosure or sale in enforcement of a mortgage" the period during which the Act remains in force shall be excluded. It also grants a similar exclusion of time for proceedings in execution of decrees passed in such suits. The trial Court was of opinion that the aforesaid section did not relate to the presentation of an application for a final decree. The learned District Judge on the other hand considered that the application amounted in effect to the commencement of a suit, because the proceeding initiated by it culminate in a decree which finally adjudicated upon the rights of the parties.

[3] A perusal of the preamble of the Act will show that it was brought on the statute book, because it was considered expedient to provide for temporary postponement of execution of certain decrees passed against agriculturists pending further legislation for granting them relief from indebtedness. The provisions of S. 5 so far as they relate to the exclusion of time for institution of a suit were apparently intended to encourage creditors to desist from filing suits, the fruits of which they could not be permitted to reap till after the enactment of the projected legislation. It would seem obvious that the legislature desired to relieve for the time being the agriculturist debtors from being harassed by their creditors in two ways : (1) by prohibiting execution of decrees based on secured or unsecured loans and (2) by discouraging fresh suits. The suits which had already been instituted were left untouched, and such suits were allowed to proceed in the ordinary way. The proceedings for final decree in a mortgage suit are clearly proceedings in a suit. They neither mark its commencement nor do they constitute proceedings in execution of a mortgage decree. They cannot, therefore, be given the benefit of S. 5. The decision in A. I. R. 1944 Avadh 102,[1] 20 Luck. 271[2] and A. I. R. 1944 ALL. 59[3] would seem to support this view. We are clear therefore, that Lachhman Prasad's application for the preparation of a final decree for sale was beyond time. The learned Additional Civil Judge was justified in rejecting the application as time barred. We allow the appeal, set aside the appellate decision of the learned District Judge and restore that of the Court of first instance. In the circumstances of the case the parties shall bear their own costs of this Court and of the Courts below.

R.G.D. *Appeal allowed.*

A. I. R. (35) 1948 Oudh 351 *[C. N. 111.]*

KIDWAI J.

Chhedi Lal v. *Gopi Nath.*

Second Civil Appeal No. 37 of 1943, Decided on 26-2-1948, against order of Civil Judge, Gonda, D/- 21-10-1942.

(a) Limitation Act (1908), Art. 44 — Suit must be brought within three years of attaining majority.

Suit for possession of a house belonging to the plaintiff and sold by his guardian, who was not a certificated guardian, during the plaintiff's minority, if governed by Art. 44, must be brought within three years of the minor's attaining majority : 26 A. I. R. 1939 Oudh 122, *Ref.* [Para 4]

Annotation : ('42-Com.) Lim. Act, Art. 44, N. 2.

(b) Limitation Act (1908), Art. 144 — Time runs from date when possession of holder becomes adverse — Possession can be adverse to minor.

Where Art. 144 applies, limitation would commence from the date that the possession of the holder became adverse. A person holding under an invalid transfer holds adversely to the real owner from the date of his possession. The fact that real owner was a minor when the possession was taken makes no difference : 6 A.I.R. 1919 P. C. 44, *Rel. on* ; 15 A. I. R. 1928 Oudh. 481, *Ref.* [Para 5]

Annotation : ('42-Com.) Limitation Act, Arts. 142 and 144 Ns. 60, 19.

(c) Limitation Act (1908), Art. 142—Applicability.

Where a suit is framed as suit for possession after dispossession, Art. 142 applies. [Para 3]

Annotation : ('42-Com.) Limitation Act, Arts. 142 and 143, N. 2.

(d) Limitation Act (1908), S. 8 — Limitation running from cessation of disability — Extension does not go beyond three years after cessation of disability — Original period expiring more than three years after cessation — There is no question of extension — Period is not curtailed — Limitation Act (1908), S. 6.

Section 6 gives an extension of time to persons suffering from a disability including minority and in their case limitation begins to run from the date on which disability ceases. But by virtue of S. 8, this extension is not to be for more than three years after the cessation of the disability. If on the other hand, the original period prescribed by Sch. 1 expires more than 3 years after the termination of the disability, then, upto the date on which the limitation prescribed by that schedule expires, there is no question of any extension of time and S. 8 will not operate to curtail the period of limitation : 24 A. I. R. 1937 Oudh 521, *Disting.* [Para 6]

Annotation : ('42-Com.) Limitation Act, S. 8, N. 4.

Cases referred :—
1. ('39) 1939 O. W. N. 241 : 26 A. I. R. 1939 Oudh 122 : 180 I. C. 329, Natha v. Thakur.
2. ('19) 46 I. A. 285 :6 A.I.R. 1919 P. C. 44:43 Mad. 244:53 IC 901 (P.C.), Varada Pillai v. Jeevarathnammal.
3. ('28) 15 A. I. R. 1928 Oudh 481 : 113 I. C. 258, Mt. Ram Dulari v. Sher Bahadur Singh.
4. ('37) 1937 O. W. N. 1012 : 24 A. I. R. 1937 Oudh 521 : 171 I. C. 187, Mt. Bachai v. Hayat Mahomed.

H. D. Srivastava — for Appellant.
S. N. Srivastava — for Respondent.

Judgment. — The appellant was born on 12-7-1913. On 28-1-1924 when the appellant was only about 11 years old his sister's husband, Jagrup Lal purporting to act as his guardian sold a house belonging to him to Ram Samujh, father of the respondent, for a sum of Rs. 24. The vendee entered into possession and after him his son, the respondent, obtained possession. The appellant attained majority on 12-7-1931 and on 15-12-1941 he instituted the suit out of which this appeal arises for possession of the house and for Rs. 10 as mesne profits in the Court of the Munsif, Gonda.

[2] The defendant raised various defences one of which was that the suit was barred by time. The learned Munsif rejected all the defences including that of limitation and decreed the suit, On appeal the learned Civil Judge of Gonda upheld the plea of limitation reversed the decree of the Munsif and dismissed the suit. The plaintiff has now come up in second appeal and the sole point for consideration is one of limitation.

[3] The suit was framed as a suit for possession after dispossession and consequently Art. 142, Limitation Act, would apply to it. In arguments both before the learned Civil Judge and in this Court it was however contended that Art. 144 applied. On the other hand the respondent contended both in this Court as well as in the Court below, that Art. 44 applied. It is immaterial which article applies because in any case the suit is barred by time.

[4] If Art. 44 applies—for which there is some authority even though it was not a certificated guardian who made the transfer—*vide* (1939 O. W. N. 241[1]) the suit was barred as not having been instituted within three years of the minor's attaining majority.

[5] If Art. 142 applies limitation would ordinarily commence from the date of dispossession, i. e., from 28-1-1924 and if Art. 144 applies limitation would commence from the date that the possession of the holder became adverse. This would also be 28-1-1924 because it is well settled that a person holding under an invalid transfer holds adversely to the real owner (*vide* 46 I. A. 285[2] at p. 290). In the present case the defendant's father entered into possession as full proprietor in denial of the appellant's rights over the property or rather on an assertion that those rights had ceased. His possession was, therefore, adverse from its commencement. There is no authority for the contention that there there can be no adverse possession against a minor. Indeed in A. I. R. 1928 Oudh 481[3] the contrary has been laid down. Consequently limitation would in ordinary circumstances run from the date of that possession.

[6] Section 6, Limitation Act, however, gives an extension of time to persons suffering from a disability including minority and in their case limitation begins to run from the date on which disability ceases. Thus in the case before me, limitation began to run not on 28-1-1924 but on 12-7-1931, and the period would be extended up to 12-7-1943. This is what the trial Court held in coming to the conclusion that the suit was instituted within time but, in doing so, it failed to consider the effect of S. 8, Limitation Act. That section is quite clearly worded and its language is not at all ambiguous. It provides that, in those cases in which the application of S. 6 of the Act results in an extension of the period prescribed by Sch. I, that extension is not to be for more than three years after the cessation of the disability. If, on the other hand, the original period prescribed by Sch. I, expires more than 3 years after the termination of the disability, then, upto the date on which the limitation prescribed by that schedule expires, there is no question of any extension of time and S. 8, will not operate to curtail the period of limitation. This is made quite clear in Illus. (c) to S. 8.

[7] In the present case, the limitation prescribed by Sch. I, would expire on 28-1-1936, i. e., more than 3 years after the termination of the disability. This cannot be curtailed by the application of S. 8. On the other hand by applying S. 6, limitation would expire on 12-7-1943, which would have the effect of extending it for more than 3 years after the cessation of disability, and this cannot be allowed, in view of the provisions of S. 8, to happen. Thus limitation expired on 28-1-1936, and the present suit was commenced beyond time.

[8] The learned advocate for the appellant relied upon 1937 O. W. N. 1012[4] but from the facts given in the report it cannot be ascertained whether S. 8, Limitation Act, could have any application to it. It is certainly not mentioned in the judgment which would lead to the conclusion that it was not relevant and the effect of its provisions on the case did not fall to be considered. This authority, therefore, can be of no assistance to the plaintiff. The decision of the learned Civil Judge is, therefore, correct and must be maintained. The appeal thus fails and is dismissed with costs.

R.G.D. *Appeal dismissed.*

END

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[Vol. 35]

SIND SECTION

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SIND CHIEF COURT

1948

CHIEF JUDGE :

The Hon'ble Mr. Hatim Badrudin Tyabji, M.A. *(Oxon)*, Bar-at-law.

PUISNE JUDGES :

The Hon'ble Mr. Dennis Nail O'Sullivan, Bar-at-law.
" " T. V. Thadani, Bar-at-law.
" " George Baxandell Constantine, B.A. *(Oxon)*, I.C.S., Bar-at-law.
" " Hassanali G. Agha, B.A., LL.B.

—:o:—

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Sind Chief Court

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DAVIS C. J. AND THADANI J.

Jiandalshah Dostalishah — Applicant v. *Emperor.*

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(a) Sind Frontier Regulation (3 [III] of 1892), S. 17 —Decree or sentence under Regulation—No appeal but revision only lies to Commissioner of Sind—Judicial Commissioner's Court has no power to revise or review it.

Under S. 17 of the Regulation no appeal lies from a decree or sentence passed under the Regulation, but there is a revising power vested in the Commissioner of Sind. The Judicial Commissioner's Court has no power of revision or review against it: 7 A. I. R 1920 Sind 51, *Foll.* [Para 2]

(b) Criminal P. C. (1898), S. 491—Magistrate purporting to act under Regulation III of 1892 issuing notice under S. 20 (1) against a person and detaining him in custody pending inquiry—Detention is illegal as unauthorised by the Regulation—Person can be set at liberty.

A Magistrate purporting to act under the Sind Frontier Regulation, 1892, issued against a person a notice under S. 20 of the Regulation and pending the inquiry detained him in custody. The person applied to the Judicial Commissioner's Court under S. 491, Criminal P. C.

Held, that there was no definite exclusion of S. 491 in the Regulation but even if there was, once the Court was satisfied that the detention was outside the provisions of the Regulation, the power of interference under that section was available ; [Para 7]

Further that, in view of the provisions of the Regulation the Magistrate had no power to detain the applicant in custody at that stage and the detention being illegal the applicant was entitled to be set at liberty, though, under the circumstances of the case, with sureties: 31 A. I. R. 1944 F. C. 86, *Ref.* [Para 7]

(46-Com.) Cr. P. C., S. 491 N. 7.

Cases referred:—

1. ('19) 13 S. L. R. 215 : 7 A. I. R. 1920 Sind 51 : 56 I. C. 769, Bahawal Khan v. Emperor.
2. ('13) 7 S. L. R. 194 : 24 I. C. 952, Emperor v. Imambux.
3. ('44) 23 Pat. 678 : 31 A. I. R. 1944 F. C. 86 : I. L. R. (1944) Kar. F. C. 172 : 1944-6 F. C. R. 295 (F. C.), Basanta Chandra v. Emperor.

A. K. Brohi—for Applicant.

Fatehchand Issudamal, Advocate General—for the Crown.

Davis C. J.—This is an application under S. 491, Criminal P. C., or in the alternative under ss. 435 and 439, Criminal P. C., read with S. 17, Sind Courts Act, in which it is prayed that we order the release from unlawful custody of one Jiandalshah, son of Dostalishah, a zamindar of Arazi, taluka Sehwan, on the ground that the District Magistrate has, purporting to act under Regulation III of 1892 (a regulation to amend the law for the suppression of crime on the Sind Frontier) acted entirely outside the scope of the Act, in that he exercised a power of detention which could only be properly exercised under the provisions of S. 117, Criminal P. C., read with the Sind Frontier Regulation. But under S. 22 (3) of that very Regulation, it is clearly laid down that S. 117, Criminal P. C., does not apply.

[2] We will make it clear at once that we do not consider this Court has any power of revision or review ; for we agree with the view in judgment in 13 S. L. R. 215,[1] in which it was pointed out by a Division Bench of the Sind Judicial Commissioner's Court that under S. 17 of the Regulation no appeal shall lie from a decree or sentence passed under the Regulation; but that there is a revising power vested in the Commissioner of Sind in the matter of sentence and decrees How this word 'sentence' is used in this context and how it should be interpreted is not now necessary to decide. In the case before the learned Judicial Commissioners the order was one of committing persons to rigorous imprisonment for failure to give security; but the learned Judicial Com-

missioners did not consider it necessary to decide whether such an order was a sentence within the meaning of S. 17 of the Regulation; for, if it was not, then no power of revision vested with the Commissioner in Sind, even less so with the Court; but if such an order be deemed a sentence then it was for the Commissioner in Sind and not for this Court to exercise a revising power. But the question of the exercise of powers under S. 491, Criminal P. C, appears to us to proceed on different principles from that of the exercise of an appellate or revising power under the Code of Criminal Procedure, because if we interfere under S. 491, Criminal P. C., it is not because of something done under the Regulation but because of something done entirely outside the scope of the Regulation and only when it is plain that what is done amounts to a detention in custody; for, while the provisions of S. 491, Criminal P. C., are wide, in that it entitles the High Court under certain circumstances to give relief to any person within the limits of its appellate jurisdiction—and a person in Dadu District is undoubtedly within the limits of our appellate Court jurisdiction—it is clear that what the section relates to is unlawful detention. Clause (b) of S. 491, for instance, relates to a person illegally or improperly detained in public or private custody and it is only from this aspect of unlawful detention that we are considering this case at all.

[3] In 13 S. L. R. 215[1] the learned Judicial Commissioners referred to another case, 7 S. L. R. 194,[2] in which the Judicial Commissioner's Court did interfere with an order purported to have been made under the provisions of the Regulation of 1892, for it was plain that the order was not made within the scope of the Regulation at all; it fell under S. 514, Criminal P C.

[4] Now, it would appear that in this case the applicant was arrested on the orders of the District Magistrate. The order which bears date 15-11-1946, reads as follow:

"Whereas it has been made to appear to me that you Jiandal Shah s/o Dost Ali Shah of Arazi taluka Sehwan are likely to commit murder or culpable homicide not amounting to murder:

"This is therefore to require you the said Jaindal Shah s/o Dost Ali Shah to appear before me on 22-11-1946 and to show cause why you should not be bound down to be of good behaviour for a period of 3 years with two sureties and P. R. for Rs. 5000 each."

Now, although no Regulation or section of the Regulation is mentioned, it is plain that this order was made within the terms of S. 20 of the Regulation of 1892 and there is no ground whatever for our interference in virtue of that order. Now S. 20 of the Regulation reads as follows:

"(a) when the District Magistrate or the Commissioner in Sindh is of opinion that it is necessary, for the purpose of preventing murder or culpable homicide not amounting to murder to require any person to execute a bond for good behaviour he may, on the conditions and in the circumstances mentioned in this section order such person to execute a bond, with or without sureties, for his good behaviour during such period, not exceeding three years, as the District Magistrate or the said Commissioner, as the case may be, may fix . . . ."

We are not concerned with the allegation that this order was made by the District Magistrate from ulterior motives or made under duress of those in authority above him to advance the prospects of a particular party at the Elections to the Provincial Legislature that were comparatively close at hand. But we think that in view of the allegations that have been made we should say that we consider the explanation that the learned District Magistrate has been good enough to give us appears to us a perfectly sincere explanation and a perfectly simple and truthful statement of the circumstances under which he acted and the applicant at least should feel satisfied that the fear that the Magistrate has taken action against him under the orders of his superiors for the purpose of advancing the prospects of a particular party at the polls, is unfounded. The learned District Magistrate might, however, wish to bear in mind the saying, which is so often applied to proceedings in Courts but which we think is capable of a wider application that not only should justice be done but that justice should seem to be done, so that there may not so readily be given to what is a mere coincidence a sinister interpretation. But while S. 20, Sind Frontier Regulation, gives power to a Magistrate to issue orders in its terms, it does not give power of detention; it gives power to a District Magistrate to make an order under sub-s. (1) on the ground set out in sub-s. (2), that is to say, on the recommendation of a Council of Elders, "or" after inquiry as hereinafter provided; and the 'inquiry hereinafter provided' is an inquiry under S 22 (1). Again, S 22 refers to an enquiry and not to the power of arrest and sub-s (3) of that very section excludes what is known as an emergency order under S 117, Criminal P. C., where before the inquiry proper is completed and a final order made, the accused person can, on failure to give security, be committed forthwith to custody. It is urged before us that it is in fact under the powers conferred by S. 117, Criminal P C., and excluded by sub s. (3) of S. 22 from the Sind Frontier Regulation that the learned District Magistrate has until now detained this Jiandalshah in unlawful custody.

[5] Now S. 27 of the Regulation incorporates in effect parts of Chap. 8, Criminal P C, and applies to cases of requiring or giving security under Ss. 20, 21 or 26 of the Regulation. Section 27 of the Regulation also says that Ss. 20 to 26 both inclusive shall be read with and construed as part of

chap. 8, Criminal P. C. It is therefore to the Code of Criminal Procedure that we look for the powers of the District Magistrate to detain the applicant Jiandalshah in custody, pending the completion of the inquiry under S. 22 and it would appear that the learned District Magistrate has purported to exercise powers under S. 114, Criminal P. C Now S 114, Criminal P. C. authorises the Magistrate under certain circumstances to order the immediate arrest by the issue of a warrant of arrest of the person to whom the proviso in S. 114, Criminal P. C. applies. But it would appear to us that the power of arrest upon a warrant under S. 114, Criminal P. C. does not authorise detention if the person arrested can give sureties who are solvent, in terms of an order which the Magistrate should make, and we think that where, for instance, in S. 114, Criminal P. C. there is no such special provision, authorising detention as there is, for instance, in sub-section (4) of S. 107, Criminal P. C. it must be presumed that the ordinary law applicable in the matter of releasing arrested person upon the giving of solvent sureties, applies just as much to a person arrested under the provisions of S. 114, Criminal P. C. embodied by S. 27, Sind Frontier Regulation in that Regulation itself as to persons arrested under S. 114, Criminal P. C. in the ordinary way. And we have not been able to find any authority nor has the learned Advocate-General been able to find any authority, which authorises the detention of a person arrested under S. 114, Criminal P. C. except on his inability to give solvent sureties in the amounts ordered by the Magistrate, directing the arrest; and the learned Advocate-General accepts the view that it is not open in these circumstances for a Magistrate to require, for instance, that the sureties shall be zamindars paying so many hundreds or so many thousands of rupees assessment, or residing within a particular locality and having power to exercise control over the conduct of the accused person. Those considerations might apply to an order to give security when the inquiry is completed or to an enquiry under S. 117, Criminal P. C. They do not apply at a stage of the proceedings where the inquiry has not been completed and no order requiring security to be given has been passed and the inquiry is pending.

[6] The purpose of the arrest under S. 114, Criminal P. C. is to bring the accused person before the Court; the purpose of taking sureties is that he should appear before the Court and though in the Criminal Procedure Code, S. 117 gives power to pass what has been called an emergency order, whereby pending the completion of the inquiry an accused person can, on his failure to provide proper sureties, be committed to custody, that section is expressly excluded from the Regulation and it is to be inferred that the power conferred by that section is not exercisable under that Regulation.

[7] We think, therefore, that it must be said that the learned District Magistrate in detaining at this stage and in these circumstances the applicant, has acted entirely outside the scope of the Regulation. We have power under S. 491, Criminal Pro. Code to direct with or without conditions that this illegal detention of the applicant be brought to an end, and the case before us is far stronger than the case in 23 Pat. 678[3] a case before the Federal Court where S. 491 was excluded by the provisions of the Ordinance itself. There is in this Regulation no definite exclusion of S. 491, Criminal P. C., but even if there was, once we are satisfied that a detention was outside the provisions of the Act, our powers of interference under S. 491, Criminal Pro. Code, would be available and would in proper circumstances be used to bring an unlawful detention to an end. We do not think however that the applicant is entitled to be set at liberty without sureties, for we think that as the Magistrate was entitled when he was arrested to detain him in custody, if solvent sureties were not forthcoming, so we should direct his release only on condition that he provides solvent sureties for the purpose of his appearance before the District Magistrate in these proceedings which the District Magistrate, it appears to us, has lawfully instituted against him. We think we should ask from him two sureties of Rs. 5,000 each and a personal bond of Rs. 10,000. In the first order requiring sureties the District Magistrate has asked for two sureties of Rs. 5,000 each and a personal bond of a like amount. We would make it plain that the order we have passed is limited only to what we consider the unlawful detention of the applicant at this stage of the proceedings. It must not be taken to limit in any way the freedom of the District Magistrate to act under the Regulation in accordance with its provisions in the proceedings now pending before him. The solvency of the sureties must be left to the determination of the District Magistrate, and it will of course be open to the applicant to deposit the sum of Rs. 10,000 in his Court as if this bail was a matter under S. 496, Criminal P. C.

Order accordingly.

D.R.

A. I. R. (35) 1948 Sind 4 [C. N. 2.]

CONSTANTINE J.

Alcock, Ashdown & Co. Ltd. —*Plaintiffs* v. *Municipal Corporation of Karachi* — *Defendants.*

Civil Suit No. 374 of 1945, Decided on 15-4-1947.

(a) City of Karachi Municipal Act (17 [XVII] of 1933), Ss. 151, 155 and 230 (2)—Newly establishing factory — Permission for, under S. 151 — Specification of period — Annual recurring fee if leviable — Annual fee if valid as tax — Permission under S. 151 granted subject to conditions — Conditions if legal.

Newly establishing a factory is not a continuing process like carrying on a trade. In the case of newly establishing a factory the provision in S. 230 (2) that the permission shall specify the period for which it is granted merely connotes that the establishment must take place within the period specified by the permission: it does not mean that in addition to establishing a factory within the period specified by the original permission fresh retrospective permissions or extensions of the original permission are to be obtained so long as the factory continues to work. [Para 15]

Plaintiff applied to the Chief officer of the Municipal Corporation for a license to establish a workshop for ship-building, ship-repairs and general engineering, informing that the motive would be electricity and the total approximate horse- power would be 325. Thereafter the Standing Committee upon a note put up by the Chief Officer granted the permission applied for under S. 151 subject to the conditions that (1) the licensee (Plaintiff) shall conform to the terms and conditions of the license to be issued by the Chief Officer in this behalf; (2) that the Standing Committee reserve to themselves the right to revoke the permission at any time without assigning any reason therefor; and (3) that an annual fee of Rs. 100 shall be charged for motors or engines of over 50. horse-power employed by the plaintiff. No period was specified in the permission granted by the standing committee but it was assumed that by the mention of an annual fee it was implied that the period was to be from year to year. In a suit brought by the plaintiff against the Corporation for a declaration that the conditions were illegal and the levy of yearly fee was unwarranted:

Held (1) that the Standing Committee was not empowered to charge a recurring annual fee as newly establishing factory for which the permission or license was granted was not a continuous process like the carrying on of a trade or factory. Hence levying of the annual fee was inconsistent with the Act and therefore unwarranted: 32 A. I. R. 1945 Sind 116, *Rel. on.* [Para 15]

[2] That a municipality is not entitled to regard and use fees as a method of taxation. But even if the annual fee (which the Corporation was not empowered to charge) be regarded as a tax it was unwarranted by the Act: 14 A. I. R. 1927 Rang. 183, 15 A. I. R 1928 Mad. 847 and 21 A. I. R. 1934 All. 39, *Ref.* [Para 21]

[3] That the annual fee could not be regarded as instalments of a single fee as the annual fees recur indefinitely nor could it be leviable as a condition under S. 151 as the levying of a fee is governed by S. 230 and the conditions contemplated by S. 151 have nothing to do with the levying of a fee for permission under S. 151. [Para 16]

[4] That the license could not be regarded as having been issued under S. 155, for if the plaintiff's trade fell within S. 155 then the first condition was unnecessary; nor could the fees be said to have been fixed under S. 155 as separate fees under that section had been paid by the plaintiff. [Paras 17, 19]

[5] that (a) the first condition was inconsistent with the language of S. 151 since it is not for the Chief officer but for the Standing Committee to lay down terms and conditions; (b) that the second condition was unreasonable; and that (c) the third condition was illegal except in so far as Rs. 100 were leviable as a fee for such permission. [Paras 22, 23 & 24]

(b) Interpretation of statutes — Power granted by statute — Exercise of.

It is advisable for authorities constituted by statute to give attention and to adhere to the language of the statute when exercising powers granted by the statute. [Para 15]

(c) Jurisdiction — Action of local bodies — A Court of law may interfere with the actions of a local body, which is a creature of statute, under certain circumstances. [Para 25]

(d) City of Karachi Municipal Act (17 [XVII] of 1933), S. 151 — Permission granted under, is not revocable. [Para 30]

Cases referred:—

1. ('45) 32 A. I, R. 1945 Sind 116, Ajitsing Ramchand v. Municipal Corporation, Karachi.
2. ('27) 5 Rang. 212 : 14 A. I. R. 1927 Rang 183 : 102 I. C. 878. Municipal Corporation of Rangoon v. Sooratee Bara Bazar Co. Ltd.
3. ('28) 51 Mad 876 : 15 A. I. R. 1928 Mad. 847 : 110 I. C. 454, Chairman, Municipal Council Chidambaram v. Tirnnarayana Ayyangar.
4. ('34) 56 All. 241 : 21 A. I. R 1934 All. 39 : 148 I. C. 603, Ajmeri Sheikh v. Emperor.

Hakumatrai — for Plaintiffs.
S. H. Lulla — for Defendants.

Judgment. — The suit is for declaration that the conditions imposed in the permission granted to the plaintiff by the municipality newly to establish a factory are illegal, and that the Municipality is not entitled to recover for such permission under S. 151, City of Karachi Municipal Act, more than a single fee; for an injunction restraining the municipality from revoking the permission or recovering more than a single fee not exceeding Rs. 100 or such other reasonable fee, as may be determined by the Court, and for the refund of Rs. 3140 with interest being amount deposited with the municipality under protest.

[2] The facts of this case are not in dispute and are clear from the correspondence, resolutions of the Standing Committee and notes of the Chief Officer. In December 1942 the plaintiff wrote to the Chief Officer to say that they intended to establish and run a workshop for ship-building, ship-repairs and general engineering and requested the necessary license. In January the Chief Officer enquired what motive power would be used for running the workshop with the horse-power. In February the plaintiffs replied that the motive would be electricity and the total approximate horse-power would be 325 H. P.

[3] On the 9th of April a note was put up by the Chief Officer to the Standing Committee recommending that the permission applied for be

granted under S. 151, Karachi Municipal Act, subject to the conditions mentioned below:

(1) That the licensee shall conform to the terms and conditions of the license to be issued by the Chief Officer in this behalf.

(2) That the Standing Committee reserve to themselves the right to revoke the permission at any time without assigning any reason therefor.

(3) That an annual fee shall be charged according to the following scale for the motors or engines employed by the firm from year to year:

Upto 5 H. P.	Rs. 10/-	p. a.
Over 5 H. P. but up to 20 H. P.	Rs. 20/-	"
Over 20 H. P. but up to 50 H. P.	Rs. 20/-	"
Over 50 H. P.	Rs. 100/-	"

[4] The Standing Committee granted the permission subject to the conditions mentioned in the above note. In May the Chief Officer informed the plaintiffs that the permission was given subject to the conditions which are set forth above. The plaintiffs in July asked for a copy of the license which was to be issued by the Chief Officer, inquired whether they were to understand that the maximum fee chargeable was Rs. 100/- a year, and added that they considered annual fees unusual. In August the Chief Officer replied that annual fees at the rates already mentioned were charged when a single motor or an engine of over 50 H. P. was employed for the purpose of a factory, and he forwarded a copy of the license. This license is Ex. 6/9 and will be referred to later. Upon this the correspondence continued, the plaintiff contending that the fees were illegitimate and the Chief Officer or Deputy Chief Officer stating that this was the scale which applied to all factories. Finally by Ex. 6/38 dated 11-8-1945, the necessary notice of the suit was given.

[5] The plaint which follows the notice contended that S. 230 (3) of the Act allowed only a single fee and not an annual fee for a permission under S. 151 and that all the conditions in the permission were unreasonable, illegal and ultra vires. It also stated that the fees demanded were extortionate and were in the nature of a tax.

[6] The written statement contended that the permission had not been granted, or if granted it was conditional, and that the plaintiffs were estopped from disputing the conditions as they had started the factory and must be deemed to have agreed to the conditions. It was denied that the conditions were illegal or ultra vires.

[7] The following issues were framed:

(1) Whether a single fee is payable for permission granted to the plaintiffs under S. 151, City of Karachi Municipal Act?

(2) Whether the fees claimed to be paid annually by the defendants amount to a tax and whether such a tax is leviable by the defendants?

(3) Whether the conditions imposed by the permission are unwarranted, illegal, ultra vires, unreasonable and/or otherwise invalid? If so, what is the consequence? (paras 8 and 11 of the plaint.)

(4) Whether the defendants and/or their standing committee have absolute discretion in issuing the permission and/or in imposing any condition whatsoever when granting permission.

(5) Are the plaintiffs estopped from questioning such discretion and/or from disputing the fees or their quantum.

(6) Whether the fee of Rs. 1570/-imposed by the defendants is reasonable. If not, what would be the proper fee?

(7) Whether the plaintiffs are entitled to refund and/or interest? If so, to what amount and at what rate of interest?

(8) Whether the suit for declaration prayed for in para 17 (a) of the plaint is maintainable in view of S. 42, Specific Relief Act?

(9) Whether the suit for injunction prayed for in para 17 (b) of the plaint is maintainable in view of Ss. 54,55, 56 and 57, Specific Relief Act?

(10) General, including the question of costs.

[8] My findings are:

(1) Yes. (2) Yes. (3) Yes. The consequence is that these conditions are not binding upon the plaintiffs. (4) Yes; provided that the discretion is exercised reasonably and within the ambit of the Act. (5) No. (6) The fee imposed is not in accordance with the resolution of the Standing Committee. (7) Yes; the whole amount less Rs. 112/-; the rate of interest should be 6% upon the balance from the date of the deposit to the date of recovery. (8) Not pressed. (9) Not pressed. (10) As under.

[9] In Chapter XI of the Karachi Municipal Act, 1933, entitled 'Public Health and Safety' under the Part entitled 'Regulation of Factories and Trades' occur two relevant sections, viz. Ss. 151 and 155. These sections are as follows:

"*151.* No person shall (1) newly establish, or (2) remove from one place to another, or (3) re-open or renew after discontinuance for a period of not less than three years, or (4) enlarge the area or dimensions of any factory, workshop or bakery in any area other than an area set apart for the accommodation of industries by any Act, for the time being in force or by any local authority except with the permission of the Standing Committee and in accordance with the terms and conditions stated in such permission. Provided that no such permission shall be required in the case under clause (3) if during the period of discontinuance the machinery has not been removed from the place where the factory, workshop or bakery was originally established."

"*155. (1)* Except under and in conformity with the terms and conditions of a licence granted by the Chief Officer in accordance with general or special orders issued by the Standing Committee in that behalf no person shall—

(a) carry on within the City the trade or operation of a carrier;

(b) keep in or upon any premises, for any purpose whatever, any article specified in Part I of Sch. VII or any article specified in Part II thereof in excess of the quantity therein prescribed as the maximum quantity of such article which may at any one time be kept in or upon the same premises without a licence;

(c) keep in or upon any premises, except for domestic use, any article specified in Part III of Schedule VII;

(d) keep in or upon any building used or intended to be used as a dwelling-house or within fifteen feet of such building, any quantity of cotton exceeding four hundred-weights;

(e) keep or allow to be kept in or upon any premises any four-footed animal (i) for sale, (ii) for letting out

on hire, (iii) for any purpose for which any charge of remuneration is made or received, or (iv) for the sale of any produce thereof;

(f) carry on or allow to be carried on, in or upon any premises—(i) any of the trades specified in Part IV of Schedule VII or any operations connected therewith; (ii) any trade or operation which in the opinion of the Chief Officer is dangerous to life, health or property or likely to create a nuisance either from its nature, or by reason of the manner in which, or the conditions under which, the same may be carried on.

Explanation 1.—A person shall be deemed to have known that a trade or operation is, in the opinion of the Chief Officer, dangerous or likely to create a nuisance within the meaning of this paragraph, after written notice to that effect signed by the Chief Officer has been served on such person or affixed to the premises to which it relates.

Explanation 2.—(1) A person shall be deemed to carry on a trade or operation or to allow it to be carried on within the meaning of this paragraph if he does any act in furtherance of such trade or is in any way engaged or concerned therein as principal, agent, master or servant or in any other similar capacity. (2) It shall be in the discretion of the Chief Officer to grant a licence for any of the purposes referred to in sub-s. (1) subject to such restrictions or conditions as he shall think fit to prescribe, or to refuse to grant such licence. (3) Every person to whom a licence is granted by the Chief Officer under sub-s. (2) shall keep such licence in or upon the premises, if any, to which it relates. (4) Nothing in this section shall be deemed to apply to mills for spinning or weaving cotton, wool, silk or jute or to any other mill or factory which the Chief Officer with the previous approval of the Standing Committee may from time to time specially exempt from the operation thereof."

[10] In Chap. 14 entitled 'General Provisions for the carrying on of municipal administration' under the part headed 'licences and written permissions' occurs S. 230 which reads as follows:

"*230.* (1) Wherever it is prescribed that the permission of the corporation is necessary for the doing of any act, such permission shall (unless it is expressly provided otherwise) be in writing.

(2) A licence or permission given under this Act shall specify the period for which, and the conditions and limitations subject to which, it is granted, and shall be signed in the prescribed manner.

(3) For every licence or permission a fee may be charged at such rate as shall from time to time be fixed by the Chief Officer with the previous approval of the Standing Committee.

(4) Every person to whom a licence or permission has been granted shall produce it at all reasonable hours for inspection if required by the Chief Officer, or any officer authorized by him in this behalf.

(5) A licence or permission may at any time be suspended or revoked by the Chief Officer, if any one of its conditions or limitations is infringed or evaded by the person to whom it was granted, or if the said person is convicted of an infringement of any of the provisions of this Act in any matter to which the licence or permission relates.

(6) When any licence or permission is suspended or revoked, or when the period for which it was granted has expired, the person to whom it was granted shall be deemed to be without a licence or permission:

Provided that, pending the receipt of orders on his application, an applicant for the renewal of a licence or permission shall be entitled to act as if it had been renewed.

(7) The acceptance by or on behalf of the Corporation of the fee for a licence or permission shall not entitle the person paying the fee to the licence or permission.

(8) Every application for a licence or permission shall be addressed to the Chief Officer.

(9) Save in cases falling under Ss. 151 and 154, if the orders of the Corporation on an application for a licence or permission which complies with the provisions of the foregoing sub sections are not communicated to the applicant within six weeks from the date of receipt of the application by the Chief Officer, the applicant may act as if the licence or permission had been granted for the year or for any shorter period mentioned in the application."

Section 286 is the section providing for power to make rules and sub-s. (54) empowers rules to be made regarding the form of licences and notices issued under this Act and the authority entitled to sign or issue them. A notification (Ex. 11) contained rules made by the Corporation under Ss. 155 and 286 (54). The operative part is as under:

"The Chief Officer being of the opinion that the trade and operations connected with the manufacture of iron safe and with iron or tin workshops or foundry and with processes of glass levelling or polishing, stone grinding or cutting, marble cutting, grinding or polishing or metal cutting is dangerous or likely to create a nuisance within the meaning of paragraph (ii), Cl. (f) of sub-s. (1) of S. 155, City of Karachi Municipal Act, 1933, is pleased to direct that any of the above trades or any operation connected therewith shall not be carried on, except as mentioned below—

1. Except under a licence from the Chief Officer and in accordance with the terms and conditions of such license, no person shall carry on the trade and operations connected with the manufacture of iron safes and with iron or tin workshops or foundry and with processes of glass levelling or polishing stone grinding or cutting, marble cutting, grinding or polishing or metal cutting.

2. Such license shall be issued on payment of the prescribed fees and shall be current for one year only, but shall be renewable annually subject to the provisions of Rr. 4 and 11 below.

3. The entire business shall be confined to the aforesaid premises (which said premises are hereinafter referred to as the "licensed premises" namely number .... rooms or space measuring sq. ft.).

4. The trade shall be carried on with the least possible nuisance and on a written requisition by the Chief Officer in this behalf the licensee shall be bound to take steps immediately to abate the nuisance caused, to the satisfaction of the Chief Officer, failing which, the license shall be liable to be revoked.

5. The trade shall not be carried on either before 7-0 a. m. or after 8-0 p. m. (S. T.)

6. The licensee shall not carry on any licenseable trade other than that permitted under this license without obtaining a license from the Chief Officer for that trade

7. The licensee shall cause his license to be affixed in some conspicuous part of the premises.

8. Except with the previous permission of the Chief Officer, the license is not transferable either as regards the person to or the premises in respect of which it is granted.

9. The licensee shall inform the Chief Officer of the name or names of the agent or agents who will carry on the trade in his absence and who will be responsible

for the due fulfilment and observance of the conditions of this license.

10. The licensee shall communicate forthwith to the Chief Officer any change in the name of agent or agents.

11. The licensee shall at all times during the continuance of the license be responsible for the due fulfilment and observance of all the conditions of the license and the provisions of the Act and of the rules as may be in force from time to time and in case of any infringement of or neglect or failure on the part of the licensee or any other person employed in or having any interest in the business to fulfil or observe any of the said conditions or provisions after his attention had been drawn in writing by the Chief Officer to such infringement, neglect or failure, the licensee shall be liable to prosecution and/or to suspension or revocation of his license.

12. The license shall also be liable to suspension or revocation, if the premises are so kept or the trade or any operation connected therewith is so carried on as to be in the opinion of the Chief Officer a source of nuisance or danger to life, health or property of persons residing in or resorting to the neighbourhood.

13. The licensed premises shall always be kept in a clean and sanitary condition and the licensee shall comply with any direction given by the Health Officer in this behalf.

14. Half yearly fees shall be chargeable in respect of licenses issued on or after 1st October, full yearly fees being payable in case of licenses issued before that date.

(Provided that on receipt of a written notice by the Chief Officer on or before 1st October that the trade has been discontinued on the licensed premises, the licensee shall be entitled to a refund of the proportionate license fee for the remaining half year provided on inspection the trade is found to have been discontinued.")

[11] The portion in brackets has since been deleted. Ex. 13/2 is the table of fees dated 15-4-1936 fixed by the Chief Officer with the previous approval of the Standing Committee for licenses and permissions to be granted under the various provisions of the Act; and in Part 4 corresponding to S. 155 (1) (f) (i) the fee for casting metal with mechanical power is Rs. 15. Later in the same part at Serial No. 42 is the following item:

" Fees for trades under S. 155 (1) (f) (ii).

(a) Blacksmiths, tinsmiths, coppersmith, Glass levelling and Glass polishing ...	...	Rs. 6 p. a. per head.
(b) Iron safe manufacturing factories Iron and tin trunk works, sheet metal works, stone grinding and cutting, marble cutting, grinding and polishing or metal cutting—	Rs. 6	" "
(c) Goor (Jagree). ...	...	" "
For every bhathi big or small	Rs. 3	" "
(d) For special license for trades other than mentioned above	Rs. 3	" " "

Exhibit 12/1 a note by the Chief Officer for the Standing Committee reads as follows:

"No. 2163 Municipal Corporation, Karachi. Dated, 28-8-1941.

Note for the Standing Committee.

As required by S. 230 (3), I have the honour to request that approval of the Standing Committee to the fixation of License Fees as under for carrying on the business of cloth printing and for newly establishing a workshop or a Factory which is permitted by the Standing Committee under S. 151, City of Karachi Municipal Act, 1933, and which is worked with a mechanical power and for which no fee has been specifically prescribed or the fee already prescribed is less than that which is prescribed hereunder.

Licence Fees.

Upto 5 H.P.	Rs. 10/-P.A.
Over 5 H.P.	Rs. 20/-P.A."

The Standing Committee then asked for the full statements of license fees, and then by Ex. 12/3 the Chief Officer put up the following note:

" No. L. 2594 Municipal Corporation, Karachi. Dated 11-10-1941.

Note for the Standing Committee.

With reference to the Standing Committee's Resolution No. 800 dated 6-9-1941, I have the honour to submit herewith a statement of fees which are charged for keeping articles shown in parts II & III of Schedule 7 and for carrying on the trades and operations as shown in Part 4 of the said Schedule, as desired by the Standing Committee.

The fees as proposed in my Note No. L 2163 dated 28-8-1941 were for permissions granted by the Standing Committee under S 151 of the Act and for printing of cloth by machinery for which no fee was prescribed. But I will now suggest that the scale of fees should be divided in four classes as under instead of the two.

Upto 5 H P.	Rs. 10/- P.A.
Over 5 H P. but upto 20 H.P.	Rs. 20/- " "
Over 20 H P. but upto 50 H.P.	Rs. 50/- " "
Over 50 H.P.	Rs. 100/ " "

The above fees will be charged for all factories and workshops permitted under S. 151, but where these fees are lower than those already prescribed for trades and operations falling within Ss. 154 and 155, the latter will be charged.

Approval of the Standing Committee is therefore requested to charge the proposed fees for printing of cloth by machinery and for permissions granted by the Standing Committee under S. 151 of the Act, subject to the conditions set forth above"

This above proposal of the Chief Officer was approved by resolution of the Standing Committee on 1-11-1941.

[12] Then in December 1944 the Chief Officer put up the following note (Ex. 12/5):

"No. L 3125 Municipal Corporation, Karachi. Dated 9-12-1944.

Note for the Standing Committee.

As required by S. 230 (3), I have the honour to request approval of the Standing Committee to the revision of fixation of license fees, as under. The new rates will come into force from 1-4-1945.

S. No.	Subject	Proposed fee.
1.	For permissions granted by the Standing Committee under S. 151 of the City of Karachi Municipal Act, 1933, and where mechanical power is employed provided that where the proposed fees are lower than those prescribed for trades or operations falling within Ss. 154 & 155 the fees fixed for trades or operations under these sections will be charged.	(1) Upto 10 H P. Rs. 25/- P.A. (2) Over 10 but upto 20 H.P. Rs. 50/- P.A. (3) Over 20 but upto 50 H.P. Rs. 100- P.A. (4) Over 50 but upto 75 H.P. Rs. 200- P.A. (5) Over 75 H.P. Rs 300- P.A.
2.	For (a) Factories and workshops established before 1-11-1933 and where mechanical power is employed, (b) Refining sugar by	

machinery, (c) Grinding of grain by machinery, (d) Cleaning and /or grinding chillies by machinery, (e) Manufacturing Ice by machinery.	Same as above:
3. For newly establishing a workshop or a factory which is permitted by the Standing Committee under S. 151 City of Karachi Municipal Act, 1933 and where no mechanical power is used and for which no fee has been specifically prescribed or the fee already prescribed is less than which is herein prescribed.	For establishing a factory···Rs. 50/- P.A. For establishing a workshop··· Rs. 25/-
4. For workshops and factories established before 1st November 1933 and where hand labour is employed.	Rs. 25 per annum except for blacksmiths, coppersmiths, tinsmiths and marble cutting where the present license fee of Rs. 6 per annum shall continue to be levied.
5. For trades to be declared offensive by the Chief Officer under the powers vested in him under S. 155 (ii) of the City of Karachi Municipal Act, 1933.	Rs. 10 per annum.

Sd. T. J. Bhojwani
Chief Officer."

This was approved by the Standing Committee.

[13] The form of license which was forwarded by the Chief Officer to the plaintiffs in August 1943 is as follows:

"Karachi Municipal Corporation

License No. 100
License fee Rs.

License for the trade and operations connected with the manufacture of iron safes, with iron or tin workshops of foundry, with processes of glass levelling or polishing, stone grinding or cutting, marble cutting, grinding or polishing or metal cutting. Mr. ..... Karachi, is hereby given a license for a period of one year from 1st April 194 to 31st March 194 for the trade and operations connected with ..... on the premises measuring in area ... sq. ft. on plot No. ..... street .... Quarter .... Karachi, subject to the rules in force relating to such license, which are hereunder reproduced and subject to any amendment thereof Dated ..... 194 .

Standing Committee's Resolution No. 346 of 29-4-1943.

Superintendent of Licenses
Deputy Chief Officer".

Below this are printed the rules which have already been set out above in Ex. 11, but it is to be observed that the heading of these rules is "Rules (under Ss. 155 and 286 (54)) read with S. 151." The words" read with S. 151" are not printed, but are written in ink.

[14] The company has paid separate fees for its operations which come under the designation of metal casting, and it is common ground that it pays property taxes, water-tax etc., and for various storage licenses.

[15] Turning to issue No. 1, I consider it obvious, with all respect to Mr. Lulla's argument to the contrary, that newly establishing a factory is not a continuing process like carrying on a trade. Section 230 (2) provides that a permission shall specify the period for which it is granted. In the case of newly establishing a factory this merely connotes that the establishment must take place within the period specified by the permission: it does not mean that in addition to establishing a factory within the period specified by the original permission fresh retrospective permissions or extensions of the original permission are to be obtained so long as the factory continues to work. No period was specified in the permission granted by the Standing Committee, but it was tacitly assumed by both parties in argument that by the mention of an annual fee it was implied that the period was to be from year to year, and that the renewal of the permission from year to year was dependent on the payment of a fee each year. It is advisable for authorities constituted by statute to give attention and to adhere to the language of the statute when exercising powers granted by the statute. The Municipal authorities concerned did not pay attention to the expression "newly establish", nor did they specify the period. Had they done so, they could hardly have avoided seeing that what the Chief Officer proposed was inconsistent with the Act; for, paraphrased in terms of the Act, what the Standing Committee did was to give the following permission:" We permit you to newly establish a factory. The period for which the permission is granted is for as many years as you work the factory. You must pay an annual fee". It seems obvious that once a factory has been established with permission, then the expiry of the permission cannot convert retrospectively such an establishing into an establishing without permission. The answer to a prosecution is clear: "We did establish with permission." The Municipal authorities have fallen into the same mistake as was pointed out by my learned brother O' Sullivan in A. I. R. 1945 Sind 116[1]: there the municipality was empowered to charge a fee for putting up a projector, but as my learned brother held, was not empowered to charge a recurring fee for the continuing use of a projector.

[16] As for the argument that annual fees should be regarded as instalments of a single fee, a short answer is that the amount of the single fee is not specified and that the annual fees recur indefinitely. Mr. Lulla also argued that an annual fee was leviable as a condition under S. 151; the levying, however, of a fee is governed by S. 230, and the conditions contemplated by S. 151 have nothing to do with the levying of a fee for a permission under S. 151.

[17] Mr. Lulla again argued that the words "in this behalf" which occur in the permission, referred not to S. 151, but to S. 155 and that the real intent was to make a condition that the plaintiff should take out a license under S. 155. If, however, plaintiff's trade fell within S. 155, then such a condition was unnecessary: if it did not, then such a condition was not warranted by the Act. It may be pointed out that the department concerned appears to have been mistaken about the true position: EX. 6/9, the license, is really referable to S. 155 only, but the department has written in ink "read with S. 151." The conditions of this license pertain to the carrying on of an obnoxious trade, not to the new establishing of a factory. This same confusion is apparent in the notes of the Chief Officer regarding the levying of fees under S. 151. Each of the notes treats the newly establishing of a factory as if it were a continuous process, like the carrying on of an obnoxious trade, or in fact as if establishing a factory was the carrying on of an obnoxious trade. In the letter signed by the Chief Officer himself, EX. 6/22 sent to the plaintiffs is the following passage:

"License fee according to the strength of the machinery employed by each owner is levied *on all such factories without exception.* The maximum amount of license fee is Rs. 100/- only per machine which is not excessive. The license fee is paid for the right to ply a licensable trade and which has to be controlled and supervised by Municipal Agency. This is one of the biggest workshops established in Karachi.

Single fee cannot be recovered in this case as the fee fixed is annual. This does not fall under S. 155 and as such fee under that section cannot be recovered as the permission granted for establishing the workshop is under S. 151 as stated above."

[18] It is indeed remarkable to find within the span of a few lines two such inconsistent statements: (a) "the license fee is paid for the right to ply a licensable trade" and (b) "the permission granted is under S. 151."

[19] A further argument was that the fees could have been fixed under S. 155 and that effect should be given to the resolution as if it fixed the fees not under S. 151, but under S. 155 (1) (f) (ii). This was not the case in the written statement, and secondly the plaintiff has paid separate fees under S. 155 (1) (f) (i).

[20] The truth of the matter is that the Municipal authorities overlooked the distinction between Ss. 151 and 155, and sought to impose a recurring impost in return for permission to establish a factory as if establishing a factory meant carrying on a factory.

[21] *Issue No. 2.*—Since an annual fee is not permitted as has been said above it would appear to follow that an annual fee is in the nature of a tax. Whether it is termed an annual fee or a tax, in either case it is not warranted by the Act. The question whether the fees levied on each machine constitute a tax does not thus arise necessarily for decision, but the authorities quoted by Mr. Hakumatrai, 5 Rang. 212,[2] 51 Mad. 876[3] and 56 ALL. 241,[4] shew that a municipality is not entitled to regard and use fees as a method of taxation, and obviously the raising of a fee from Rs. 6 for metal cutting to over Rs. 1,000 suggests an impost calculated according to capacity to pay rather than according to the cost to the municipality.

[22] *Issue No. 3.*—The first condition purports to delegate authority to the Chief Officer to lay down terms and conditions, and is thus inconsistent with the language of S. 151, since it is not for the Chief Officer, but for the Standing Committee to lay down terms and conditions.

[23] The second condition is that the Standing Committee reserve to themselves the right to revoke the permission at any time without assigning any reason therefor. This is, in my opinion, an unreasonable condition. If it means what it says, then the Standing Committee could wait till the plaintiffs erected their factory and a day after its erection it could without any reason known to the plaintiff revoke the permission; or, it could wait for thirty years and then turn round and say that the permission was revoked. Section 151 contemplates that conditions if any must be specified.

[24] The third condition is illegal except in so far as Rs. 100 are leviable as a fee for such permission. The plaint does not make a grievance of the fact that the department sought to recover a fee in respect of each motor. It was, however, only after the production in Court by the municipality of the Standing Committee's proceedings of 1941 that the true interpretation of the Standing Committee's resolution (EX. 6/5) granting permission to the plaintiffs to establish a factory could be ascertained by the plaintiffs; and it is noteworthy that in the correspondence the department had refused to supply a copy of the Chief Officer's note to the Standing Committee. There is not a word in the Chief Officer's notes to suggest that each motor was to have a separate fee levied in respect of it, and it seems obvious that such an intention would require very clear words. If separate motors were to be the unit for calculation of fees, then the municipality at once discriminated in favour of steam boilers as against separate electric motors. According to the true interpretation of the resolutions the Chief Officer had not been given power to assess fees upon each motor.

[25] *Issue No. 4.*—This issue is not necessary for the disposal of this case, but it is clear from the authorities that a Court of law may interfere

with the actions of a local body, which is a creature of statute, under certain circumstances.

[26] *Issue No. 5*.—It is clear that from the start the plaintiffs disputed the terms of the permission. I cannot see that by their conduct in starting the factory they made any representation to the Standing Committee or let it to understand that they would accept terms and conditions which the Standing Committee or the Chief Officer were not authorised to impose.

[27] *Issue No. 6*.—The fee of Rs. 1570 has been reached by calculating the fees on separate motors. This was not the purport of the Chief Officer's note which underlay the resolution of 1941, and an increase from Rs. 100 to Rs. 1570 would *prima facie* appear unreasonable. It is true that the amount of a single fee may perhaps justifiably be more than that of an annual fee. In any case it is not for this Court to state what fees the municipality should impose. All that concerns the Court in this particular case is that the Standing Committee had authorised a levy of Rs. 100 only and that if a factory was established during the subsistence of the permission then the non-payment of fees in future clould not convert that establishment into a wrongful establishment.

[28] *Issue No. 7*.—Since the plaintiff under the threat of process deposited on 10-8-45 under protest with the municipality an amount to which the municipality is not entitled the plaintiff is entitled to a refund with interest at 6 per. cent per annum. Admittedly, Rs. 100 were due two years before the deposit was made and Mr. Hakumatrai is willing to pay interest on Rs. 100 in return for interest on the balance of the deposit. Hence, Rs. 3128 were deposited in excess and the interest on this amount should run from 10-8-45 up to the date of recovery.

[29] *Issues Nos. 8 and 9*.—These issues were not pressed.

[30] *Issue No. 10*.—It is declared that the conditions imposed on the permission granted by the Standing Committee in its resolution (Ex. 6/5) upon the Chief Officer's note (Ex. 6/4) are illegal and not binding on the plaintiffs, except in so far Rs. 100 are leviable as a fee for such a permission. It is declared that the permission granted under S. 151 of the City of Karachi Municipal Act is not revocable. The defendants do pay the plaintiffs Rs. 3128 with interest thereon at 6 per cent. per annum from 10-8-1945 till the date of recovery and costs of the suit.

N.S.D. *Decree accordingly.*

A. I. R. (35) 1948 Sind 10 *[C.N. 3.]*

DAVIS C. J. AND THADANI J.

Vatoomal Thanwerdas—Defendant—Applicant v. *Godhumal Mulchand—Plaintiff—Opponent.*

Civil Revn. Appln. No. 74 of 1943, Decided on 20-3-1947, from order of Asst. Judge, Larkana, D/-12-5-1943.

Civil P. C. (1908), O. 9, R. 13—Ex parte decree—Appeal from, summarily dismissed—Application to set aside decree, if competent — Civil P. C. (1908), O. 41, R. 11 and S. 37.

The Court which has passed an *ex parte* decree is not competent to deal with an application made to it for setting aside the *ex parte* decree when an appeal against the *ex parte* decree has been summarily dismissed by the appellate Court: *Case law discussed.*

[Paras 4, 23]

Annotation:—('44 Com) Civil P. C. O. 9 R. 13 N. 11.

Cases referred:—

1. ('97) 21 Bom. 548, Bapu v. Vajir.
2. ('21) 23 Bom. L R. 597: 9 A. I. R. 1922 Bom. 130: 46 Bom. 1: 63 I. C. 910, Shiappa Parsa v. Ramchandra Narasimha.
3. ('17) 44 Cal. 1011: 4 A. I. R. 1917 Cal. 29: 41 I. C. 497, Pyari Mohan Kundu v. Kalu Khan.
4. ('32) 11 Pat 409: 19 A. I. R. 1932 Pat. 238: 138 I. C. 903, Batuk Prasad Singh v. Ambika Prasad Singh.
5. ('70-72) 14 M. I. A. 465: 10 Beng. L. R. 101 (P. C.), Kristo Kinker v. Burrodacaunt Singh.
6. ('41) 16 Luck. 697 : 28 A. I. R. 1941 Oudh 251: 192 I. C. 269, Sheo Piari v. Tribeny Prasad.
7. ('33) 20 A. I. R. 1933 Nag. 117: 142 I. C. 143, Sheolal v. Mohammad Ismail.
8. ('27) 14 A. I. R. 1927 Mad. 722: 103 I. C. 146, Subramania Iyer v. Varadarajulu Naidu.
9. ('22) 9 A. I. R. 1922 Mad. 33: 66 I. C. 59, Palaniappa Chetty v. Subramania Chetty.
10. ('24) 11 A. I. R. 1924 Cal. 830: 51 Cal. 715: 83 I. C. 220, Kalimuddin Ahmed v. Esabakuddin.
11. ('37) 24 A. I. R. 1937 Nag. 381 : 172 I. C. 608, Kikabhai v. Mt. Safia Bi.
12. ('37) 24 A. I. R. 1937 Cal. 548: 172 I. C. 729, Mono Mohan Kundu v. Nripendra Nath.
13. ('15) 37 All. 208 : 2 A. I. R. 1915 All. 2: 28 I. C. 261, Mathura Prasad v. Ramcharan Lal.
14. ('97) 24 Cal. 759, Uma Sundri Devi v. Bindu Basini.
15. ('81) 3 Mad. 1, Royal Reddi v. Linga Reddi.

Srikrishindas H. Lulla—for Applicant.

Jamiatrai Lalchand—for Opponent.

Thadani J.—This is a revision application against the order of the learned Assistant Judge of Larkana who confirmed the order of the trial Judge, who had refused to entertain an application for setting aside an *ex parte* decree.

[2] The applicant Vatoomal son of Thanwerdas was a defendant in Suit No. 425 of 1941 instituted in the Subordinate Civil Court of Mehar, in which an *ex parte* decree was passed against him. The applicant then made an application under O. 9, R. 13, Civil P. C., to the trial Court for setting aside the *ex parte* decree. Before his application was decided, the applicant filed an appeal against the *ex parte* decree but his appeal was summarily dismissed by the District Court, Larkana. After the summary dismissal

of the appeal, the applicant moved the trial Court to hear his application under O. 9, R. 13, Civil P. C., but the trial Court declined to hear the application on the ground that an appeal against the decree *ex parte* had been summarily dismissed. The applicant then filed an appeal against the order of the trial Court dismissing the application under O. 9, R. 13, Civil P. C. to the District Court, Larkana, and the District Court, Larkana, dismissed the appeal. It is against the order of the appellate Court dismissing the appeal that the applicant has come in revision.

[3] Mr. Lulla for the applicant contends that the trial Court was bound to hear and decide the application fo setting aside the *ex parte* decree, that the trial Court's refusal to decide it amounts to a failure to exercise jurisdiction vested in it by law. Mr. Lulla's argument is that the summary dismissal of an appeal under the provisions of O. 41, R. 11, Civil P. C., has not the effect of merging the decree of the trial Court into the decree of the appellate Court, as is evidenced by the fact that no decree is drawn up where an appellate Court summarily dismisses an appeal.

[4] The question for our consideration is whether the Court which has passed an *ex parte* decree is competent to deal with an application made to it for setting aside the *ex parte* decree when an appeal against the *ex parte* decree has been summarily dismissed by the appellate Court. Our view is that it is not competent.

[5] Mr. Lulla for the applicant has relied upon the decision of the Bombay High Court in 21 Bom. 548.[1] The question in that case, however, was whether the Court that passed the decree was competent to amend the decree after an appeal filed against the decree had been summarily dismissed.

[6] The facts of that case were these: The plaintiff had sued to establish his right to have a mortgage bond passed to him by the defendants registered to him under the Registration Act, 3 [III] of 1877. The defendants having denied execution before the Registrar, registration of the bond was refused. The Subordinate Judge found that the execution of the bond by the defendants was not proved and rejected the claim. On appeal the appellate Judge found that the execution of the bond by the defendants was proved, and he passed a decree reversing the decree of the Court below, and awarded the plaintiff's claim with costs. The defendants preferred a second appeal, but the High Court dismissed it under S. 551, Civil P. C. [Act XIV [14] of 1882] corresponding to O. 41, R. 11, Civil P. C. [Act V [5] of 1908.] The plaintiff then applied to the trial Judge for a review of the judgment on the ground that it was necessary that the decree should contain an order directing the registration of the document. The Judge ordered the decree to be amended as prayed for. The defendant then applied to the High Court contending that the decree of the Judge in appeal having been superseded by that of the High Court in second appeal, the Judge had no power to pass any order either under S. 206 or under S. 630, Civil P. C. of 1882.

[7] Mr. Lulla contends that the principle involved in the Bombay case is applicable to a case where an application is made to set aside an *ex parte* decree, and that when an appeal has been summarily dismissed under the provisions of O. 41, R. 11, Civil P. C., the decree of the trial Court is not affirmed, varied or reversed, and so remains intact, and that so long as it is not affirmed, varied or reversed, the Court that passed the *ex parte* decree must hear and decide an application to set it aside.

[8] The judgment of Farran C. J. in the Bombay case is a very short one and proceeds on the change of language made in 1888 in S. 551, Civil P.C. of 1882. But we do not think that the change of language made in 1888 in S. 551, Civil C. P. of 1882, has the effect of rendering a decree of summary dismissal passed by the appellate Court for the purposes of the Code of Civil Procedure, for instance S. 37, a nullity. Farran C. J. in his judgment has stated that it may be conceded that a dismissal of an appeal under S. 551, Civil P. C. of 1882 corresponding to O. 41, R. 11, Civil. P. C. of 1908, is a decree and is appealable. But the learned Judge says:

"Still it is clearly not one confirming the decree of the lower Court. It leaves the decree of the lower Court untouched, neither confirmed, nor varied, nor reversed."

[9] Many years later in 1921, Macleod C. J. in 23 Bom. L. R. 597[2] had occasion to consider the decision of Farran C. J. and it would appear from the judgment of Macleod C. J. that he did not regard the judgment of Farran C. J. in 21 Bom. 548[1] with approval. Macleod C. J. observed that:

"The fact that in 21 Bom. 548,[1] the High Court decided that an application to amend a decree, an appeal from which had been summarily dismissed, should be made to the lower Court, does not appear to decide the point before us. The Judges may very well have thought that an application to amend a decree under S. 206 of the Code of 1882 in the limited circumstances mentioned therein should be made to the Court which passed the decree, and not to the Court which summarily dismissed an appeal therefrom, and the *ratio decidendi* may have been that the decree of the lower Court continued to be the substantive decree, but that decision is not binding on us when having to determine an entirely different question, and it has been dissented from by the High Courts of Calcutta, Madras and Allahabad. There would be an end to all certainty in litigation if a case could be reopened in the lower Court after an appeal to the High Court had been disposed of. This was the view taken by the Calcutta High Court in 44 Cal. 1011."[3]

Before Macleod C. J. the question was whether the Court which passed the decree was competent to hear an application for review when an appeal against the judgment and decree of the trial Court had been summarily dismissed. We think it is obvious that very undesirable consequences might follow if an application under O. 9, R. 13, Civil P. C., is heard by the Court that passed an *ex parte* decree, after the appellate Court has summarily dismissed an appeal against the *ex parte* decree on its merits. For instance, if the Court that passed the *ex parte* decree were to hear an application under O. 9, R. 13, Civil P. C., after the appeal against the *ex parte* decree has been dismissed summarily, there is nothing to prevent it from allowing the application and then dismissing the plaintiff's suit. We would then have two decrees, one of the appellate Court summarily dismissing the appeal against the *ex parte* decree thereby keeping in tact the decree in which the plaintiff has succeeded in his claim and another decree passed by the trial Court in respect of the same subject-matter between the same parties in which the plaintiff's suit stands dismissed. In none of the cases upon which Mr. Lulla has relied has this aspect of the case been considered.

[10] In 11 Pat. 409,[4] also the question of summary dismissal of an appeal was considered in relation to the forum in which an application for amendment would lie. The learned Judges relied upon 21 Bom. 548[1] but made no reference to the later decision of the Bombay High Court in 23 Bom. L. R. 597[2] in which the soundness of the decision in 21 Bom. 548[1] was doubted.

[11] We think the following observations of their Lordships of the Privy Council in 14 M. I. A. 465[5] at p. 490, furnish a guide in interpreting an order of summary dismissal of an appeal under O. 41, R. 11, Civil P. C. notwithstanding the fact that many years later a change was made in the language of S. 551, Civil P. C., 1882. Their Lordships said:

"The function of an appellate Court is to determine what decree, the Court below ought to have made. It may affirm, reverse or vary the decree under appeal. In the first case, it leaves the original decree standing superadding, it may be, an order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given."

[12] We think, then the simple way to look at an order passed under O. 41, R. 11, Civil P. C., summarily dismissing an appeal is to see whether the order of summary dismissal leaves the original decree standing, and if it does, it amounts to an affirmation of the decree. In our view, where an appeal is filed and the judgment of the trial Court is before the appellate Court, and the appellate Court hears arguments of the appellant's advocate and considers the judgment and then takes the view that it will serve no useful purpose to issue notice to the respondent, and decides to dismiss the appeal summarily, the judgment of summary dismissal affirms the decree of the trial Court in the words of their Lordships to which we have referred. It is, we think, upon the strict adherence to the interpretation as put by their Lordships of the Privy Council upon the functions of an appellate Court that the possibility of conflicting decisions which we have indicated can be avoided.

[13] There must be some object whereby under O. 41, R. 11 (3), Civil P. C., the dismissal of an appeal under R. 11 shall be notified to the Court from whose decree the appeal is preferred. We think the object is to be gathered from the language of S. 37, Civil P. C. Section 37, Civil P. C., says:

"The expression 'Court which passed the decree', or words to that effect, shall, in relation to the execution of decrees unless there is anything repugnant in the subject or context, be deemd to include, (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance....."

As the executing Court of an appellate decree is the Court of the first instance, it is sufficient to notify to the Court of the first instance that the appellate Court has summarily dismissed the appeal from its decree, and the Court of the first instance could then execute the decree of summary dismissal which in effect is its own decree.

[14] In view of S. 37, Civil P. C. read with O. 41, R. 11 (3), Civil P. C., we do not think it is necessary to say that a decree passed by the trial Court is merged in the decree of the appellate Court when the appellate Court dismisses the appeal. Indeed, we think there is no difference between an order summarily dismissing an appeal and a judgment affirming a decree of the lower Court on appeal under O. 41, R. 32, Civil P. C., in the matter of the execution of decrees. In either case, S. 37, Civil P. C., applies. We think this view is in conformity with the words used by the Privy Council to which we have referred.

[15] Two other cases to which Mr. Lulla has invited our attention are 16 Luck. 697[6] and A. I. R. 1933 Nag. 117[7]. Neither of these cases however, deals with an application under O. 9, R. 13, Civil P. C.

[16] The only case which Mr. Lulla has been able to refer to us and which deals directly with the point is the one reported in A. I. R. 1927 Mad. 722,[8] where Curgenven J. took the view that the trial Court had jurisdiction to entertain an application to set aside an *ex parte* decree even after the dismissal of the defendant's appeal

against the same *ex parte* decree. The learned Judge thought that the language of O. 9, R. 13, Civil P. C., which enables a defendant to "apply to the Court by which a decree was passed for an order to set it aside" would appear to reserve that power even after an appellate decree has beed passed. We are unable to see any such reservation in the language of order 9, Rule 13, Civil P. C. As we have observed, if such a power were still reserved and the trial Court exercised that power to set aside the *ex parte* decree, and then nonsuited the plaintiff, an extraordinary result would follow, a result which could never have been in the contemplation of the framers of the Civil Procedure Code. Curgenven J. appears to have been influenced by the decision of an earlier decision of the Madras High Court in A. I. R. 1922 Mad. 33,[9] in which it was held that even where a defendant has been a party to an appeal which has been disposed of, an application by him to set aside an *ex parte* decree does not lie in the appellate Court but ought to be filed in the first Court.

[17] We have referred to this case and we think, in one sense, it is against the contention of the applicant. Ramesam J. said at pages 33-34:

"We must remember that in the discussion of this question it must be assumed that the defendant who was absent in the first Court appeard in the appellate Court for if he was absent in the appellate Court also under O. 41, R. 17 (2) an application to set aside the appellate *ex parte* decree would lie under O. 41, R. 21 and Art. 169 (not Art 164), Limitation Act, would apply. On this assumption, it is difficult to describe the appellate decree as an *ex parte* decree of the appellate Court except by a straining of language which is not justified; and if it can be so described, the petitioner would have a second period of limitation under Art. 164 starting from the appellate decree—an anomalous result which could hardly have been intended by the legislature. It may be urged by the petitioner that, it is equally anomalous if the first Court has jurisdiction to set aside an *ex parte* decree after it is affirmed by the appellate Court. But, in reply to this apparent anomaly, I would urge two considerations: (1) an application after the disposal of the appeal, to set aside the *ex parte* decree of the first Court can hardly be in time and can arise very rarely. The Legislature might well have been content not to anticipate and provide for a case which is most unlikely; (2) in such cases the proper course of the applicant would be not to wait till the disposal of the appeal but to get an adjournment of hearing of the appeal to enable him to apply before the first Court to set aside the *ex parte* decree."

The case in A. I. R. 1924 Cal. 830,[10] is distinguishable by reason of the fact that the appeal in that case was not summarily dismissed but dismissed for default.

[18] We will now refer to the cases in which this particular contention of the applicant has been negatived.

[19] In A. I. R. 1937 Nag. 381,[11] Niyogi and Pollock JJ. considered this aspect of the case, and came to the conclusion that where an appellate Court has judicially considered the grounds impeaching the correctness of the decree under appeal and dismissed the appeal by an order which, so far as that Court is concerned, is conclusive, the dismissal of the appeal under Order 41, Rule 11, Civil P. C., supersedes the decree of the trial Court. The facts of that case are identical to the facts before us. In that case, the defendant applied to the trial Court to set aside an *ex parte* decree under order 9, Rule 13, Civil P. C., and at the same time filed an appeal against the *ex parte* decree. The appeal was dismissed under Order 41, Rule 11, Civil P. C., and later the trial Court dismissed the application under O. 9, R. 13, Civil P. C., on the ground that the *ex-parte* decree had been superseded by the decree of the appellate Court.

[20] In A. I. R. 1937 Cal. 518,[12] the view taken was that an *ex parte* decree retains its character as an *ex parte* decree until the appellate Court has determined the rights of the parties. After such determination by the appellate Court the decree of the trial Court ceases to exist. It is true that in this case, the appeal was not summarily dismissed under O. 41, R. 11, Civil P. C., but we can see no difference in principle in the matter of an adjudication resulting from a summary dismissal of an appeal and that resulting from the affirmation of the decree of the trial Court under O. 41, R. 32, Civil P. C.

[21] In 37 ALL. 208,[13] Chamier and Piggott J.J. also took the view that it is not open to the Court which passed the *ex parte* decree to entertain an application to set it aside.

[22] In 24 Cal. 759,[14] Macpherson and Ameer Ali JJ. did not accept the contention that a dismissal under S. 551 of the Code of 1882, corresponding to O. 41, R. 11 of the Code of 1908, was not a decree or an adjudication of the rights of the parties. The learned Judges observed (p. 762):

"It is true that the Court, acting under S. 551 is not in a position to deal fully with the appeal or to make any alteration in the judgment or decree appealed against. Nevertheless, it is a determination and a final determination of the appeal and it adjudicates on the questions raised by the appellant so far as it is necessary to adjudicate upon them for the purposes of the appeal, and we can see no distinction between an appeal, which is dismissed under S. 551 and an appeal which is dismissed under any other section of the Code after full hearing. The case in 3 Mad. 1,[15] supports this view. Rightly or wrongly it is the practice of this Court not to draw up decrees in cases dismissed under S. 551, or in the case of a second appeal, when the decree is one of dismissal, to record anything in the decree more than that the appeal is dismissed. But the effect practically is to make the decree which is confirmed, the final decree to be executed in the suit, and there can be no question that this Court has power to amend the decree which has been in effect confirmed by it so as to bring it into conformity with the judgment which is also confirmed."

[23] Our conclusion, then, is that the Court which passed the *ex parte* decree is not competent to entertain an application under O. 9, R. 13, Civil P. C., when an appeal against the *ex parte* decree has been summarily dismissed.

[24] The result is that the revision application is dismissed with costs.

V.B.B. *Petition dismissed.*

A. I. R (35) 1948 Sind 14 *[C. N. 4.]*

O'SULLIVAN AND THADANI JJ.

Manager, Encumbered Estates in Sind Hyderabad — Appellant v. *Kanyalal Bharomal Wadhwa and others—Respondents.*

First Appeal No. 11 of 1942, Decided on 5-5-1947, against decree of First Class, Sub-Judge, Shikarpur, D/- 7-12-1941.

(a) Limitation Act (1908), Art. 14 — "Act or order"— Preparation and submission of scheme by Manager Incumbered Estates — Sind Encumbered Estates Act, 2 [II] of 1896.

The preparation and submission of a liquidation scheme under S. 17 (1), Sind Encumbered Estates Act, is a statutory duty and cannot be regarded as an act or order within the meaning of Art. 14. Where, therefore, the Manager, Encumbered Estates, includes a certain immovable property in the estate of the estate owner as belonging to him and as mortgaged by conditional sale, a suit by the alleged conditional vendee to establish the nature or extent of his right to the property is not governed by Art. 14 : A. I. R. 1930 Sind 150, *Ref.* [Paras 6, 8 and 9]

Annotation:—('42-Com) Lim. Act, Art. 14, N. 3

(b) Sind Encumbered Estates Act (2 [II] of 1896), S. 17 (1)—Liquidation scheme—Certain property included in scheme – Alleged conditional vendee of property —Right of suit.

The liquidation scheme prepared and submitted in pursuance of S. 17 (1) pertains to the determination of debts and liabilities of the estate-owner and the manner in which it is proposed to pay them. It makes no reference whatever to rights over immovable property, and S. 12 deals with procedure in the matter of the notification of claims and not rights to immovable property against the estate-owner. Therefore, where the Manager, Encumbered Estates, includes an immovable property in the scheme as belonging to the estate-owner and as mortgaged by conditional sale, the alleged conditional vendee is not bound to challenge the inclusion within six months from the date of the publication of the order of management and it is open to him to establish the nature or extent of his right to the property by a suit : 2 Sind Sadar Court, Selected Decisions, P. 88. *Rel. on.* [Paras 5, 7 and 8]

Cases Referred:—

1. ('30)17 A. I R. 1930 Sind 150 : 124 I. C. 369, Sufan v. Khemchand,
2. ('99 2 Sind Saddar Court, Sel. Dec. at p.88, Mahomed Saleh Mahmuyd v. Mato.
3. ('80) 5 Bom. 135, Asmal Saleman v. Collector of Broach.

Keshowdas Dalpatrai—for Appellant.

Srikrishindas H. Lulla — for Respondent 1.

Thadani J. — This is an appeal from the decision of the learned First Class Subordinate Judge of Shikarpur in which he decreed the suit of one Kanayalal son of Bharomal for a declaration and injunction, with costs, against the Manager, Encumbered Estates in Sind.

[2] The facts material to the appeal are these: On 4-5-1933 one Rattanmal Shalumal sold survey number 742 measuring some four acres to one Sukhumal Tharumal for a sum of Rs. 5,000. Three years later, on 22-6-1936, and after the death of Rattanmal, Sukhumal sold it to Kanayalal Bharomal for the same amount. Both the conveyances were by registered sale-deeds.

[3] Shortly after the death of Rattanmal, his son Naumal went under the protection of the Manager, I. E. in Sind. In due course, a liquidation scheme was sanctioned on 5-4-1938 by the Revenue Commissioner for Sind which showed that the estate comprised 79-Ac 4½-Gh. of agricultural land situated in Talukas Shikarpur and Garhi Yasin. The net liability against the estate taken under the management was Rs. 2668 at the close of the year 1936-37. In regard to the land in suit situated in Shikarpur Taluka, the report of the Manager, I. E. in Sind is as follows:

"The land in this Taluka comprises one survey number only measuring four acres. It was sold conditionally by the estate owners' father before management to one Sokhumal who again sold it to one Kanayalal on the same terms. The conditional vendees have not filed any claim yet in spite of a notice to them to do so. They will be evicted under S. 21 on the passing of liquidation scheme and the survey number leased out."

[4] On 3-7-1939 the land in suit was leased out by the Manager. Two years later, on 21-2-1941, Kanayalal filed a suit in the Court of the First Class Subordinate Judge, Shikarpur, against the Manager and the heirs and legal representatives of Rattanmal for a declaration and injunction alleging that the property in suit was not the subject matter of any mortgage by conditional sale either in 1933 or 1936 and sought to restrain the Manager from interfering with his possession.

[5] The defence of the Manager, I. E. in Sind was that Rattanmal who was an agriculturist had sold the property in suit to Sukhumal subject to a contemporaneous oral agreement which rendered the transaction a mortgage by conditional sale, and that Kanayalal's claim for the return of Rs. 500 paid as consideration was barred under the provisions of the Sind Incumbered Estates Act, as he had failed to make a claim within six months from the date of the publication of the order of management in the Sind Government Gazette. Many other defences were taken to which it is not necessary to refer. On the pleadings, the learned trial Judge framed the following issues:

1. Is the suit time barred? 2. Is the plaint not sufficiently stamped? 3. Has the Court no jurisdiction to try this suit? 4. Whether the plain-

tiff has no right to sue? 5. Is the suit not maintainable in the form in which it has been brought? 6. Is the suit bad for multifariousness? 7. Is the suit barred by Bombay Revenue Jurisdiction Act X of 1876? 8. Is the suit barred by the decision of defendant 1, and the Revenue Commissioner? 9. Is the suit barred by S. 42, Specific Relief Act? 10. Was Rattanmal Shalumal an agriculturist? 11. Whether the sale-deed executed by Rattanmal Shalumal was not an out and out sale but a mortgage by way of conditional sale? 12. Has the plaintiff purchased the property in suit from Sukhumal? If so, is the transaction collusive and *mala fide*? 13. Is the plaintiff entitled to the declaration and injunction sought? 14. Whether notice given to defendant 1 is legal? If not what is the consequence? 15. What should the decree be?

[6] Mr. Keshowdas who appears for the Manager, I. E. in Sind, has questioned the finding of the learned trial Judge on issues 1 and 11 only. It is argued by Mr. Keshowdas that as the Manager, I. E. in Sind, included the property in suit in the estate of the deceased Rattanmal, the suit should have been filed within twelve months of 17-3-1938 under Art. 14, Limitation Act. In support of his argument Mr Keshowdas has relied upon the case in A. I. R. 1930 Sind 150.[1] But we do not think the preparation and submission of a liquidation scheme can in any way be regarded as an act or an order within the meaning of Art. 14, Limitation Act The preparation and submission to the Commissioner of a liquidation scheme is a statutory duty; it is neither an act nor an order.

[7] The liquidation scheme prepared and submitted in pursuance of S. 17 (1), Sind Incumbered Estates Act, 1896, pertains to the determination of debts and liabilities of the estate-owner and the manner in which it is proposed to pay or discharge them. It makes no reference whatever to rights over immovable property, and S. 12 deals with procedure in the matter of the notification of claims and not rights to immoveable property against the estate-owner.

[8] It is impossible to accept Mr. Keshowdas' contention that as the Manager, I. E. in Sind, included the property in suit as belonging to the estate-owner, and mortgaged by conditional sale, Kanayalal, the alleged conditional vendee, was bound to challenge the inclusion and that as he had failed to do so, it was not open to him to establish the nature or extent of his right to the immovable property by a suit.

[9] This aspect of the case has been fully considered by Batty J. in 2 Sind Saddar Court, Sel. Dec. at p. 88.[2] After analysing the relevant sections of the Sind Incumbered Estates Act, 2 [II] of 1896, Batty J. observed:

"There is no indication of any intention to confiscate titles, and the whole spirit of the Sections hereinbefore examined manifestly limits the operations of the Act to the management of the debtor's property, and does not extend to any property already vested in anybody else. Section 9 is, perhaps, still more explicit and unmistakable in prescribing the effect of an order of management. It declares (1) that all proceedings then pending. . . in respect of the *debts* and *liabilities* mentioned in S. 8 shall be stayed, and the operation of all processes etc. then in force for such *debts* and *liabilities* shall be suspended, and (2) that so long as the management continues no fresh proceedings etc, shall be instituted, etc., in respect of such *debts* and *liabilities*, (3) the power of the debtor shall be restricted, and (4) no person other than the Manager shall be competent to mortgage, charge, or lease such property or any part thereof. In this suit, sub-sections (1) and (2) of S. 9 require special consideration. They relate only to proceedings, etc., in respect to the debts and liabilities mentioned in S. 8, i e., debts and liabilities to which the debtor is subject, or which are charged on the whole or any part of his immovable property. Now, debts and liabilities to which the debtor alone is subject are plainly debts and liabilities for which he is personally liable, and which can only be enforced against him *in personam* such as unsecured debts, liabilities arising from b each of contract or from torts, and the like. And this class requires no consideration in the present instance, for so far as the claims for accounts and other money liabilities are concerned there is no dispute that the proceedings have been properly stayed. For the sub-section to apply to the proceedings on any other ground, it would have to be shown that the claim was either for a debt or a liability charged on the whole or some part of the debtor's immovable property. Now, here the contention is not that property belonging to the debtor is subject to a debt or a liability, but that certain property is not the property of the debtor at all, that is, not his, not that it is his, subject to certain debts and liabilities, but that he has no title to it, and that no one else can claim it, or manage it or apply it to the satisfaction of his debts on his behalf . . . The liability of an estate is clearly a distinct thing from the title to, i. e. the right of ownership in, an estate, and none of the terms used in the paragraph last preceding could, with any shadow of meaning, be associated with any phrase that included a complete adverse proprietary title. . . . . It is incredible that the Legislature intended to impose such a limitation on the proprietary rights of any person who had not consented thereto by application, for otherwise there would have been no necessity for requiring such an application as the preliminary to action under the statute. It is, therefore also incredible that the Legislature intended that every man whose property the manager might, by inadvertence or on misrepresentations made, have taken under his control should be deprived, even when the management had ceased, of the ordinary rights of an owner. To turn from the Act to the authorities cited in argument, it is to be observed that nothing in Act (15[XV]of 1871) has been pointed out which would show that the decision in 5 Bom. 135,[3] relating to that Act, would be inapplicable in cases to which the S. I. E. Act, 1896, applies. . . . . That is to say, the manager has no power to decide whether certain property claimed by his debtor belongs to that debtor or to somebody else."

We entirely agree with the view of Batty J. The learned trial Judge was right in holding

that Art. 14, Limitation Act, had no application to an act or order of the manager which attempts to affect title to immovable property. (The rest of the judgment is not necessary for the purpose of report.)

V.B. *Appeal dismissed.*

A. I. R. (35) 1948 Sind 16 [C. N. 5.]

DAVIS C. J. AND O'SULLIVAN J.

Municipal Corporation of Karachi v. *Province of Sind and others.*

First Appeal No. 58 of 1946, Decided on 25-2-1947, from Judgment of Thadani J., *reported in 34 A. I. R. 1947 Sind 69.*

Grant—Resumption—Grant of land resumable for 'public purpose'—Manufacture of salt, whether 'public purpose'—Employment of private agency to carry out public purpose, if affects nature of purpose.

The phrase 'public purpose' must include a purpose that is an object or aim, in which the general interest of the community as opposed to the particular interest of the individuals, is directly and vitally concerned: 1 A. I. R. 1914 P. C. 20, *Foll.* [Paras 4, 5]

By an agreement contained in a resolution, the Government granted certain land to the Karachi Corporation as a concession, the Government reserving the right to resume any part of the land forming part of the concession for a public purpose on certain terms. The Government resumed certain portion of the land for the expansion of the salt manufacture:

Held that the increase in the production of salt, a vital commodity for the life of the community, was manifestly a public purpose and the means whereby that public purpose was achieved either through the departmental action of the Government or the energy and effort of private enterprise, did not materially affect the essentially public nature of the purpose. [Para 6]

Quære: How far the Court can go in prohibiting the action of the Government in the resumption of land. [Para 7]

Case referred:—

1. ('15) 39 Bom. 279: 1 A. I. R. 1914 P. C. 20: 42 I. A. 44: 27 I. C. 26 (P.C.), Hamabai Framjee Petit v. Secy. of State.

Kimatrai Bhojraj—For Appellant.

Fatehchand Assudamal and Tikamdas Wadhumal —for Respondents Nos. 1 and 2 respectively.

Davis C. J.—This is an appeal from a judgment of Thadani J. of this Court, sitting in his original jurisdiction, in which he dismissed with costs a suit brought by the Municipal Corporation of Karachi against the Province of Sind and Messrs. Eduljee Dinshaw, a firm engaged in the manufacture of salt.

[2] It appears that on 3rd November 1873 the Government of Bombay in the Revenue Department, passed a resolution No. 6072 regarding certain concessions proposed to be made by the Government of Bombay to the then Municipality of Karachi. The material clause of that resolution is clause 8 and is as follows:

"On the completion of the survey, Government is to have the right to set apart for the present and prospective wants of the state whatever additional land they may think proper, and to repossess themselves thereafter of land in the possession of the municipality which may be required for a public purpose on payment of the value of buildings which may have been erected and other improvements effected."

and in pursuance of the powers reserved by this clause the Government of Bombay in March 1936 resumed an area of 159.86 acres, part of the foreshore and part of the land, contained within this concession granted by Government to the municipality. The Municipal Corporation of Karachi was slow to bring a suit against Government; for nearly seven years elapsed before the suit out of which this appeal arises was instituted, and it is now the contention of the appellant, the Municipal Corporation of Karachi, that Government did not repossess themselves of the land in suit for a public purpose; for the land when once repossessed by Government was granted to a private firm, namely, the firm of Messrs. Eduljee Dinshaw for the purpose of manufacturing salt and for the purpose of manufacturing salt for private gain; and it was alleged by the plaintiff, the Municipal Corporation, that this private firm made large profits and that anything recovered by the Province of Sind from this private firm under the terms and conditions of a license granted by the Province of Sind to this private firm should be paid over to the plaintiff Municipal Corporation.

[3] It was the contention of the province of Sind that it had the right to resume the land for a public purpose and that the expansion of salt manufacture in Karachi was such a purpose and that the Government of the Province of Sind was the sole judge of this question, whether the land was acquired for a public purpose and that in any case in fact it was so acquired and that it is immaterial if a license to manufacture salt is given to a private individual or to a corporation even though it should appear the individual or corporation may make a profit and not suffer a loss. The Province of Sind also rebutted the claim of the Municipal Corporation to obtain possession of the land in suit, or to claim compensation for the land so resumed and they denied the right of the plaintiff Municipal Corporation to ask for an account of the dealings between itself and this firm of Eduljee Dinshaw. It was also contended that the suit was premature, in that, possession of land had not yet been given to this firm of Eduljee Dinshaw and that the suit was time-barred. We, however, think it so plain that this land was lawfully resumed by Government under its agreement with the Municipal Corporation of Karachi for a public purpose, that it is quite unnecessary for us to consider any claim for compensation, any question of accounts or any question of limitation.

[4] Now the argument on behalf of the appellant that this land was not acquired for a public purpose, appears to us to rest upon the view that merely because in carrying out a public purpose a private agency is employed by Government and that private agency may make some profit from its labours, therefore the purpose for which land has thus been acquired cannot be a public purpose. But we think the mere fact that the public purpose, which Government had in view when the land was acquired, is furthered or carried to its ultimate conclusion in serving the interests of the community by means of a private agency, which makes some profit, is immaterial. In 39 Bom. 279,[1] from which a part of the judgment of Lord Dunedin is quoted in the judgment of Thadani, J., it is said:

"The argument of the appellants is really rested upon the view that there cannot be a 'public purpose' in taking land if that land when taken is not in some way or other made available to the public at large. Their Lordships do not agree with this view. They think the true view is well expressed by Batchelor J., in the first case, when he says:

'General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase 'public purposes' in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned'."

"That being so, all that remains is to determine whether the purpose here is a purpose in which the general interest of the community is concerned. Prima facie the Government are good judges of that. They cannot say: '*sic volo sic jubeo*' but at least a Court would not easily hold them to be wrong. But here, so far from holding them to be wrong, the whole of the learned judges, who are thoroughly conversant with the conditions of Indian life, say that they are satisfied that the scheme is one which will redound to public benefit by helping the Government to maintain the efficiency of its servants. From such a conclusion their lordships would be slow to differ, and upon its own statement it commends itself to their judgment."

[5] We do not see how it can be said that the increase of the supply of such a vital necessity for the health of the community at large, as salt is not a matter in which the general interests of the community as opposed to the particular interests of individuals are directly and vitally concerned. It is true of course that as time passes, political theory changes and the duties and responsibilities of the State towards its subjects are extended: so that today it is common knowledge that in some forms of society it is considered in the public interests that all sources of production and all means of distribution are matters for the State, to be controlled by the State in the general interests of the community at large. But we are not concerned here with the carrying out into actual practice of a political theory, however far advanced; we are concerned merely with the encouragement by the State of the production of salt which is a vital necessity of life. We cannot see, as we have said, merely because the public purpose is to be carried out, or the interests of the community as a whole are to be served by the efforts of private enterprize and that private enterprize may make some profit for itself, the essential public nature of the purpose is in any way affected, or doubt is cast in any way upon its existence. In the order of the Commissioner of Sind dated 2nd July 1935 it is stated that:

"the plot of land known as 'Novanal' admeasuring 159.86 acres situated at the Maurypur foreshore within the limits of the Karachi Municipality as shown in the Karachi Port Trust plan No. B. V./ Vii-65, dated 24-10-1934, is hereby resumed under clause VIII paragraph 10 of Government Resolution, Revenue Department, No. 6072 dated 3rd November 1873, being required for a public purpose, viz., the expansion of salt manufacture at Karachi."

[6] It is true that in the marginal note in the order of the Commissioner of Sind is written "Lands, Maurypur, Karachi : resumption of the area known as 'Novanal' for the Eduljee Dinshaw salt works". We scarcely think a marginal note in the order of the Commissioner of Sind is conclusive on the question as to whether the land is or is not acquired for a public purpose within the terms of the agreement made by the Government of Bombay with the Municipal Corporation when the land was granted as a concession to the Municipal Corporation. As the learned Judge in the trial Court points out, the manufacture of salt is a Government monopoly; no private individual can manufacture salt without a license; the licensee must pay to Government a fixed sum Rs. 1-9-0 for every maund of salt manufactured and sums so collected form part of the revenue of the Central Government: so that, it appears that two public purposes, and not one, are served: one public purpose is the increase in the supply of a necessity of life for the people at large and the second public purpose is the increase of Government revenue, which revenue is again to be used for the benefit and welfare of the community as a whole. The learned Judge says in his judgment that the manufacture of salt is for all practical purposes of State industry and as a State industry it is essentially an industry for a public purpose, indeed a national purpose, and as the land is to be resumed for this national industry, its resumption is necessary for a public purpose. The fact that an individual or corporation has been given a licence to manufacture salt does not affect the purpose of resumption. This statement of the learned Judge has been challenged by the learned advocate for the appellant on the ground that the manufacture of salt is not a State industry; it is merely an

industry conducted under a licence granted by Government and that the manufacture of salt, for instance, is no more a State industry than is the manufacture and sale of liquor. But we do not think it is necessary to decide this question on the consideration whether the industry is or is not a State industry. We prefer to base our decision on the broader ground that the increase in the production of salt, a vital commodity for the life of the community, is manifestly a public purpose and the means whereby this public purpose is achieved either through the departmental action of Government or the energy and effort of private enterprize, does not materially affect the essentially public nature of the purpose in this case.

[7] It was argued before us and the argument was based on the judgment of the Privy Council that the Government are not the sole judges of whether a purpose is or is not a public purpose. It may well be it is in the public interest, that it is within the power of the Courts to scrutinize each case that comes before them and to decide upon the facts whether the powers of Government have been exercised in good faith in the interest of the public; that Government have not acted merely according to the phrase '*sic volo sic jubeo*'. It may well be that it is in the public interests that the Courts may be in a position to pronounce in any case that comes before them, upon the good faith of Government and could, if the facts so justify, hold that the action of Government was a fraud upon the Act, and that the land acquired was not acquired for a public purpose. We, however, are not concerned, in this case, where the public nature of the purpose is so manifest, with considerations as to how far the Court can go in prohibiting, as it were, the action of Government in the acquisition of land. There is not a shadow of doubt in our minds that land has been properly resumed by Government within the terms of the agreement made between the Government of Bombay and the Municipal Corporation of Karachi, in terms of the resolution of the Government of Bombay dated 3-11-1873, and we think this appeal should be dismissed with costs.

[8] As we have said, it appears to us so plain that this land has been lawfully acquired by Government for a public purpose, that our decision on the other issues raised is unnecessary.

[9] The appeal is dismissed with costs accordingly. We think, this is a case where two sets of costs should be allowed and we order accordingly.

V.B.B. *Appeal dismissed.*

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* A. I. R. (35) 1948 Sind 18 [C. N. 6.]

DAVIS C. J. AND O'SULLIVAN J.

Tulsidas Pohumal—*Appellant* v. *Parsram R. Thadani*—*Respondent.*

First Appeal No. 55 of 1946, Decided on 13-12-1946, against the judgment of Taybji J., D/- 4-4-1946.

***Limitation Act (1908), S. 12 (2)—"Time requisite for obtaining a copy of the decree."**

It is not necessary for an appellant to apply for a copy of the decree before the expiry of the period of limitation in order to have the advantage of the time that elapsed between the pronouncement of the judgment and the signing of the decree. It would not be a matter of importance whether an application for copies was made within or after the period of limitation if it was made even a day before the decree was signed: 23 A. I. R. 1936 Pat. 45 (FB), *Rel. on*; *Case law referred.* [Paras 6, 9 and 10]

Annotation ('42-Com.) Lim. Act, S. 12, N. 25, Pts. 3 to 5.

Cases referred:—

1. ('90) 12 All. 461 (FB), Bechi v. Ahsan-ullah Khan.
2. ('84) 10 Cal. 652, Ramey v. Broughton.
3. ('99) 23 Bom. 442, Yamaji v. Antaji.
4. ('07) 1 S. L. R. 71, Lakhiomal v. Joomromal.
5. ('37) 39 Bom. L. R. 32 : 24 A. I. R. 1937 Bom. 162 : I. L. R. (1937) Bom. 443 : 168 I. C. 77 (F B), Murlidhar Shrinivas v. Motilal Ramcoomar.
6. ('28) 55 I. A. 161 : 15 A. I. R. 1928 P. C. 103 : 6 Rang 302 : 109 I. C. 1 (P. C.), Jijibhoy N. Surty v. T. S. Chettyar Firm.
7. ('32) 59 Cal. 1215 : 19 A. I. R. 1932 Cal. 331 : 137 I. C. 526 (F B), Secy. of State v. Parijat Debee.
8. ('22) 49 I. A. 307 : 9 A. I. R. 1922 P. C. 352 : 49 Cal. 999 : 68 I. C. 900, (P C), Pramatha Nath Roy v. William Arthur Lee.
9. ('36) 15 Pat. 284 : 23 A. I. R. 1936 Pat. 45 : 160 I. C. 447 (F B), Gabriel Christian v. Chandra Mohan.
10. ('86) 13 Cal. 104 (F B), Rani Madhab Mitter v. Matuagini Dasi.

Dingomal Narainsing and Murlidhar Mani —for Appellant.

Srikrishindas H. Lulla—for Respondent.

Davis C. J.—This is an appeal against a judgment of Tyabji J. in Suit No. 276 of 1942, and the question we have first to consider is, whether the appeal was filed in time. Arguments were finished in this case on 1st November 1945, and the oral judgment was given in Court on 4th April 1946. The judgment was signed between 4th and 6th May the dates on which the transcript of the judgment was sent to the learned Judge and returned by him, but no decree was prepared until 8th August; and we know, as a matter of fact, an application for copies of the judgment and decree was made on 6th August and copies were ready on 9th September. The appeal was filed on 7th October: the appellant had 90 days from the date on which the judgment was pronounced in Court, that is to say, 3rd July. But it is claimed the appeal is in time because the appellant had not only the 90 days, but the time requisite for obtaining a copy of the decree. As the material section of the

Limitation Act to be considered is S. 12 (2), I set it out at once; it reads:

"In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded."

[2] It was argued before us that the time requisite for obtaining a decree, which term has been interpreted by the Privy Council as meaning "properly required", must at least include all time which elapsed until the decree is signed; for, the signing of the decree is in no way within the control of the appellant and it is a matter of no importance whether an application for a copy of the judgment and decree has been made before the decree was signed; for, even if it had so been made, the time requisite would in no way have been affected; indeed, until the decree is signed and a copy can be given, the application by the appellant for a copy is not material.

[3] On the other hand, it was argued that in accordance with a series of Sind rulings and indeed with a series of Bombay rulings until recently modified, the date when the application was made for a copy of the decree is a matter of very great importance indeed, even though the decree had not been signed and a copy could not have been given. For, it was held that stress should be laid on the word "obtaining" rather than on the word "requisite"; that it cannot be said that any time could be requisite for obtaining a copy of the decree before an application for a copy had been made: so that if an application for a copy of the decree had not been made within the 90 days, it mattered not whether the application could have been granted or not by reason of the existence or non existence of the decree, if the appellant was to save time and to add, as it were, to the 90 days the time requisite for obtaining a copy of the decree; an application before the expiry of the 90 days was vital. The case that it is necessary for an application for a copy of the decree to be made before the expiry of the period of limitation, be it 20, 30 or 90 days, has been most forcefully put by Mahmood, J., in 12 ALL. 461.[1] Mahmood J. said:

"Now, in the first place I entertain no doubt that it is necessary and indispensable for a litigant who intends to appeal from a decree which is the result of a judgment against him, and which decree must, under the law, bear the date on which the judgment was pronounced, to apply for a copy of the decree and, if necessary, of the judgment also, before the lapse of the period of limitation for the appeal which he intends to file, whatever that period may be. This view is amply supported by the ruling of Garth, C. J. (Cunninghan J. concurring) in 10 Cal. 652,[2] which was an appeal from a decree passed on the original side of the High Court and was therefore governed by the 20 days' limitation under Art. 151, Limitation Act. In that case the decree had remained unsigned for more than the period of limitation, and the appellant subsequently applied for and obtained a copy of the decree. It was there contended on behalf of the appellant 'that where the decree was not drawn up and signed until after 20 days had expired from the delivery of the judgment, the 20 days ought to count from the time when the decree was made." In dealing with this contention, Garth C. J. said (at pp. 659-60):—'But this is directly contrary to the express language of the law. By Art. 151 of the schedule to the Limitation Act the 20 days are to be reckoned from the date of the decree; and by S. 205, Civil P. C., the decree is to bear date the day on which the judgment is pronounced, so that the appeal must clearly be filed within 20 days from the day on which the judgment is pronounced.' This rule must be read with the observation of Garth C. J. in the course of the argument, when he said 'if the appellant had applied for a copy while the 20 days were running he would not be barred,' and this is the effect of the judgment in the case."

"It appears to me upon general principles that it would be defeating the object of limitation to allow the would-be appellant to sleep over his right of appeal for more than the limitation period, and then by the accidental or unavoidable delay in the decree being prepared, to claim extension of the period of limitation for appealing from a decree for obtaining a copy of which he had not taken even the first step, by filing an application therefor. This construction is in my opinion supported by the words of the para. 2 of S. 12, Limitation Act, itself. The words referring to exclusion are 'the time requisite for obtaining a copy of the decree'. The words "requisite" and "obtaining" as they occur in the context seem to me to assume that some definite step ancillary to the obtaining, that is acquisition, is not only intended to be taken, but has already been taken. The first step for "obtaining" must be to take some step towards the obtainment, and the act of "obtaining" cannot be said to have been commenced before such step. Taking it to be a sound rule of interpretation to interpret the words of a statute in their ordinary and usual sense, unless the contrary is shown, I have consulted Webster's English Dictionary, and it explains the word "obtain" to mean "to get hold of by effort; to gain possession of; to acquire" as the ordinary sense of the word. In this sense I interpret the word 'obtaining' as it occurs in para. 2 of S. 12, Limitation Act, and hold that 'the time requisite for obtaining a copy of the decree' cannot refer to any period antecedent to the appellant's asking for a copy by the usual mode of applying therefor, or to any period subsequent to its being ready for delivery. If at the time when the application for a copy is made, the decree is not ready, he will of course be entitled to the allowance of such portion of time during which the decree remains unsigned, along with the time which may be occupied in preparing the copy for delivery; the reason being obvious that the act of obtaining has already commenced and the delay in such a case could not be referred to any omission or neglect on his part. But when he has made no application to obtain a copy and the decree remains unsigned for a portion of, or the whole period of, limitation, he cannot claim the benefit of a matter which in no sense and to no extent frustrated or retarded any endeavour on his part to obtain a copy of the decree, the endeavour itself not having yet commenced."

and this view commended itself to the learned Judges of the Bombay High Court in 23 Bom.

442,[3] and was followed by the Sind Judicial Commissioner's Court in 1 S. L. R. 71[4] in which quoting Parsons Acting C. J. and Ranade J., the learned Judges said :

"The time requisite for obtaining a copy must, in our opinion, be confined to the action of the party who wishes to obtain the copy and must be taken to commence only when he does something in order to obtain the copy and to end when he obtains the copy. We fail to see how any delay in signing the decree can be brought in to benefit a person who has not made an application to obtain a copy or how it can be said that the time, during which the delay lasted, was time requisite for him to obtain a copy . . . . . A party is at liberty to ask for a copy of the decree whether the latter is signed or not . . . . . It will be found, we think, in most cases that a party is quite ignorant when a decree is signed."

The learned Judges then go on to say, their own view is in complete accord with that of the learned Judges of the High Courts of Bombay and Allahabad.

[4] But in 39 Bom. L. R. 32,[5] the matter was referred to a Full Bench, and the learned Chief Justice was of the view that there was no justification, in the language of the section, for requiring the appellant to apply for a copy of the decree before the period of limitation had expired and the learned Chief Justice said :

"The decisions of this Court really amount to adding to S. 12 a proviso that application for copy of the decree has been made before the time limited for appeal by Art. 151 has expired, and the section contains no such proviso . . . . . It is difficult to see in such a case what advantage is to be gained by the appellant applying within twenty days from the date of the decree for a copy of the decree, when he well knows that the decree itself is not in existence, and cannot be copied."

The learned Chief Justice was of the opinion that the decisions imposing this restriction upon the appellant were inconsistent with the decision of the Privy Council in 55 I. A. 161,[6] that S. 12, Limitation Act confers a substantive right upon the appellant to the exclusion of the time specified. The learned Chief Justice went on to say :

"I am not, however, prepared to agree with the view which, I understand, the Calcutta High Court took in 59 Cal. 1215,[7] namely, that the requisite time for obtaining a copy of the decree in no case begins to run until the decree has been sealed."

The learned Chief Justice then goes on to make it plain that he is dealing with a special procedure in the High Courts of Calcutta and Bombay and that because of this the time required for drawing up the order is not in all cases necessarily to be included in the time requisite for obtaining a copy of the decree.

[5] Rangnekar J. was unable to agree with the view which he thought was taken by the Calcutta High Court that limitation begins to run from the date of the signing of the decree, but in view of the decision of the Privy Council in 49 I. A 307,[8] he was not prepared to differ from the Chief Justice.

[6] Kania J., in his judgment agreeing with the Chief Justice refers again to the case in 49 I. A. 307[8] and refers to a recent decision of the Patna High Court which formerly accepted the Bombay view, but came to a different conclusion in a later Full Bench case reported in 15 Pat. 284.[9] In that case a Bench of seven Judges considered the question as to whether time that elapsed between the date of the judgment, which is the date of the decree under the Civil Procedure Code and the time when the appellant applied for copies should be excluded in computing the period of limitation, it being argued that the time would not start to run in favour of the appellant until he had done something in the matter of obtaining a copy of the decree appealed from and this he should have done by applying for the copy at the earliest possible opportunity, even before the decree had been signed. In the particular case before the Full Bench of the Patna High Court, and indeed in the case before us, the appellant did apply for a copy of the decree before the decree had been signed, and, speaking for myself, I do not think it necessary for an appellant to apply for a copy of the decree before the expiry of the period of limitation under Art. 151, Limitation Act, in order to have the advantage of the time that elapsed until the date when the decree is signed. The learned Chief Justice of the Patna High Court in giving judgment said :

"The difference of opinion has arisen over the construction of the words in S. 12, sub-ss. (2) and (3) 'the time requisite for obtaining copy of the decree appealed from' and the choice is between two alternative constructions depending upon whether (a) the proper emphasis is upon the word 'requisite' so that the meaning is 'the time which would have been necessary in any case' or (b) whether the emphasis should be upon the word 'obtaining' with the result that the meaning is as though the words were 'the time actually employed by the appellant' and hence that no time preceding the application for copies by the appellant can be considered. In our opinion the former of these alternatives is the correct construction and that it is correct is shown by the observations of their Lordships of the Judicial Committee in 55 I. A. 161.[6] The result is that no period which may be under the control of the appellant between the date upon which judgment is pronounced (which is the date of the decree under the Civil Procedure Code) and the date on which the appeal was filed can be considered as the time requisite within the meaning of S. 12. In most cases the decree of the trial Court follows upon the judgment without the parties being required to do anything in the interval and in such cases the appellant will be entitled to the exclusion of the time between the judgment and the decree."

Where, as in Calcutta and Bombay, something may be required to be done by the parties in order that the decree may be drawn up and signed, it may well be that one or other of the parties is guilty of delay or default and he may not be given the benefit of all the time that elapses between the date of the judgment and

the signing of the decree. He will be excluded from the benefit of the time which elapsed and which was due to his own negligence or default, but we are not, in the case before us, concerned with a case of this nature: We are concerned with a case very similar to that before the Patna High Court, for in this case a copy of the decree was applied for on 6th August, the decree being signed on 8th August. This would, according to the Patna ruling and indeed in my view, according to the correct interpretation of S. 12 (2), Limitation Act, give the appellant the benefit of the time that elapsed from the date of judgment until the signing of the decree, and as no copy was supplied until 6th September, it is plain that when the time intervening between the day when the judgment is signed—one may assume the date to be 4th May—and the date when the decree was signed on 8th August, is added to the 90 days given to the appellant by the Limitation Act, this appeal is clearly within time.

[7] It was argued before us, the Privy Council had not before them this question as to whether the application for copies must be made before the time of limitation has expired, be it 20, 30 or 90 days, as the case may be. This is correct. Lord Buckmaster, delivering the judgment of the Board in 49 I. A. 307,[8] did state the facts of the Calcutta case in 13 Cal. 104[10] to which reference was made, and did set out the dates which showed that an application for a copy was made after the decree had been signed. Judgment was pronounced on 17th July; the decree was signed on 23rd July, and the application for a copy was made only on 3rd August. The point was not taken that application for a copy had to be made before the period of 20 days had elapsed, and indeed it would appear, this period of 20 days had not elapsed when the application for a copy was made on 3rd August. In 49 I. A. 307,[8] the period of 20 days from the date of the decree expired on 15th August and it was only on 28th August that the draft of the order was submitted. No steps, however, were taken to have the necessary order drawn up by the plaintiff nor by the defendants after it was competent for them to do so on the lapse of four days. Even when the plaintiff applied to have the order drawn up and the draft was sent to the appellant or defendant, he delayed and returned it only on 16th August; on 28th August it was signed and on 3rd September it was filed by the plaintiff. In the opinion of their Lordships, the appellant had taken no reasonable or proper steps to obtain a copy of the decree or order which would entitle him to the benefit of S. 12, Limitation Act.

[8] It cannot, therefore, be said that this case is direct authority either one way or the other that an application for copy of the decree must be made within the period of limitation if the appellant is to be entitled to the advantage of any time taken by the Court in the preparation of the copy of the decree. But this case is authority for the statement emphasised in the case decided by the Patna Full Bench that the time taken in doing things beyond the control of the appellant for which he is in no way responsible, cannot run against him or work to his disadvantage.

[9] The Rangoon case in 55 I. A. 161,[9] was referred to by the Full Bench of the Patna High Court and indeed by other High Courts in dealing with this question. In that case the point really in issue was, whether the time taken in obtaining a copy of the decree when the rules did not require such a copy to be attached to the memorandum of appeal could be "time requisite" within the meaning of S. 12, Limitation Act, and so time to be excluded in favour of the appellant in computing the date when limitation expired. But, again, there is nothing in that case directly bearing on the decision of the question as to whether time can run in favour of the appellant, if he has made no application for a copy of the decree after the period of limitation has expired, but it would not, in my view, be a matter of importance, whether an application for copies was made within or after the 90 days if it was made even a day before the decree was signed; for, in the result there will be no difference in the date when the period of limitation expired and on which or before which the appeal is to be filed, which is one of the two crucial dates. The other crucial date is the date of the decree or judgment. As in this case, if it be as has been alleged, that an application, now lost, was made for copies, soon after judgment was pronounced in Court on 4th April, even before the judgment was signed on 6th May, then the appellant would be entitled to the benefit of the time which elapsed before the copies were ready for him to take away, that is to say, 6th September, and he would be entitled only to time up to 6th September, if he applied on the very day on which the decree was signed, or on the day before, but if he delayed thereafter, then time would begin to run against him and if he delayed till the expiry of 90 days, his appeal must be out of time; and if he delays at all in applying after the decree is signed, then so long as he delays so long does time run against him and must be deducted from the 90 days which he is allowed over and above the time taken in the preparation and signing of the decree, in which, in mofussil Courts he can have no part and for which he can have no responsibility.

[10] The two judgments of the Privy Council then in their general interpretation of the material words in S. 12 (2), Limitation Act do, in my view, support the case that it is not necessary for the appellant to apply for a copy of the decree before the period of limitation has expired in order to secure the benefit of the time required for the preparation of the decree, which is beyond his control and of which he must supply a copy. In the case before us, whether we take it that application was made for a copy soon after the judgment was given on 4th April or two days before the decree was signed on 8th August, the application was made before the decree was signed: there is no difficulty in estimating the time which is to be excluded from the period of limitation or rather to be added to the period of limitation, which in this case, is from the date of the judgment to the date on which the decree was signed, that is, from 4th April to 8th August.

[11] We heard arguments on the question of fact, as to whether an application for the copies was made after the judgment was signed and before at least 6th May, when the application for stay was made in which it is stated that an application for copies had been made already. In my view of the case the decision of the question of fact is not necessary, though I should hold on the facts that an application was made; for, there could be no doubt that the statement in the application of 6th May, asking for stay, that copies had been applied for, must have been made either because what it stated was true, or in the *bona fide* belief that it was true, and I think myself the *bona fide* belief that this was true could only be based upon an act so recent that its correct recollection should properly be presumed. The application of 6th May, which stated that copies had already been applied for, could easily have been turned into an application for copies also by the addition of the appropriate request, and this would have been done if it had not been believed, in good faith, that this application for copies was unnecessary, for it had already been made. I think, the undoubted existence of this genuine belief would justify the presumption that the belief was well-founded and this application for copies was made before 6th May. On that ground also this appeal would be in time.

[12] My view, therefore, is that this appeal is not time-barred, and should be put down for hearing in the usual way.

O'Sullivan J. — I agree.

D.H. *Order accordingly.*

A. I. R. (35) 1948 Sind 22 *[C. N. 7.]*

DAVIS C. J. AND O'SULLIVAN J.

Emperor v. *Muhammad Hussain and another* — *Accused.*

Criminal Ref. No. 264 of 1946, Decided on 10-1-1947, made by Dist. Magistrate, Sukkur.

Criminal P. C. (1898), S. 342 — Applicability to summary proceedings.

That proceedings are summary proceedings is no reason why an accused should not be properly examined in accordance with S. 342. [Para 3]

Two Excise subordinates were prosecuted for an offence under S. 122, Railways Act. The Magistrate in a summary proceeding convicted both the accused on the strength of the entry in column 7 of the Register of Cases in respect of both of them which was as follows: "Admits unlawful entry on the platform. Pleads guilty."

Held that the Magistrate had not properly examined the accused persons under S. 342. It was probable in the extreme that the two accused in effect merely admitted that they had not the usual platform passes nor the identification cards and that this admission was construed wrongly as an admission of unlawful entry and as a plea of guilty. The conviction was therefore set aside. [Para 4]

Annotation: ('46-Com.) Cri. P. C., S. 263 N 6.

Advocate-General—for the Crown.

Davis C. J. — This is a reference by the District Magistrate, Sukkur, who endorses a complaint made by the Deputy Commissioner, Salt and Excise for Sind, against a Railway Magistrate who in summary proceedings convicted two Excise subordinates upon their own plea of guilty of unlawful entry upon a railway platform, an offence punishable under S. 122, Railways Act, and sentenced each to pay a fine of Rs. 50.

[2] The Deputy Commissioner in his letter to the District Magistrate states that in the ordinary course Excise subordinates are given platform passes by Railway authorities; such platform passes ordinarily hold good for a period of six months. But on 17-6-1946, the Divisional Superintendent of the North Western Railway at Karachi informed him that in future platform permits would not be given; that the Excise Department should issue identification cards to their own subordinates and these identification cards will be accepted by the Railway authorities in place of the platform passes, and the Divisional Superintendent asked the Deputy Commissioner to return the platform passes issued to the Excise staff. This apparently the Deputy Commissioner did, but identification cards were not apparently properly printed or supplied to the Excise subordinates who, on the instructions of the Deputy Commissioner were told to rely on their buckle number, which would obtain for them the necessary entry to the Railway station for the purpose of carrying out their duties of search, etc. Thus it came about that on 29-6-1946, without passes and without identifica-

tion cards, two Excise subordinates entered a railway carriage and searched or attempted to search a passenger. The railway authorities apparently took objection and in fairness to them it should be stated that all Station Masters were by a letter dated 29-5-1946, informed by the Divisional Commercial Officer, North Western Railway, that platform permits for Excise subordinates had been withdrawn and that identification cards were in future to be considered a sufficient authority for Excise subordinates to enter upon railway platforms.

[3] It may be said then that the railway authorities were not acting outside their obvious duty. The Excise subordinates had neither platform passes, nor identification cards and their entry apparently was in consequence of what the Deputy Commissioner of Salt and Excise thought to be a reasonable temporary arrangement made by him without, apparently, consulting the Railway authorities, and without obtaining their consent; and had we been satisfied that the Railway Magistrate who was dealing with this matter in a summary way, had made a sufficient inquiry, we should not have interfered, but we cannot, in the circumstances, believe that the entries in column 7 of the Register of Cases correctly represent what happened in this case, or give an indication that the Magistrate has properly examined the accused persons under S. 342, Criminal P. C., and we have held, more than once, in this Court, that the mere fact that the proceedings are summary proceedings is no reason why an accused should not be properly examined in accordance with the provisions of S. 342, Criminal P. C. The entries in column 7 are : "Admits unlawful entry on the platform. Pleads gulity." This entry is in reference to accused Muhammad Hassan Yar Muhammad Bhutto. The second entry is the same "Admits unlawful entry on the platform. Pleads guilty," and has reference to accused Ferozdin Nazar Muhammad.

[4] We think in effect that it is probable in the extreme, these two Excise Constables merely admitted that they had not the usual platform passes, nor the identification cards, and that this admission was construed wrongly as an admission of unlawful entry and as a plea of guilty; and we think, therefore, on that account these proceedings should be set aside and these two accused persons should be tried again upon the same charge, but the Magistrate should consider any relevant evidence that may be brought before him to show that though the Excise subordinates had neither platform passes nor identification cards, in view of the fact that the passes in the ordinary way would have held good until 30-6-1946, their entry on 29-6-1946, was with the implied consent of the Railway authorities and therefore was not an unlawful entry; and the Magistrate should take care to see that the substance of the accused's statements if they make any should be entered in column 7 and the Magistrate should in examining the accused follow the provisions of S. 342, Criminal P. C.

[5] We would, however, point out that we do not think the Deputy Commissioner has followed a proper course in writing to the District Magistrate. What the Deputy Commissioner should have done, we think, was to see that his subordinates were given proper legal assistance, and that a proper application in revision was made to this Court in the ordinary way, supported by affidavits; for, the Deputy Commissioner of Salt and Excise is in no privileged position, so that he can approach this Court through the District Magistrate when an ordinary private person would be unable to do so; and the fact that he appears to think that he and his subordinates occupy a privileged position, may explain some of the trouble that has arisen in this case.

[6] We therefore set aside the conviction of the two Excise constables Muhammad Hassan and Ferozdin and send the case back to the District Magistrate of Sukkur for him to send it to a competent Magistrate for retrial. Order accordingly.

N.S.D. *Conviction set aside.*

A. I. R. (35) 1948 Sind 23 *[C. N. 8.]*

DAVIS C. J. AND O'SULLIVAN J.

Zahur Ahmed Muhammad Saeed and another—Applicants v. *Emperor.*

Criminal Revn. No. 243 of 1946, Decided on 10-1-1947, against order of Dist. Magistrate, Dadu, D/-8-8-1946.

Criminal P. C. (1898), S. 421 — Admission of appeal—Effect.

Once an appeal is admitted to a full hearing the Court should not dismiss it summarily but should pass a reasoned order thereon. [Para 2]

Annotation: ('46-Com.) Cr. P.C., S. 421, Note 1 Pt. 16.

A. K. Brohi —for Applicants.

Advocate-General—for the Crown.

Davis C. J.—This is an application in revision made on behalf of two accused persons against an order of the District Magistrate of Dadu, which is as follows :

"Appeal is summarily rejected. The accused are directed to appear before the S. D. M. Dadu to give sureties on 15th August 1946."

[2] We cannot in these proceedings go into the merits of the order by which the accused were bound over or the order under which their sureties were rejected; but we infer from the order passed by the District Magistrate of Dadu that he had admitted the appeal of the accused

for full hearing and that being so, the summary rejection of the appeal is misconceived. Once the appeal, as it would appear, was admitted to a formal hearing, the learned District Magistrate should have given a reasoned order upon it and should not have dismissed it summarily. We infer that the appeal was admitted to full hearing owing to the fact that the District Magistrate had suspended the order of the Sub-Divisional Magistrate for the time being and the record shows he heard Mr. Najmuddin on behalf of the Crown and the applicants on behalf of the accused.

[3] The order of the learned District Magistrate is therefore set aside and the case is returned to him for the purpose of hearing the parties and passing a reasoned order thereon. Order accordingly.

D.H. *Order accordingly.*

A. I. R. (35) 1948 Sind 24 *[C. N. 9.]*

DAVIS C. J.

Bhagwandas s/o Dwarkadas — Assignee— Appellant v. *Sm. Heejulbai w/o Gulomal and another—Judgment-debtors — Respondents.*

First Appeal No. 20 of 1944, Decided on 30th October 1946, from decision of First Class Sub-Judge, Sukkur, D/- 23rd December 1943.

Civil P. C. (1908), O. 21, R. 58—Scope of—Order to attach property in execution — Court cannot decide that property belongs to third person on objection of judgment-debtor—If property is attached third party can raise objection under O. 21, R. 58.

Order 21, R. 58, Civil P. C., provides a special procedure for dealing with the claims of third parties in relation to property attached in execution of a decree : 28 A. I. R. 1941 Cal. 357, *Rel. on.* [Para 3]

Where the Court has before it an application to execute a decree by attachment of property, it is concerned with the property in the hands of the judgment-debtors; it is concerned with judgment-debtors ; it is not concerned with third parties; and if it should appear thereafter that the property attached was in the possession of a third party, then it is for the third party to raise his claim and ask for an adjudication; but it is not for the Court to adjudicate upon the claim of a third party on the objection of a judgment-debtor. An order passed in such a case that the property belonged to a third party and not to the judgment-debtor is wrong as being premature. [Para 3]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 58, N. 1, Pt. 10.

Case referred :—

1. ('41) 45 C. W. N. 323 : 28 A. I. R. 1941 Cal. 357 : I. L. R. (1941) 1 Cal. 363 : 196 I C 247, Jagat Tarini Dassi v. Saroj Ranjanpal.

Kimatrai Bhojraj — for Appellant.

Fatehchand Assudamal and Gordhandas T. Vazirani for Tikamdas Basarmal —

for Respondents 1 and 2.

Judgment. — This is an appeal against an order of the First Class Subordinate Judge of Sukkur, dismissing an execution application with costs, primarily on the ground that the property sought to be attached was the property of a third party. The decree to be executed was one obtained by Messrs. William Jacks and Company and assigned to one Bhagwandas for execution against one Gulomal since deceased; in execution the assignee of the decree sought to attach and sell certain immovable property shown in the list attached to the execution application. The widow of the deceased Gulomal Smt. Heejulbai appears to have been the chief contestant, for Motiomal the son of Gulomal raised no objection to the execution. Indeed, it was argued that he as a close relation of Bhagwandas acted in collusion with him.

[2] It was contended on behalf of the widow Smt. Heejulbai that so far as she was concerned, at least, the decree could not be executed, because she was not shown as one of the legal representatives of Gulomal in the decree when it was transferred from the Court of the Judicial Commissioner to the District Court, Sukkur, and from the District Court to the Subordinate Court, Sukkur, for execution, and that it was not therefore open to the decree-holder to seek execution of the decree against one who had not been properly joined as the legal representative.

[3] The second point taken on behalf of Smt. Heejulbai and which, in fact, was a substantial point if it had been taken at the right time and in right manner, was that the property sought to be attached was not the property of the judgment debtor; it was the property of one Parumal son of Panjumal; and indeed the argument of the learned advocate who appeared for the decree-holder whose execution application had been dismissed, was that the learned Judge was not justified at this stage of the proceedings in inquiring into the question of the rights of a third party. It was not for the judgment-debtor to raise the rights of a third party; it was for the third party himself under O. 21, R. 58, Civil P. C., to raise objection, as he was entitled to raise objection, when an attempt was made to attach property which was in his hands. The learned advocate referred me to a case reported in 45 C. W. N. 323[1] in support of his argument that O. 21, R. 58, Civil P. C., provided a special procedure for dealing with the claims of third parties in relation to property attached in execution of a decree and I think, myself, that in this he is right. The learned Judge had before him an application to execute a decree by attachment of property; he was concerned with the property in the hands of the judgment-debtors; he was concerned with judgment-debtors; he was not concerned with third parties; and if it should appear thereafter that the property attached was in the possession of a third party, then it was for the third party to raise his claim and ask for an adjudication, but it is not for the learned Judge to adjudicate upon the claim of a

third party on the objection of a judgment-debtor. I think myself, therefore, that the order of the learned Judge was wrong when he decided this property was the property of Parumal Panjumal, wrong, I mean, in this sense, that it was premature; for, I do not say that the learned Judge was wrong in his appreciation of evidence or that in the proper inquiry on an objection properly raised by Parumal Panjumal himself the learned Judge's conclusion would not have been the right one. All I say is, at this stage of the proceedings, it was, I think, wrong for him to come to any conclusion at all upon this point or to hold an inquiry or adjudication into it. This brings me then to the other objection raised on behalf of Smt. Heejulbai the widow that so far as she is concerned, the decree is not susceptible of execution and if it is not susceptible of execution against her, it is not susceptible of execution against her either by way of attachment of property or otherwise. The learned advocate for the appellant admits that Smt. Heejulbai named as the widow is not the legal representative even by virtue of the new legislation which confers upon the Hindu widows certain rights and he does not press before me the case that the executing Court is entitled to join for the first time in execution of a decree transferred to it, legal representatives not joined by the Court which passed the decree and indeed the learned advocate does not, it appears to me, wish to press the case against Smt. Heejulbai at all, and I think, so far as she is concerned, the execution application should be dismissed.

[4] But so far as Matiomal is concerned, so far as the property of the judgment-debtor which is sought to be attached is in his hands, the execution application should, I think, be allowed to proceed. It is true that the position taken by Matiomal in these proceedings is invidious. He supports the execution application; he states in his written statement that he has no objection if the property is attached and sold in execution of the decree; but he is careful not to say that any such property is in his possession. If any such property is in his possession, it can of course be attached and sold in execution of the decree against him as legal representative properly joined of his father Gulomal the judgment-debtor; and I myself would infer from the fact that there is apparently a deliberate abstention in the written statement from any statement that the attached property is in the possession of Matiomal, that no such property is in his possession at all. If that is so, the order directing the decree to be executed against him or rather against property in his possession, is worthless; it is my surmise that this will prove to be the case. But nevertheless, the assignee, the decree-holder, the applicant in execution, is entitled to an order that the decree should be executed against Matiomal by the attachment and sale of the property shown in the list attached to the execution application which is in his possession. But I would, at the same time, make it clear that any such order would not cover property in possession of a third party; if, for instance, the property sought to be attached is in the possession of Parumal Panjumal. But it would be for Parumal Panjumal to raise his claim and ask for an adjudication under O. 21, R. 58, Civil P. C.

[5] It has been pointed out to me that the applicant in his execution application has said that he gives up defendant 2 for ever; that he has no property and that whatever he has is mortgaged, and it was argued that if a decree-holder seeks to execute a decree against two persons, one of whom is not a legal representative, and the other one against whom he abandons his claim, there is no one against whom the decree can be executed and therefore no property under it which is susceptible of attachment or sale. But though I think, the execution application, so far as Matiomal is concerned, is ambiguous and probably purposely so, nevertheless, I do not think it can necessarily be said that the assignee, the decree-holder, has given up his claim against Mational as the legal representative of Gulomal, and I think, there should be an order that the decree should be executed by attachment and sale of the property shown in the list attached to the execution application, so far as such property is in the possession or control of Matiomal; and if, as is argued, there is no property in the possession of Matiomal at all, then this order will be worth little more than the paper on which it is written. But it is an order to which upon the facts, as they would at this stage appear, and in accordance with the law as I have interpreted it, the appellant, the assignee of the decree-holder, is entitled. Heejulbai should not have been joined in these proceedings; therefore she is entitled to her costs against the decree-holder and against her the execution application is dismissed.

[6] In view of the ambiguous conduct of the decree-holder in relation to Matiomal, I do not think he should have any costs at all. The order of the learned Judge is modified, as I have explained, and the appeal is to that extent allowed. The order as to costs is as I have set out.

N.S. *Order modified.*

A. I. R. (35) 1948 Sind 26 *[C. N. 10.]*

O'SULLIVAN J.

National Swadeshi Stores — Plaintiffs v. *The Governor-General in Council — Defendant.*

Civil Suit No. 142 of 1944, Decided on 26-2-1947.

(a) Limitation Act (1908), Art. 31 — Applicability —Relation between Arts. 30 and 31—Cause of non-delivery if essential for applicability of Article — —Limitation Act (1908), Art. 30.

Article 31 which makes no reference to a deliberate withholding of delivery applies to any suit against a carrier for compensation for non-delivery or delay in delivering goods, irrespective of the cause of non-delivery. Articles 30 and 31 are not mutually exclusive but overlap and in any case in which the carrier has failed to fulfil his obligation under the terms of the contract to deliver the goods, the party aggrieved is entitled to sue for non-delivery, and such a case comes within Art. 31 : 10 A. I. R. 1923 Cal. 397, *Rel. on*; 5 A. I. R. 1918 Sind 6 and 12 A. I. R. 1925 Pat. 727, *Ref.*; 9 A.I.R. 1922 Pat 106, *Dissent.* [Paras 17 and 18]

A carrier is not entitled to set up a loss, whether or not such loss amounts to a tort to the goods, to bring a suit within the shorter period contemplated by Art 30, when it clearly falls within Art. 31 and the cause of action of which is not based on loss or destruction of the goods by the carrier. [Paras 23 and 24]

Annotation : ('42-Com.) Limitation Act, Art. 30 N 1; Art. 31, N. 2 and N. 7.

(b) Limitation Act (1903), Art. 30—Loss contemplated by Article is loss by Railway Company and not loss to owner. [Para 12]

Annotation : ('42-Com.) Limitation Act, Art. 30, N. 7, Pt. 1.

(c) Railways Act (1890), S. 72—Loss of goods entrusted to Railway Company for carriage— Burden to prove want of care on part of servants of Company—Evidence Act (1872), S. 106.

In cases of loss or damage to goods entrusted to a railway company for carriage, it may be for the company to lay the materials before the Court, but it remains for the plaintiff suing for such loss or damage to satisfy the Court that the true inference from those materials is that the servants of the company have not shown due care, skill and nerve : 4 A. I. R. 1917 P. C. 173, *Foll.* [Para 28]

Where, in a suit for compensation for non-delivery of a bale delivered to a railway company for consignment to the plaintiff the evidence of the defendant showed nothing more than that the missing bale was one of the bales loaded into a sealed and rivetted wagon and that in consequence of the tapes of one of the seals having been seen to have been cut, by the Train Clerk, a check was made by the Goods Clerk and these bales, including the bale in question, were found to be missing :

Held that the defendant failed to place before the Court all the necessary facts exclusively within the knowledge of the railway as to how the bale was dealt with and the true inference from what material there was on the record was that the servants of the railway had not shown due care with regard to the consignment in suit. [Paras 42 and 43]

Cases referred :—

1. ('22) 69 I. C. 103 : 9 A. I. R. 1922 Pat. 106, E. I. Ry. Co. v. Kali Charan Ram Prasad.
2. ('23) 10 A. I. R. 1923 Cal. 397 : 72 I. C. 714, Assam Bengal Ry. Co., Ltd. v. Radhika Mohan Nath.
3. ('19) 51 I. C. 570 : 5 A.I.R. 1918 Sind 6 : 13 S.L.R. 1, Firm Ludhomal Furtomal & Co. v. Secy. of State.
4. ('13) 19 I. C. 477 (Lab), Fakir Chand v. Secy. of State.
5. ('26) 5 Pat. 106 : 12 A.I.R. 1925 Pat. 727 : 90 I. C. 374, Agent, B. N. Ry. Co., Ltd. v. Hamir Mull Chagan Mull.
6. ('18) 20 Bom. L. R. 735 : 4 A.I.R. 1917 P. C. 173 : 46 I.C. 319 (P.C.), Dwarkanath v. Rivers Steam Navigation Co., Ltd.

Atmaram Harchandrai — for Plaintiffs.
Choithram Dewandas — for Defendant.

Judgment. — The plaintiffs, the National Swadeshi Stores, described as a joint Hindu family firm, carrying on business at Karachi have sued the Governor-General in Council claiming a sum of Rs. 655-8-0 as damages for the failure of the North Western Railway to deliver a bale of piecegoods consigned for carriage to the plaintiffs.

[2] The plaintiffs' case, as set out in the plaint, is that on 30-1-1943 a firm known as the Grover Calico Printing Mills delivered the bale in question to the North Western Railway at Amritsar for consignment to the plaintiffs at Karachi, under a Railway Receipt; that in the ordinary course of transit the consignment should have reached Karachi on or about 17-2-1943; that plaintiffs discovered that the bale did not arrive at Karachi and carried on correspondence with the Railway Authorities who informed them that enquiries were being made. The Railway Authorities, however, failed to deliver the bale, and the plaintiffs served them with statutory notice under S. 80 and S. 77, Railways Act. The sum of Rs. 655-8-0 is said to be the cost of the missing bale, and the plaintiffs claim this amount together with the costs of the suit and interest.

[3] The principal plea taken by the defendant in the written statement is that the suit is time barred. It is said that the cause of action arose early in February 1943 when the bale was lost. Apart from this plea the plaintiffs were put to proof of the facts stated in the plaint, it being denied that they were a joint family firm; that the cause of action arose at Karachi; that the bale was consigned by the Grover Calico Mills to the plaintiffs; that they were entitled to delivery of the bale without surrendering the Railway Receipt, and that the price of the consignment was Rs. 655-8-0 as claimed.

[4] The following issues were framed.

1. Are the plaintiffs a joint Hindu family firm?
2. Has the Court jurisdiction?
3. Is the suit barred by limitation?
4. Was the bale in question consigned by Messrs. Grover Calico Printing Mills to the plaintiffs and were the latter entitled to obtain delivery thereof?
5. Are the plaintiffs debarred from obtaining delivery of the bale and getting its value without surrendering the Railway Receipt?

6. Did the plaintiffs offer to surrender the R. R. at the time delivery was asked for ?

7. Are defendants liable for the loss of the bale in question ?

8. To what amount, if any, are the plaintiffs entitled ?

9. Is notice under S. 80. Civil P. C. proper ?

10. General.

[5] My findings on these issues are as follows: *Issue 1.* Yes. *Issue 2.* Yes. *Issue 3.* No. *Issue 4.* Yes. *Issue 5.* No. *Issue 6.* Yes. *Issue 7.* Yes. *Issue 8.* Rupees 655-8-0 together with costs of the suit and interest from date of suit till payment. *Issue 9.* Yes. *Issues 1, 2, 4, 5, 6 and 9* were dropped on behalf of defendant, and it is, therefore, not necessary to go into these issues in detail. With regard to Issue 1, the evidence of the plaintiffs' witness, Dipchand Chandumal, establishes that the plaintiffs are a joint Hindu family firm. With regard to Issue 2, the contract of carriage involved delivery of the consignment at Karachi, the contract or part of it, was to be performed at Karachi, and this Court, therefore, clearly has jurisdiction. With regard to Issue 4, the evidence of Dipchand Chandumal and Narsinghlal, a clerk in the Central Bank of India Ltd., establishes that the documents of title covering the consignment, that is to say, the invoice Ex. 6, the Railway Receipt and relative draft, were despatched to the Central Bank of India Ltd., Karachi, for collection and that the plaintiffs were given the Railway Receipt on payment of the bill in full. The amount actually paid by the plaintiffs was Rs. 655-8-0, the amount of the bill being Rupees 653-0-6, and the balance being commission and bank charges. The original invoice, Ex. 6, shows the consignor as the Grower Calico Printing Mills. It is, as I have said, not now disputed that the Grover Calico Mills were the consignors. The Railway Receipt, which is in the possession of the defendant, was produced in Court, but not filed by the defendant. It is also not disputed that the goods were consigned to the plaintiffs, and that they were entitled on production of the Railway Receipt to delivery of the bale. The plaintiffs had pleaded in the plaint that they had lost the Railway Receipt; but this is obviously an error, because, in the course of the proceedings, it was discovered that the Railway Receipt was in the possession of the Railway, and Mr. Choithram who appeared for the defendant, produced it. Apparently what happened was that the plaintiffs at the request of the Railway authorities relinquished the Railway Receipt.

[6] The main point in the case is that covered by Issue 3 as to whether the suit is barred by limitation.

[7] It is Mr. Atmaram's contention on behalf of the plaintiffs that this is a simple claim for compensation against a carrier for non-delivery of goods, falling under Art. 31 of Sch. 1, Limitation Act, which requires the suit to be filed within one year from the date when the goods ought to be delivered. In the plaint it was pleaded that the goods should have been delivered on 17th February 1943, but the evidence of one of the defendant's own witness, Tejumal, Ex. 25, a clerk in the office of the Divisional Superintendent of the North Western Railway, Karachi, establishes beyond doubt that 4th March 1943 is the date when the bale ought to have been delivered. This witness has produced the delivery book establishing that other consignments sent from Amritsar in the same wagon with the consignment in question reached Karachi on 4th March 1943.

[8] Mr. Choithram, on behalf of the defendant, concedes that if Art. 31 applies to this case, the suit is in time, but it is his contention that Art. 30 applies.

[9] Article 30 requires that a suit against a carrier for compensation for losing or injuring goods must be brought within one year from the date when the loss or injury occurred.

[10] By the evidence of three witnesses it has been attempted to be established on behalf of the defendant that the consignment must have been stolen from the train. This evidence will be dealt with in more detail hereafter, when considering Issue 7. At this stage it is sufficient to say that it is relied upon to prove that the bale in question together with a number of others was placed in a wagon at Amritsar on 30th January 1943 and the wagon duly sealed "for Samasatta" it being in contemplation of the Railway that it would be opened and the contents checked and distributed into other wagons at Samasatta; but on 4th February 1943 when it arrived at Montgomery, one of the stations before Samasatta, the tapes of the seal on one side were found to have been tampered with. The wagon was, therefore, opened and the contents checked and three bales including the bale in question were found to be missing.

[11] It was Mr. Choithram's contention that the "losing" of goods within the contemplation of Art. 30 includes theft of goods, and that the missing bale must be deemed to have been lost on or before 4th February 1943, and that therefore, under Art. 30 the suit is barred. It is conceded that if Art. 30 applies and the bale was lost on or before 4th February 1943, the suit would be time barred.

[12] In developing his argument Mr. Choithram emphasised what is indeed obvious from the terms of Art. 30 that the loss contemplated is

loss by the Railway Company and not loss to the owner. The words "against the carrier for compensation for losing or injuring goods" are clear, and it is unnecessary to refer to the cases cited by Mr. Choithram in which the word "loss" in ss. 72 and 77, Railways Act, has been interpreted as meaning loss of the goods by the Railway Company while in transit.

[13] Mr. Choithram then went on to say that the 'losing' of the goods by the carrier within the contemplation of Art. 30 included all cases where the goods had been stolen. In the ordinary sense the losing of an article by a person is generally accepted as meaning something in the nature of a mislaying of that article by that person; of a dealing with it by that person in some way so that it cannot be found. When for instance a man accidentally drops an article and departs in ignorance of the fact, he loses it temporarily or irretrievably, but when he places an article in a safe and the safe is broken open by a thief and the article stolen there has not in the ordinary sense been a 'losing' of that article by that man although in the wider sense he has suffered the loss of it. If as, I hold to be the case, the 'losing' of goods within the meaning of Art. 30 means a losing of the goods by the Railway Company then it might be argued with some justification that a theft of goods from a carrier is not a losing of them by the carrier. It might be said that Art. 30 interpreted in a plain and natural sense is confined only to those cases where the goods leave the custody of the carrier by a losing or mislaying of them by the carrier or his servants and would include neither theft nor misdelivery. This restricted interpretation might however involve the result that the "injuring" of goods within Art. 30 must be by the servants of the carrier or his servants, and not by outside agency. On the other hand it may be argued in support of the broader interpretation that when the carrier has suffered (whether by theft, misdelivery or other cause) goods to be lost to the owner, he may, for the purposes of this Article, be said to have lost them himself.

[14] Article 30 is in many respects very unsatisfactory, and I do not propose to embark upon a detailed discussion as to its scope or express any final opinion as to whether the word 'losing' includes a case of theft in transit. I will assume for the purpose of this case that it does.

[15] The crux of Mr. Choithram's argument is that Arts. 30 and 31 are mutually exclusive, and that Art. 30 covers all cases of loss, deterioration and damage to the goods, that is to say, all cases in which the goods are wholly or in part no longer in a deliverable state, whereas Art. 31 contemplates only those cases where the carrier deliberately withholds delivery.

[16] The argument is mainly based on the words in Art. 31 "when the goods ought to be delivered," it being Mr. Choithram's submission that these words contemplate possession by the carrier of goods in a deliverable state and cannot include goods which have been lost or destroyed; and Mr. Choithram relies on 69 I. C. 103,[1] in which Jwala Prasad J. said:

"There is again a cardinal difference between the 'non-delivery' and the 'loss, destruction or deterioration' of goods while in charge of a carrier, such as, the Railway Company. In the former there is a deliberate withholding of the property from the person entitled to its delivery and in the latter the loss, destruction or deterioration takes place on account of certain extraneous causes. In the latter case, there is no deliberate withholding of the property though there may be a wilful neglect in not taking proper care of the goods."

[17] I cannot see how this view is justified by the plain terms of Art. 31 which makes no reference to a deliberate withholding. Article 31 appears to me to apply to any suit against a carrier for compensation for non-delivery or delay in delivering goods, irrespective of the cause of the non-delivery. Indeed, if the article were to be interpreted as excluding all cases in which goods had been lost, destroyed or misdelivered, its applicability would be so narrowly restricted as to render its inclusion in the Limitation Act virtually unnecessary. It is difficult to conceive of a case in which a deliberate withholding by a carrier was provable. No carrier in ordinary circumstances would admit a deliberate withholding.

[18] I consider that the correct view is that Arts. 30 and 31 overlap, and that, in any case in which the carrier has failed to fulfil his obligation under the terms of the contract to deliver the goods, the party aggrieved is entitled to sue for non-delivery, and that such a case comes within Art. 31.

[19] I am fortified in this view by certain observations of Richardson J. in A. I. R. 1923 Cal. 397,[2] in which it was argued that goods not delivered or short delivered are not lost, reliance being placed for this proposition on the judgment of Jwala Prasad J. referred to above. Richardson J. rejecting the argument said:

"I will assume that the word 'loss' in this section means loss by the Railway Administration. The argument is that goods not delivered or short delivered are not 'lost' and reliance was placed on the judgment of Jwala Prasad J. in A. I. R. 1922 Pat. 106.[1] The learned Judge referred to the distinction which appears in Arts. 30 and 31 of the Schedule of the Limitation Act between claims against a carrier on the one hand for compensation for losing or injuring goods and on the other for compensation for non-delivery of or delay in delivering goods. In the first case limitation runs from the time when the loss or injury occurs and in the second case from the time when the goods ought to be delivered. In my opinion with respect these two Articles of the Limitation Act throw little, if any, light on the construction of S. 77, Railways Act. *There may be rea-*

sons for the presence of both Articles in the Limitation Act but they may still be overlapping. Where there is an agreement by a carrier to deliver goods at a fixed time or within a reasonable time, a claim for goods lost may be drawn as a claim for their non-delivery.

The reasoning of the learned Judge then proceeds on the assumption—mistaken as I venture to think — that a claim for non-delivery necessarily imports that the Railway Company are consciously and deliberately withholding goods in their possession, which they might deliver if they chose to do so.

As it seems to me, a claim for non-delivery without more, merely asserts that the goods were not delivered at the agreed time or within a reasonable time. *Such a claim asserts nothing as to the cause of the non-delivery.*"

[20] I would also refer to certain observations of Fawcett, A. J. C. in 51 I. C. 570.[3] Dealing with an argument advanced on behalf of the plaintiffs that non-delivery in Art. 31 did not include mis-delivery, Fawcett, A. J. C. said :

"The only question, therefore, is whether this is a suit against a carrier for compensation for non delivery of goods, so as to fall under Art. 31. On this point Mr. Elphinston has cited a ruling of the Punjab Chief Court in 19 I. C. 477,[4] where Rattigan J. held that the word 'non-delivery' in this Article does not include mis-delivery, and that the case of mis-delivery falls within the purview of Art. 115 of the Act. With due deference I do not think that the grounds given are fully sufficient for holding that the Legislature did not intend to include such a case as the the present one under the word non-delivery. Mr. Lobo has pointed out that, whatever be the manner in which the carrier may have dealt with the goods, whether he may have mis-appropriated them or delivered them to some one else, the complaint of the plaintiffs in both cases is one that they have suffered injury through the non-delivery to them of the goods. And in this plaint, as I have already pointed out, the cause of action is specifically alleged to be a failure or neglect to deliver. *What gives plaintiff this cause of action is that the defendants have not performed their contract with him, not that they have performed their contract improperly so as to make it a case of misperformance instead of one of non-performance. The fact that the defendants allege that delivery was given to a third party which the plaintiffs say was a mis-delivery, is, it seems to me, immaterial in considering whether the description of the suit is or is not one in which plaintiffs seek compensation for non-delivery of the goods. In this case I think there can be no doubt whatever that it is such a suit, and that the case, therefore, falls under Art. 31, Limitation Act.*"

[21] For the purposes of Mr. Choitbram's contention there is no difference in principle between a case of mis-delivery and a case of theft. Fawcett A. J. C.'s observations are directly applicable to the present case.

[22] I would also point out that the judgment of Jwala Prasad J. has been dissented from in a series of subsequent cases. These are all referred to in the judgment of Mullick, A. C. J. in 5 Pat. 106.[5]

[23] The plaintiffs' cause of action in the present case was that the defendant had not performed his contract to deliver the goods. It was a simple case of non-delivery such as contemplated by Art. 31. The cause of action was not based on loss or destruction of the goods by the Railway, and I cannot see how subsequent proof by the Railway that there was a loss is calculated to take the case out of the plain terms of Art. 31 by which it is clearly governed.

[24] I do not see how a carrier is entitled to set up a loss (which I am assuming includes theft), whether or not such loss amounts to a tort to the goods, to bring a suit within the shorter period contemplated by Art. 30 when it clearly falls within Art. 31.

[25] Incidentally, in this particular case, the correspondence indicates that the consignees could not obtain reasonable information from the Railway as to the fate of the consignment. The correspondence is Ex. 7/1 to Ex. 7/9, and indicates that the consignees took up the matter with the Railway early in 1943 and in spite of continual reminders they were still kept in virtual ignorance of what is alleged to have occurred to the bale upto 16-2-1944; the Railway having merely in the meanwhile intimated in October 1943 that the matter was under reference with the police. No details of any kind were given. In the written statement the defendant has merely stated that the bale was 'lost' but again gives no information as to how, where or when it was lost. It is obvious, as Mr. Atmaram points out, that it is quite impossible in such circumstances for a consignee to base a suit upon a losing of the goods by the Railway Company. I have incidentally expressed the view in other cases that correspondence of this nature does not operate to extend time under Art. 30 which clearly lays down the starting point of limitation as the date when the loss or injury occurs, subject of course to the correspondence embodying acknowledgment of liability within the meaning of S. 19, Limitation Act. We are not here dealing with a case falling within Art. 30 but nevertheless I would mention that another unsatisfactory aspect of the operation of Art. 30 is that a plaintiff is required in a case falling within that Article to bring his suit within a year from the date of his loss or destruction of the goods, when in a great many cases he is unable to obtain from the carrier, within the period of limitation, any information as to the date and circumstances of the loss or destruction. In many cases the precise date might not be known to the carrier himself. This seems to me an additional ground for saying that Arts. 30 and 31 are (not?) mutually exclusive.

[26] *Issue 7.* Section 72, Railways Act, provides that in the absence of any special contract, the liability of a Railway Administration for the loss, destruction or deterioration of goods delivered to it for carriage, is that of a bailee

under Ss. 151, 152 and 161, Contract Act. There was no special contract in this case limitating the responsibility of the Railway and the point for consideration under this issue is therefore as to whether the Railway took such care of the bale in question as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value.

[27] The burden of proof in such a case is discussed in Mulla's Indian Contract Act, Edn. 7, at p. 495 as follows:

"In cases governed by the provisions of Ss. 151 and 152, the loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee. The same rule applies, by reason of S. 72, Railways Act, to a railway administration, unless the goods are consigned under a risk note under which the railway company are absolved from all liability for loss or damage except that due to wilful negligence on the part of their servants, in which case the burden lies in the first instance upon the company to prove that the loss was such as was contemplated by the contract, and when this has been done it shifts upon the plaintiff to show that the loss was due to the wilful neglect of the company or its servants."

[28] This passage is based on numerous Indian decisions to which specific reference is unnecessary. The learned commentator proceeds to point out that there are special cases where goods are destroyed by fire arising from some unknown cause, and in the paragraph dealing with these he has referred to the following passage of the judgment of the Privy Council in 20 Bom. L. R. 735.[6]

"The weight to be attached to the judgment of the learned Judge of first instance, who saw the witnesses, is a good deal lessened by reason of his having apparently thrown the burden of proof on the wrong party. He states that it was, in his opinion, incumbent upon the defendant company to satisfy him that they had taken such care of these goods as a man of ordinary prudence would take of his own goods. *This, in their Lordships' view, is not a correct statement of the law. It is true that under the law of Evidence Act of 1872, S. 106, 'when any fact is especially within the knowledge of any person, the burden of proving that fact is on him' and it was therefore right that the defendant company should call the material witnesses who were on the spot, as it seems to have done.* But this provision of the law of evidence does not discharge the plaintiff from proving the want of due diligence, or (expressing it otherwise) the negligence of the servants of the defendant company. *It may be for the company to lay the materials before the Court, but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant company have not shown due care, skill and nerve.*"

[29] Although the learned commentator has made no comment to this effect, there does seem some divergence between the expressions used as to the burden of proof in some of the Indian decisions and in the passage from the Privy Council judgment set out above. It is true that the case before the Privy Council was one in which damages were claimed for loss by fire, but nevertheless certain general principles have been laid down as to the burden of proof in cases of loss of or damage to goods entrusted to a bailee, and I proceed on the basis laid down by the Privy Council.

[30] Section 106, Evidence Act, reads as follows:

"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

[31] In this case all the facts regarding how the consignment was dealt with from the time it was handed over to the Railway up to the time of discovery of the alleged loss are especially within the knowledge of the Railway, and the plaintiff is not in a position to have any knowledge whatever of these facts.

[32] Three witnesses were examined on behalf of the defendant to show how the consignment was dealt with while in the custody of the Railway and it is for the plaintiffs to satisfy me that the true inference from these facts is that the Railway did not exercise the care and skill required of a bailee.

[33] The first of these witnesses was Gianchand Nibalchand, Ex. 12, a Goods Clerk at the North Western Railway Station, Amritsar. His evidence is directed to show that on 30th January 1943 the bale in question consigned to Karachi under R. R. No. 583433 was loaded under his supervision into a covered Railway wagon at Amritsar. The wagon was then "sealed to Samasatta" There were in all, according to the witness, 149 packages in the wagon. The witness has no particular recollection of having dealt with the consignment, and his evidence is based on a "Detail sheet," Ex. 13, which was prepared at the time and which includes an entry as to the missing bale. There was considerable discussion as to the admissibility of Ex. 13, it being established in cross-examination that Ex. 13 was a copy made in May 1944 from the original Detail Sheet. When the question was raised the witness produced the original Detail Sheet, Ex 16. There is nothing to show as has been suggested on behalf of the plaintiff, that Ex. 16 is not a genuine document, and there is no reason why the evidence of the witness should not be accepted. The only comment I have to make is that there was no attempt to explain the method adopted in sealing and rivetting the wagon.

[34] The next of the defendant's witnesses was Shivlal Hardayal, Ex. 17, a train clerk in the North Western Railway. He states that in 1943 he was stationed at Montgomery as a train clerk and that his duty involved "the taking of the numbers of the trains" which arrived. The wagon in question arrived at Montgomery on

4th February 1943 and on looking at it he discovered that on one side the tapes bearing the seal had been severed and the severed ends knotted together. The seals themselves were intact as were the rivets. His discovery was entered into a seal book which has since been lost. The wagon was then "Kutcha" or crudely sealed, and a memorandum issued to the Goods Clerk, said to be one Jiwandas, to check the contents of the wagon. Exhibit 18 is said to be that memorandum. It is said Jiwandas, the Goods Clerk subsequently made a check and found 3 bales of piecegoods missing out of the total of 149 in the wagon. The witness was himself not present at the check. Jiwandas is then said to have issued a memorandum, Ex. 19 as follows :

"20 Go. Wagon 12826 ex—yours to Samasatta T. R. Van arrived with one side old label of wagon 35254 as ASA to LHR. Oil Van tied—checked jointly and 146 against 149 or 3 bales C. P. Goods by ASR 13305/1, 13779/1, 13778/1, KYC short."

Jiwandas who is said to have written this memorandum and whose handwriting the witness purports to identify, has not been examined as a witness, and is said no longer to be in the employ of the Railway. Jiwandas is also said to have made an entry, Ex. 20 in the "Deficiency Book" relating to his inspection. This entry reads :

"Wagon No. 12826 ex am. to Sind shunted in goods shed with one side seal ASR and other side one old label of wagon No. 35257 as ASR to LHR. Oilvan tied in jointly in presence of Prakashsingh constable No. 871 — found 146 packages against 149 or 3 bales C. P. goods. 2117 ASR 13305/1 KYC, 13779/1, 13778/1 KYC short."

[35] Objection was taken to the admissibility of Exs. 19 and 20 by Mr. Atmaram on behalf of the plaintiffs on the ground that Jiwandas who made these entries had not been examined.

[36] To this matter I will refer later. Apart from these documents the admissibility of which has been questioned, the evidence of Shivlal, so far as it relates to matters within his knowledge, is merely to the effect that in the course of his duties he observed that the tapes to which the seal (on one side of the wagon) was attached had been severed and knotted together, that in consequence of what he saw he made a report and there later followed a check of the contents of the wagon at which he was not present. The witness is extremely vague on what he actually did see. He has said that the rivets were intact, but was unable to explain how therefore the theft could have taken place. He has said in cross-examination :

"The wagons are rivetted by having a metal rod passed through metal loops on the door and the rod subsequently bent by the rivetting man. The metal rod may be roughly the thickness of a pencil. The rivet is usually on the middle of the wagon. There is no foothold on the side of the wagon. The rivet cannot be opened except by means of a hammer and short chisel. It may take five minutes to open a rivet. I cannot myself say how thieves break into a running train."

It is the contention of Mr. Choithram on behalf of the defendant that theft must have occurred while the train was in motion but the evidence of Shivlal leaves entirely unexplained how any such theft could have taken place in the present case, and why assuming the thieves did unrivet the wagon they chose to re-rivet it. Then again the evidence of the witness regarding the seal is far from clear. He says that the tapes had been severed and the severed ends retied, but he admitted in cross-examination that the tapes are normally tight or taut, and did not explain how in the circumstances they could have been retied. Nor is there any reason why they should have been retied, if there had been theft when the train was in motion. Apart from the fact that there is no suggestion that the rivets had been tampered with, it passes my comprehension how thieves could have re-rivetted the wagon in motion and why in any event they should have thought fit to re-rivet it and retie the tapes assuming such a thing were possible. Taken at its face value the evidence of this witness, to my mind, indicates nothing more than that it was in consequence of something he saw that the disappearance of the bale came to light. His evidence is of little assistance to the defendant.

[37] The third witness relied upon by the defendant in connexion with the disappearance of the bale is Ramchand Pagaram, Ex. 23. He states that in February 1943 he was stationed at Montgomery in the Watch and Ward Department of the North Western Railway; that in February 1943 Jiwandas in his presence checked the contents of a certain wagon the result of the check being entered in a book and that he signed the entry. The entry is Ex. 20, and his signature Ex. 20-A. In the course of the check 3 packages were found to be missing from the wagon. The entry Ex. 20 was made in his presence by Jiwandas and read out to him before he signed it.

[38] The witness was merely a chowkidar or watchman and his evidence was of a vague nature. It is obvious that he had no recollection of the event and that what he said was based on the entry made by Jiwandas. He said that at the time of the inspection a policeman and a railway coolie were present; that the rivet was removed with a chisel and hammer and that the original seal was intact. He cannot read or write English and he says that he knows English figures only. It is obvious to my mind that his evidence carries the case no further than whatever may be gathered from Ex. 20.

[39] Mr. Choithram on behalf of the defendant contends that Exs. 19 and 20 are relevant

under S. 35, Evidence Act as being entries made in an official book.

[40] There may be some doubt as to whether the collection of telegram forms in which EX. 19 appears is an official book, but I will assume it is and accept the entry. I think the "Deficiency Book" in which EX. 20 appears must be described as an official book and I also accept the entry relied upon for what it is worth.

[41] To my mind the evidence of the defendant's three witnesses and the documents which were produced show nothing more than that the missing bale was one of the 149 bales loaded into a sealed and revitted wagon at Amritsar Station on 30-1-1943 and that on 4-2-1943, in consequence of the tapes of one of the seals having been seen to have been cut by the Train Clerk, Shivlal, a check was made by the Goods Clerk, Jiwandas (not before the Court) in the presence of police and the witness Ramchand, and three bales found to be missing, including the bale consigned to the plaintiff.

[42] In my view, the defendant has failed to place before the Court all the necessary facts, facts exclusively within the knowledge of the Railway, as to how the bale was dealt with. It is very significant that there was a failure to call as a witness the guard of the train or any one on the train at any time, or any policeman or police officer. There is nothing to show how many stations, if any, the train stopped at before Montgomery; there is nothing to show how long it remained at Amritsar or how long it was at Montgomery before anything was found wrong; there is nothing to show whether any care whatever was taken of this wagon loaded with valuable property whether when stationary or in motion. In short, nothing of its history is given between 30th January and 4-2-1943. A train "guard," as the designation would indicate, is presumably required to exercise some care and supervision over the train and the contents of it, and, as I have said, no guard has been called as a witness. Some care and supervision is also required to be exercised when a train containing valuable property is stationary, that is to say, is drawn up and stops for any appreciable time *en route*, and there is no information forthcoming as to whether any steps were taken to guard it.

[43] Heavy bales of piecegoods are not expected, ordinarily, to disappear when they have been placed in a properly rivetted wagon. Running train thefts are known to be frequent in India, but on the other hand it seems to me that there is a tendency by railways to attribute losses to running train thefts when in fact thefts occur at stations, sidings and yards. In this particular case, as I have already pointed out, there is nothing whatever to indicate a running train theft. The rivets were found intact and thieves would not ordinarily, unless in collusion with the railway staff take the trouble to re-rivet a wagon after a theft had been committed. The defendant has clearly omitted to call material witnesses and the plaintiff has satisfied me that the true inference from what material there is on the record is that the servants of the railway have not shown due care with regard to the consignment in suit.

[44] *Issue 8.* Plaintiffs have claimed Rs. 665-8-0 as compensation for the missing bale. The only argument advanced on behalf of the defendant on this issue is that the plaintiffs have not examined the consignor as to the contents of the bale. When the matter came up for hearing, several months ago, an application was made on behalf of the plaintiffs to examine the consignor on commission. This application was vehemently opposed on behalf of the defendant and was dismissed. I am of the view that the plaintiffs are entitled to compensation as claimed.

[45] Dipchand Chandumal, plaintiffs' manager, has established to my satisfaction that his firm had previous dealings with the consignors, the Grover Calico Printing Mills at Amritsar, and that this firm on 30th January consigned the bale in question to the plaintiffs at Karachi. The invoice, EX. 6, has been produced and this shows the value of the goods as Rs. 653 and gives a detailed description of them, showing them as printed poplins. This invoice together with the relative railway receipt and bill of collection has been proved by Narsinglal, a clerk in the Central Bank of India Ltd. Karachi, to have been sent by the bank's Amritsar Branch to their Karachi Branch for collection and that the amount of the bill was paid in full by the plaintiffs and the relative railway receipt handed over to them. At one stage of the case Dipchand Chandumal was asked whether he had produced his books of account in Court and he said that he had not. I recollect, however, that on an adjourned hearing he informed the defendant's advocate that he had now produced his account books but the defendant's advocate did not pursue the matter.

[46] I am satisfied from the evidence that the plaintiffs had entered into a genuine mercantile transaction with the Grover Calico Printing Mills and that the latter consigned to them a bale of piecegoods. The railway receipt shows that a bale described as a bale of piecegoods had been received by the railway for carriage. It was suggested by Mr. Choithram that the goods may not have been of the value claimed for them or alternatively that the bale may have contained mere rubbish. I am not prepared to accept such a contention on the particular facts of this

case. I hold that there was a genuine mercantile transaction by concerns who had previously done business together before and that the bale must have contained goods of this value paid for. Apart from this the plaintiff paid for the bale in full and the measure of compensation for non-delivery is in this case what the plaintiff in good faith paid for the bale. I, therefore, hold that the compensation claimed by the plaintiffs is payable. I would add here that this is purely a question of facts and it does not follow that in every case similar evidence would necessarily be accepted.

[47] *Issue 10.* I accordingly pass a decree in favour of the plaintiffs for the sum of Rs. 655-8-0 together with the costs of the suit and interest on the claim at 6 per cent. per annum from date of suit till payment.

Suit decreed.

V.R.

A. I. R. (35) 1948 Sind 33 *[C. N. 11.]*

DAVIS C. J.

Radhomal Pohumal — Applicant v. *Abdulrahim and others — Opponents.*

Civil Revn. Appln. No. 17 of 1943, Decided on 29th January 1947, from order of Sm. C. C., Judge, Jacobabad, D/- 9th September 1942.

(a) Civil P. C. (1908), S. 115 and O. 9, R. 13—Order under O. 9, R. 13—Revision.

Where an order is passed by a Court purporting to exercise jurisdiction under O. 9, R. 13 and against this exercise of jurisdiction it is contended that O. 9, R. 13 does not apply to the proceedings in which the order is passed, revision lies against the order. [Para 3]

Annotation: ('44-Com.) Civil P.C., O. 9, R. 13, N. 30.

(b) Civil P. C. (1908), O. 9, R. 13—Applicability—O. 9, R. 13 does not apply to execution proceedings under O. 21: 17 All. 106 (P. C.) and 18 A. I. R. 1931 Mad 656, *Ref.*; 8 A. I. R. 1921 Sind 55, *Doubted. (Obiter).* [Para 4]

Annotation: ('44-Com.) Civil P. C., O. 9, Gen. N. 1, Pt. 3.

(c) Civil P. C. (1908), S. 151 and O. 21, R. 58 — Order dismissing claim petition under O. 21, R. 58 —Setting aside.

A petitioner whose claim petition under O. 21, R. 58 has been dismissed has a remedy open to him by way of a suit under O. 21, R. 63. Hence the Court cannot set aside the order of dismissal under its inherent powers under S. 151. [Paras 4, 5]

Annotation: ('44-Com.) Civil P.C., S. 151, N. 2, Pt. 7.

Cases referred :—

1. ('31) 18 A I. R. 1931 Mad. 656 : 55 Mad. 17 : 134 I. C. 806 (F. B.), Arunachalam v. Veerappa Chettiar.
2. ('23) 17 S. L. R. 105 : 8 A. I. R. 1921 Sind 55 : 83 I. C. 749. Issarsing v. Udhavdas.
3. ('95) 17 All. 106 : 22 I A. 44 : 6 Sar. 526 (P. C.), Thakur Prasad v. Fakir Ullah.

Kodumal Isserdas — for Applicant.

Manghanmal Bhojraj — for Opponents.

Order. — This is an application in revision against a judgment of the Subordinate Judge of Jacobabad, exercising Small Cause Court jurisdiction, in which purporting to exercise the powers vested in him, he upheld the contention of a third party in execution proceedings that the tonga which had been attached was not the tonga of the judgment-debtor, who was a tonga driver. The learned Judge found that the tonga was the property of one Mian Abdul Satar Shah, this Mian Abdul Satar Shah describes himself as a poor Sayed and the owner of the tonga. The learned Judge allowed the claim petition in proceedings under O. 21, R. 58, Civil P. C., thus setting aside a previous ex parte order, dismissing the claim petition and ordering execution proceedings to go on on the petition of the decree-holder who was present. The order restoring the claim petition to the file is dated 9th September 1942 and the order upholding the claim of the tonga driver passed in the absence of the decree-holder is dated 24th September 1942.

[2] The decree-holder now comes in revision to this Court alleging that the Subordinate Judge had no jurisdiction to set aside his previous order, though an ex parte order, dismissing the claimant's petition for default, because under O. 21, R. 63, Civil P. C., a claimant has a right to institute a suit within one year and no necessity for exercise by a Court of its inherent jurisdiction or its jurisdiction under S. 151, Civil P. C., arises at all and that O. 9, R. 13 under which the Subordinate Judge purported to restore the claimant's petition dismissed on the ground of default, does not apply to execution proceedings.

[3] The learned advocate for the claimant took a preliminary objection that no revision lay, but I do not think there is any force in this objection. I am dealing essentially with the question of jurisdiction. The Subordinate Judge purports to exercise jurisdiction under O. 9, R. 13, Civil P. C., and against this exercise of jurisdiction it is contended that O. 9, R. 13 does not apply to the proceedings of the nature now before me, and in my view an application for revision in the matter of jurisdiction clearly does lie.

[4] Now the learned advocate for the appellant relies principally on a Full Bench judgment of the Madras High Court in A. I. R. 1931 Mad. 656,[1] where generally it was laid down that O. 9, R. 13, Civil P. C. does not apply to execution proceedings under O. 21, Civil P. C., even if such proceedings fall also within S. 47, Civil P. C., while the learned advocate for the opponent relies for the most part on the judgment of the Sind Judicial Commissioner's Court reported in 17 S. L. R. 105.[2] But it appears to me that judgment, whether the decision is right or wrong proceeds principally on the ground that it is not conceivable that there can be no remedy against an ex parte order, where the Legislature has made no provision by way of appeal or original suit to undo a wrong that has been done, but in

the case of a claim which has been dismissed for default, there is a remedy by way of suit: that remedy is specifically provided by O. 21, R. 63, Civil P. C., and the fact that it is to be brought within a year does not appear to me to be material. There is a remedy open to a claimant whose petition has been dismissed by way of a suit within a proper time and so it does not appear necessary for me to deal at length with this judgment in 17 S. L. R. 105,[2] against which there now appears a considerable body of judicial authority. Generally speaking, the judgment of the Privy Council reported in 17 ALL. 106,[3] is now binding authority, though in effect O. 9, Civil P. C., does not apply to execution proceedings and Jenkins C. J. in interpreting that judgment of the Privy Council explains that in the result S. 141, Civil P. C., does not apply to proceedings in execution; and as the learned Chief Justice points out, there is no injustice in this, because R. 13 of O. 9 is not conclusive but is subject to the right of an aggrieved person to bring a suit. It is true, the learned Chief Justice was dealing with proceedings under Rr. 100 and 101 of O. 21, Civil P. C. The same argument would apply to proceedings under O. 21, R. 58, Civil P. C., whereby under R. 63 the right to bring a suit is expressly reserved.

[5] I cannot see then that there is any room for the exercise by the Subordinate Judge under S. 151, Civil P. C., of any inherent powers and it appears to me that although the learned Subordinate Judge was plainly wrong when after having dismissed the claimant's petition by way of default, and such dismissal being finally conclusive subject to the express provision to bring a suit, he did thereafter without proper notice to the decree-holder, set aside his ex parte order and finally in another ex parte order allowed the claim of the claimant that he was the owner of the tonga. I must therefore set aside the order of the learned Judge, restore his order dismissing the claim petition of the Sayed with costs and I allow the revision application with costs accordingly.

N.S.D. *Application allowed.*

A. I. R. (35) 1948 Sind 34 *[C. N. 12.]*

DAVIS C. J. AND THADANI J.

Sikanderali Shah Ghulam Kadir Shah — Applicant v. *Emperor.*

Criminal Revn. Appln. No. 268 of 1946, Decided on 3-2-1947, from order of Dist. Magistrate, Nawabshah, D/- 21-10-1946.

Criminal P. C. (1898), S. 196A—Criminal conspiracy.

The cognizance of an offence of criminal conspiracy the object of which was to file or cause to be filed a false complaint under Ss. 498 and 342, Penal Code is barred without the sanction of the Provincial Government or other authority under S. 196A. [Para 12]

Annotation : ('46-Com.) Cr. P.C. S. 196A, N. 1.

Allahbakhsh K. Brohi—for Applicant.

Fatehchand Assudomal, Advocate-General of Sind — for the Crown.

Judgment. — This is an application by Sikanderali Shah son of Ghulam Kadir Shah, a retired Mukhtiarkar and First Class Magistrate, under the provisions of Ss. 435 and 439, Criminal P. C., to quash a complaint of one Ak filed against himself and five others pending in the Court of the District Magistrate of Nawabshah for offences alleged to have been committed under S.120B read with Ss.366 and 363,Penal Code.

[2] The facts which led Ak to file a complaint are these: The applicant was a First Class Magistrate and Mukhtiarkar of Naushahro Feroz in the district of Nawabshah. On 23-4-1946, one Ismail son of Ghulam Muhamad filed a complaint against Ak son of Khamiso in the Court of the Additional District Magistrate of Nawabshah under Ss. 498 and 342, Penal Code, in which he alleged that he had been lawfully married to one Mt. Hajran for some fifteen years and had six children by her, four sons and two daughters, and that Ak had enticed her and detained her in his house at Jalbani for illicit purposes. He also complained that his wife was wrongfully confined by Ak, and asked for process against Ak under Ss. 498 and 342, Penal Code. This complaint was transferred by the learned Additional District Magistrate, Nawabshah, to the First Class Magistrate of Naushahro, the applicant Sikanderali Shah.

[3] Sikanderali Shah acting as a Magistrate issued process against Ak under S. 342, Penal Code, only and a search warrant under the provisions of S. 100, Criminal P. C., for the production of Mt. Saran daughter of Ismail and his wife Mt. Hajran. In due course, both appeared before the applicant who proceeded to record their statements. Mt. Saran stated that she apprehended danger to her life from Ak with whom her mother was on terms of intimacy and that she and her mother were in wrongful confinement, and that she was willing to go to her father Ismail. Mt. Hajran, Ismail's wife, stated that she was being wrongfully confined by Ak, with whom she had lived for a long time, and had four children from him; Saran, however, was the daughter of Ismail; she was willing to go back to Ismail. On the strength of these two statements, the applicant passed an order that Mt. Hajran and Saran were free to go wherever they liked, and allowed the request of Mt. Hajran for police protection. This order was made some time before 4-5-1946, on which date the hearing of the case against Ak under S. 342, Penal Code, was set down for hearing.

[4] On 4-5-1946, when the case against Ak was called for hearing, the complainant Ismail was absent and the accused Ak was discharged under S. 259, Criminal P. C.

[5] On 8-5-1946 Ak made a petition to the District Maistrate, Nawabbshah, in which he stated : (After stating the complaint and the order of District Magistrate the judgment proceeded.)

[6] In pursuance of the search warrant issued by the learned District Magistrate, Nawabshah, on 11-5-1946, the police secured Mt. Hajran and her dughter Saran on 19-9-1946, and produced them before the learned District Magistrate on 22-9-1946, who recorded their statements on the same day, but passed no further orders.

[7] It appears that the learned District Magistrate had required the Sub-divisional Magistrate, Naushahro, to submit the record and proceedings in the case in which Ismail had filed a complaint against Ak under Ss. 342 and 498, Penal Code, with his report. The report of the Sub-divisional Magistrate, Naushahro, was received by the District Magistrate on 15-9-1946. Nearly a month later, on 10-10-1946, the District Magistrate disposed of the petition filed by Ak by issuing process against the applicant, Nur Muhammad Shah, Allah Obhayo, Sobdarkhan, Ismail and Jumo under S. 120B read with Ss. 366 and 363, Penal Code. It is against this complaint that the applicant has come in revision.

[8] In disposing of this application, we do not propose to take any notice of the allegations made by the applicant in para. 1 of his application in which he has set out the reasons which prompted the learned District Magistrate to take cognizance of Ak's petition. We propose to dispose of the application in accordance with the law relating to cognisance of offences of criminal conspiracy.

[9] It is contended on behalf of the applicant that Ak had not filed a complaint against the applicant or anybody else, but had merely made a petition by which he sought to bring certain facts to the notice of the District Magistrate, and requested the District Magistrate to obtain sanction of the local Government for the prosecution of the applicant. There is some force in the contention, but for the purposes of this application we are prepared to regard it as a complaint.

[10] The question arises whether the District Magistrate was competent to take cognizance of the offence of criminal conspiracy as alleged by Ak, without the consent of the Local Government as required by S. 196A, Criminal P. C. It is to be observed that the learned District Magistrate has issued process under S. 120B, Penal Code read with Ss. 366 and 363, Penal Code. But in the complaint made by Ak on 8-5-1946 nowhere is it alleged that the object of the conspiracy was to commit an offence under S. 366 or S. 363, Penal Code. Far from alleging that the object of the conspiracy was to take Mt. Hajran away by force or by fraud, or to kidnap Saran, Ak has, strangely enough, stated in the petition that Mt. Hajran was infatuated with Ismail, and had promised Ismail that if she were taken out anywhere, she and her elder daughter Saran would desert Ak and follow Ismail, and that with this end in view, Ismail had sought the assistance of Nur Mahomed Shah M. L. A., and approached the applicant.

[11] It is contended on behalf of the Crown that this arrangement implied coercion in the form of securing the attendance of Mt. Hajran and her daughter Mt. Saran under compulsion of law. But whatever were the means adopted for securing the attendance of Hajran and Saran in Court, they were not the object of the conspiracy to which the applicant and the other accused are alleged to be parties. The object if any was to cause to be filed a false complaint under Ss. 498 and 342, Penal Code, so as to compell the attendance of Hajran and Saran in Court. According to Ak's complaint Hajran was willing to attend Court if she was ordered to do so, by a Court of law. We cannot then see how the object of the conspiracy was to abduct Hajran or to kidnap Saran. As we have said, the utmost that can be alleged is that the applicant conspired with Ismail to cause a false complaint under Ss. 498 and 342, Penal Code, to be filed against Ak. Such a conspiracy would clearly attract the provisions of S. 196A, Criminal P. C., for an offence under S. 498, Penal Code, is non-cognisable, and an offence under S. 342, Penal Code although cognisable is only punishable with one year. Section 196A says: (After quoting the section, the judgment proceeded.)

[12] The learned Advocate-General has contended that the statements recorded by the learned District Magistrate in pursuance of the complaint made by Ak should be taken into consideration for the purpose of ascertaining the nature of the conspiracy disclosed; even so, S. 196A prescribes a bar to the taking of cognizance of the offence of criminal conspiracy punishable under S. 120B, Penal Code, if the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Local Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has, by order in writing, consented to the

initiation of the proceedings, and in our opinion the object, if any, of the alleged conspiracy clearly was to cause a false complaint to be filed in order to secure the attendance of Hajran and Saran—an offence punishable under S. 211, Penal Code. An offence of criminal conspiracy to cause a false complaint to be filed of enticing a married woman and unlawfully confining her, the one a non-cognizable offence and the other though cognizable punishable with less than two years, clearly requires the consent of the local Government by reason of the provisions of S. 196A, Criminal P. C.

[13] In the view we take, that the cognizance of a conspiracy, the object of which was to file or cause to be filed a false complaint under Ss. 498 and 342, Penal Code is barred by the provisions of S. 196A, Criminal P. C. it is not necessary to consider the application of S. 197, Criminal P. C.

[14] We would accordingly quash the complaint filed by the learned District Magistrate, Nawabshah, and all the proceedings taken upon that complaint.

G.B. *Proceedings quashed.*

A. I. R. (35) 1948 Sind 36 *[C. N. 13.]*

O'SULLIVAN AND THADANI JJ.

Pir Agha Muhammad Hussain Jan and others—Appellants v. *Elias Haji Wahiddino —Respondent.*

First Appeal No. 35 of 1944, Decided on 23-1-1947.

Specific Relief Act (1877), S. 55—Opening of new windows overlooking neighbour's land—No invasion of neighbour's right to or enjoyment of property — Neighbour has right to place erection against such windows on his own land — Mandatory injunction to close windows cannot be granted —Easements Act (1882), S. 18.

Before a perpetual injunction can be granted under S. 54 there must be an invasion or a threat of invasion of the plaintiff's right to or enjoyment of his property. The mere opening of a window by a man in a building on his own property cannot constitute an invasion of or a threat to invade the rights to or enjoyment of, his neighbour's property except in those rare cases where a custom as to right of privacy is provable. [Paras 15 & 16]

Invasion of privacy by opening a window which overlooks another man's grounds, is not recognized by law as a wrongful act. The opening of a new window, being in itself an innocent act, cannot therefore destroy existing rights in one party, or give new, or revive old rights in another : *Tapling* v. *Jones*, (1865) 145 R. R. 192, *Foll.* [Para 20]

A man has no inherent right to obstruct his neighbour's windows. He has merely the right to place any erection on his own land subject to any right which has by law accrued to his neighbour. [Para 21]

Where the defendant built upon his own land and opened several windows overlooking the plaintiff's land and the plaintiff obstructed the windows by putting up wooden planks thereon which the defendant removed, it was held that no mandatory injunction directing the defendant to close the windows could be granted as there was no invasion of the plaintiff's right: 28 A.I.R. 1941 Oudh 442, *Rel. on*; 9 A. I. R. 1922 Bom. 83 and 11 A. I. R. 1924 Lah. 628, *Disting.*; Observations of Tekchand J. in 20 A.I.R. 1933 Lah. 847 as to giving redress by grant of pecuniary compensation in such cases not approved. [Paras 24 & 26]

Cases referred :—

1. (1865) 145 R.R. 192 : 11 H.L.C. 290 : 34 L. J. C. P. 342 : 13 W. R. 617 : 12 L. T. (N. S.) 555, Tapling v. Jones.
2. ('22) 24 Bom. L. R. 305 : 9 A. I. R. 1922 Bom. 83 : 46 Bom. 827 : 67 I. C. 356, Kashibhai Kalidas v. Vallabhai Wagjibhai.
3. ('33) 20 A.I.R. 1933 Lah. 847 : 148 I. C. 224, Kashi Nath v. Ram Jiwan.
4. ('24) 11 A.I.R. 1924 Lah. 628 : 75 I.C. 608, Chiragh Din v. Ghulam Muhammad.
5. ('41) 16 Luck. 686 : 28 A.I.R. 1941 Oudh 442 : 194 I. C. 73, Ganesh Prasad v. Basdeo.

Tikamdas Bassarmal—for Appellants.

Kimatrai Bhojraj—for Respondent.

O'Sullivan J.—This is an appeal against the judgment and decree in a suit in which Lobo J. granted respondent (plaintiff) a mandatory injunction against the appellant (defendant) directing him to close the 12 windows in a building of which he is the owner.

[2] The parties own contiguous plots of lands roughly square in shape, the south-west corner of the appellant's land meeting that of the respondent at a point on the north-west side; that is to say, the two areas adjoin diagonally.

[3] There is a gully or lane some 3 feet wide and a few yards long running the length of the appellant's land on the southern side and giving access to the respondent's land. Both areas were originally owned by the same person who in the year 1926 sold out to the predecessors-in-title of the parties to the suit.

[4] The title deeds in favour of the appellant make no mention of this lane to which reference has been made above. Those in favour of the respondent, however, do mention the lane as a boundary but do not make it clear that it was conveyed to the respondent's predecessor-in-title.

[5] Both the areas in question have been built upon, as also the area to the south of the lane which is owned by somebody, who is not a party to this suit, and whose building has windows looking out upon the lane.

[6] In the year 1929 the appellant erected on his land a three storied building in which on the southern side he opened 12 windows (four on each floor) overlooking the lane.

[7] On 28th August 1940 respondent filed the present suit praying

"for a perpetual mandatory injunction ordering the defendant (appellant) to close the said 12 windows and apertures in the southern wall of his building adjoining the plaintiff's (respondent's) building and costs of the suit."

[8] In strict point of fact, as has already been made clear, the 12 windows do not overlook respondent's building, but the lane which is unbuilt upon.

[9] The respondent in his plaint asserted that he was the owner of the lane; that the appellant had not acquired any right or easement in respect of the said windows or apertures which, therefore, constituted "a trespass to plaintiff's property," and that about January 1940 the appellant was called upon to close the said windows but refused to do so, and "on the contrary removed wooden planks put up by the plaintiff against the said windows and appertures."

[10] The appellant in his written statement denied any trespass and, *inter alia*, pleaded that the lane was not the respondent's property; that he and his predecessors-in-title had used the lane as of right and without interruption, and that the respondent who had been aware of the opening of these windows for a number of years had delayed in taking any action, and was debarred from objecting to their existence at this stage.

[11] Lobo J. found that the respondent was the owner of the lane; that he was in occupation of his property including the lane through his tenants, and that he was entitled to a mandatory injunction against the appellant directing him to close the 12 windows in question.

[12] The first argument put forward by Mr. Tikamdas for the appellant is in substance that the respondent had no cause of action. He questions the finding of Lobo J. as to the ownership of the lane but argues that assuming the lane was owned by the respondent, the opening by the appellant of his 12 windows was an innocent act, an act he is entitled to do in law, and does not constitute trespass and that no injunction can be granted directing him to close his windows.

[13] We consider the contentions of Mr. Tikamdas well founded, and indeed obvious, and since the appeal can properly be decided on this ground, it is unnecessary to discuss the question of the ownership of the lane. In the circumstances of the case, the appellant's contention as to his having acquired prescriptive rights does not arise.

[14] Mr. Kimatrai first contended that the act of the appellant in opening the 12 windows constituted trespass. He contended that it was a trespass against the privacy of the respondent. He was invited to explain how the opening of the windows in any way infringed the rights of the respondent or affected his enjoyment of his property, but Mr. Kimatrai was unable to do so, and on his attention being invited to the provisions of S. 54, Specific Relief Act and to the well-known decisions of the House of Lords in (1865) 145 R. R. 192,[1] (to which a more detailed reference will hereafter be made), he abandoned the argument as to trespass, and proceeded on other lines.

[15] Section 54, Specific Relief Act lays it down that:

"Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chap. II of this Act.

When the defendant invades or threatens to invade the plaintiff's right to or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely):

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief."

As this section makes it clear there must, before a perpetual injunction may be granted, be an invasion or a threat of invasion of the plaintiff's right to or enjoyment of his property and it is manifest that the mere opening of a window by a man in a building in his own property cannot constitute an invasion of or a threat to invade the rights to or enjoyment of, his neighbour's property.

[16] This is of course subject to those rare cases in which a custom as to right of privacy is provable. There is no question in this case of such a custom.

[17] It was Mr. Kimatrai's second contention that his cause of action was not trespass, as specifically pleaded in the plaint, but was the removal by the appellant of the planks which respondent had erected against appellant's windows. It would appear from the reference in the plaint to these planks, and from the respondent's own evidence, that they had been nailed or otherwise affixed to the appellant's windows. The plaint refers to them as having been "put up" by the respondent "against the said windows", and the respondent's own evidence is that he "*boarded up these windows and apertures* soon after the defendant purchased the property about 4 years ago." The respondent then refers to certain correspondence that passed between the parties, and a letter written on his behalf by his lawyers, to the appellant's lawyers, dated 8th January 1940. This letter says that "we regret your client has not yet removed the wooden planks fixed against the windows." If, as seems clear, the planks were affixed by the respondent to the appellant's

property this, *prima facie*, constituted a trespass by the respondent. The respondent would not be entitled to affix any planks to the appellant's wall. If, however, as Mr. Kimatrai now contends the respondent merely built an erection upon his own land so as to shut out appellant's light and air, he was fully entitled to do so subject to any prescriptive rights which the appellant had acquired as to light and air. But a further difficulty stands in Mr. Kimatrai's way. His plaint is clearly based on trespass constituted by the opening of the windows, and not on the action of the appellant in pulling down the plainks, and, as has already been made clear, the prayer is for a mandatory injunction directing that the appellant should close his windows.

[18] Mr. Kimatrai pressed us to hold that since the appellant had pulled down respondent's planks, the latter was entitled to ask the Court to direct the appellant to close his windows; and he referred us to the following passage in the judgment of Lobo J. in which his contention appears to have been accepted :

"It has been contended by the learned advocate for the defendant that the plaintiff's remedy is in his own hands. It is for him to close the windows and apertures if he considers them a trespass, and if the defendant removes any obstructions put up by the plaintiff, the plaintiff can then come to Court and seek remedy by an injunction. The argument, however, is without substance. If the plaintiff has the right to close the windows and apertures in suit, he has surely the right to ask the Court to do so. It is idle to contend that the plaintiff should engage in a continuous battle with the defendant, the plaintiff closing his (defendant's) windows and apertures, and the defendant breaking down the obstruction to his windows and apertures. There is no substance in the contentions of the defendant raised in para. 10 of his written statement, and my answer to issue 6 therefore is in the negative."

[19] We consider there is no force in Mr. Kimatrai's argument, and that it is entirely met by the decision in (1865) 145 R. R. 192.[1]

[20] With regard to the question of trespass upon privacy, I would refer to the following part of the head-note which correctly sets out the principle stated by their Lordships in a lengthy judgment :

"Invasion of privacy by opening a window which overlooks another man's grounds, is not recognized by law as a wrongful act.

The opening of a new window, being in itself an innocent act, cannot therefore destroy existing rights in one party, or give new, or revive old rights in another."

[21] Mr. Kimatrai's argument under the second head involved some right by the respondent to "obstruct" the appellant's windows. But this is clearly misleading. The point is that a man has no inherent right to obstruct his neighbour's windows. He has merely the right to place any erection on his own land subject to any right which has by law accrued to his neighbour, and in this connexion I would refer to the very cogent observations in (1865) 145 R. R. 192[1] of both the Lord Chancellor (Lord Westbury) and Lord Cranworth: Lord Westbury, L. C. said:

"Before dealing with the present appeal, it may be useful to point out some expressions which are found in the decided cases, and which seem to have a tendency to mislead; one of these expressions is the phrase 'right to obstruct.' If my adjoining neighbour builds upon his land, and opens numerous windows which look over my gardens or my pleasure grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right of building or raising any erection I please on my own land, unless that right has been by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbour.

Again, there is another form of words which is often found in the cases on this subject, namely the phrase 'invasion of privacy by opening windows.' That is not treated by the law as a wrong for which any remedy is given. If *A* is the owner of beautiful gardens and pleasure grounds, and *B* is the owner of an adjoining piece of land, *B* may build on it a manufactory with a hundred windows overlooking the pleasure grounds, and *A* has neither more nor less than the right, which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly erected manufactory . . . .

By opening the new windows he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of so building on his land."

Lord Cranworth said :

"I am unable to comprehend the principle on which such a claim can rest. Where a person has wrongfully obstructed another in the enjoyment of an easement, as, for instance, by building a wall across a path over which there is a right of way, public or private, any person so unlawfully obstructed may remove the obstruction; and if any damage thereby arises to him who wrongfully set it up, he has no right to complain. His own wrongful act justified what would otherwise have been a trespass. *But this depends entirely on the circumstances that the act of erecting the wall was a wrongful act, whereas the opening of a window is not an unlawful act.* Every man may open any number of windows looking over his neighbour's land; and, on the other hand, the neighbour may, by building on his own land within 20 years after the opening of the window, obstruct the light which would otherwise reach it. Some confusion seems to have arisen from speaking of the right of the neighbour in such a case, as a right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks most to his interests; and if by doing so he obstructs the access of light to the new windows, he is doing that which affords no ground of complaint. He has a right to build, and if thereby he obstructs the new lights, he is not committing a wrong. *But what ground is there for contending that, because his building so as to obstruct a new light would afford no ground of complaint, therefor, if he cannot so build without committing a trespass, he may commit a trespass? I can discover no principle to warrant any such inference.*"

[22] Mr. Kimatrai made no attempt to discuss the principles as laid down in (1865) 145 R. R. 192,[1] but referred us to certain Indian cases. He first cited 24 Bom. L. R. 305[2] and re-

ferred in particular to the following passage in the judgment of Macleod C. J.:

"The Statute of Limitation entitles the plaintiff to seek relief by means of an injunction against a party seeking to establish an easement against him within 20 years."

[23] The facts of that case are not parallel. The defendant projected certain eaves over the plaintiff's land and discharged rain water from these eaves on into the plaintiff's lands, and it was held, decreeing the claim for an injunction, that the defendant in erecting his building in defiance of the plaintiff's rights, did so at his own risk; and that there was no equity arising from plaintiff's acquiescence, since there would be no more expense to the defendant in obeying the injunction than there could have been if the suit had been brought shortly after the defendant erected his building.

[24] With this decision we are in agreement; but the point to be made clear is that the defendant in erecting his building infringed the plaintiff's right by projecting eaves over the plaintiff's land and discharging rain water over the plaintiff's land. In the present case there is no case of infringement of the respondent's rights, as has already been made clear. The words of Macleod C. J., to which reference has been made, do not in our view imply that the plaintiff is entitled to an injunction against his neighbour directing his neighbour to refrain from doing anything which that neighbour is fully entitled to do, and the words must be read in the light of the facts with which Macleod C. J. was dealing.

[25] Mr. Kimatrai next referred to two decisions of the Lahore High Court, neither of which support him. In A. I. R. 1933 Lah. 847,[3] it was specifically held, to quote a portion of the head note, that :

"Every owner has got the right to open apertures in his own wall and unless by doing so he invades the privacy or any other pre-existing and well established right vested in his neighbour, the latter cannot force him to close the apertures. The neighbour's remedy is to build on his own land or otherwise obstruct the apertures."

The words 'otherwise obstruct the apertures' refer, presumably, to something which the plaintiff may do on his own land. It is true that Tekchand J. in that case went on to say that although there was no legal ground for granting the injunction and that injunction was not the proper relief, the plaintiff was entitled to redress by grant of pecuniary compensation.

[26] We are unable to agree that any redress by way of pecuniary compensation is payable in a case such as that before us.

[27] The other Lahore case referred to was A. I. R. 1924 Lah. 628.[4] The facts of that case are not in point. The dispute between the parties was in relation to a party wall, and as Le Rossignol J., said :

"The finding of both Courts is that the plaintiff wished to build against the windows and the defendant objected; in my opinion, this gave plaintiff a right of action, for his liberty of dealing with his own property was threatened."

It was, as is clear, a finding of fact that the plaintiff wished to deal with his own property, and the defendant was obstructing him from doing so.

[28] Mr. Tikamdas referred to 16 Luck. 686,[5] which is in point. To quote the head note in that case :

"The grant of an absolute injunction under S. 54, Specific Relief Act restraining the defendant from enjoying his own land is wholly illegal where there is no obligation in favour of the plaintiff to restrain the defendant from so enjoying his property.

Where the defendant opens doors on his own land he cannot be legally ordered to close them merely because of the plaintiff's apprehension that if the doors are allowed to stand the defendant may acquire a right of easement to light and air after the lapse of 20 years."

[29] Finally Mr. Kimatrai asked that we should grant a declaration in favour of the respondent as to his right to obstruct the appellant's windows by building on his (respondent's) own land, or alternatively that he should be permitted to amend the plaint so as to include a prayer for an injunction restraining the appellant from interfering with any erection the respondent may make on his own land with a view to obstructing the appellant's windows.

[30] We cannot say that on the facts and circumstances of this case any such reliefs are open to the respondent. It has been made sufficiently clear already that any man may build upon his own property subject to any antecedent rights acquired by his neighbour. In particular, with regard to the request for amendment of the plaint, no details have been furnished to us with regard to the nature of the required amendment. In any event, we cannot say that any question arises of the amendment of the plaint, because the appellant has not, so far as we can ascertain, pulled down any structures which the respondent made upon his own land.

[31] Assuming we had any discretion to grant these requests by Mr. Kimatrai, it is clearly not a case in which such discretion should be exercised. There has been considerable delay in the bringing of this action. The appellant built upon his property and opened his windows in the year 1929, and it was not until 11 years later in 1940 that the respondent filed the present proceeding. Again we cannot say that on the facts as presented to us, the respondent has been in the very least damnified or affected by the action of the appellant. There are already windows on one side overlooking the lane, and it

has not been suggested in the plaint how the appellant's windows on the other side of the lane in any way constitute a nuisance. It was, admittedly, suggested in the evidence of the respondent that the appellant's tenants were in the habit of throwing rubbish into the lane, but there is no such plea in the plaint and the fact was never in issue. Moreover, it is manifest that if the appellant or his tenants do commit a nuisance in this form, they may be restrained by appropriate action.

[32] In the result, we have no hesitation in allowing this appeal with costs throughout. Order accordingly.

K.S. *Appeal allowed.*

A. I. R. (35) 1948 Sind 40 *[C. N. 14.]*

O'SULLIVAN J.

on difference between

TYABJI AND MEHER JJ.

Waroo — Appellant v. *Emperor.*

Confirmation Case No. 36 of 1946 (Criminal Appeal No. 174 of 1946), Decided on 23-10-1946, from the judgment of Tyabji and Meher JJ.

(a) Criminal P. C. (1898), Ss. 221 and 237—Charge specifying housebreaking in order to commit offence of hurt—Conviction for housebreaking with intent to commit adultery is bad.

Where the accused was charged of "having made preparations to cause hurt, etc., committed housebreaking by night by entering into the building belonging to complainant and used as dwelling house in order to the commission of certain offence punishable with imprisonment to wit an offence of causing hurts etc. . . ." and there was no reference to and much less any definite allegation of any intention to commit adultery with any married woman in the charge and no allegation was made by any of the prosecution witnesses in their examination-in-chief that the accused had gone to the house that night for purpose of committing adultery; and the question of adultery with married woman was not in issue:

Held, that the accused could not be convicted of housebreaking with intention of committing adultery. [Para 48]

(b) Criminal P. C. (1898), S. 233 — Charge must be for distinct offence.

There must be a charge for every distinct offence and it must be formulated with precision. The precise charge framed is to be tried and tried separately, except in the cases mentioned in Ss. 234 to 236 and S. 239. [Para 17]

Annotation : ('46-Com.) Cr. P. C., S. 233, Notes 3 and 4.

(c) Penal Code (1860), S. 451—Adultery, ingredients of—Charge under S. 451—Facts to be proved —Onus.

To sustain a conviction for adultery, it must be established *inter alia* that sexual intercourse was committed without the consent or connivance of the husband, and to sustain a conviction under S. 451, Penal Code, for offence of house-trespass with intent to commit an offence, the offence being adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman : 19 All. 74, *Ref.* [Para 22]

The onus to show that there was no connivance or consent of the husband is on the prosecution. [Para 23]

(d) Criminal P. C. (1898), Ss. 237 and 537 — Applicability.

Where it is not a case of conviction for an offence other than the one for which the accused was charged, S. 237 has no application. The section does not cover the case of a conviction for another or more aggravated form of the same offence but for another offence. No prejudice is deemed to arise when conditions referred to in this section and S. 238 are fulfilled : 5 S. L. R. 16, *Ref.* [Para 28]

Annotation : ('46-Com.) Cr. P. C. S. 237 Note 2.

(Applicability of S. 238 indicated.) [Paras 30, 34]

(e) Penal Code (1860), S. 441 — Intention is necessary element.

Obiter : — Intention is necessary essential in the offence of criminal trespass and the charge should specify the intention. [Para 36]

(f) Evidence Act (1872), Ss. 105 and 106, 102— Scope of.

The burden of proving the existence of circumstances bringing the case within a general or special exception is no doubt cast upon the accused by S. 105 but this does not in any way absolve the prosecution of the burden laid on it by S. 102 so far as the entire "proceeding" is concerned. If at the close of the whole evidence, there is reasonable doubt as to the guilt of the accused, the benefit of that doubt should be given to the accused and he is entitled to be acquitted : (1935) A. C. 462, *Expl. and Foll.*; 26 A. I. R. 1939 Sind 209, 28 A. I. R. 1941 All. 402 (F. B.) *and* 24 A. I. R. 1937 Rang. 83 (F. B.), *Foll.* [Para 61]

Annotation : ('46-Com.) Cr. P. C. S. 237, Note 2.

(g) Criminal P. C. (1898), Ss. 225, 232 and 537— Applicability—Charge not irregular but conviction not warranted by charge—Sections, if apply.

Where the charge is quite in order, it cannot be said that there is an "error" in charge because the evidence for the prosecution is subsequently at the trial found to be false or insufficient to establish the charge. When conviction is had in such case for offence not included in the charge Ss. 225, 232 or 537 would not apply, for the reason that there is nothing irregular in the charge as such. [Paras 19, 20 and 25]

Cases referred:—

1. ('31) 54 Mad. 515 : 18 A. I. R. 1931 Mad. 231 : 131 I. C. 455 : 32 Cr. L. J. 749, Chinna v. Kesamma.
2. ('34) 35 Cr. L. J. 964 : 21 A. I. R. 1934 Oudh 281 : 149 I. C. 368, Baldeo Prasad v. Emperor.
3. ('38) I. L. R. (1938) 19 Lah. 462 : 25 A. I. R. 1938 Lah. 514 : 176 I. C. 410 : 39 Cr. L. J. 734 (F. B.), Mahomedyar v. Emperor.
4. ('95) 22 Cal. 391, Balmakand v. Ghansham Ram.
5. ('11) 12 Cr. L. J. 453 : 11 I. C. 797 (Mad.), In re Kurnam Seshayya.
6. ('01) 28 Cal. 434, Reily v. Emperor.
7. ('97) 19 All 74; Brij Basi v. Queen-Empress.
8. ('11) 5 S. L. R. 16 : 10 I. C. 168, Ganesh Krishna v. Emperor.
9. ('74) 11 Bom. H. C. R. 240, Reg. v. Chand Nur.
10. ('17) 44 Cal. 358 : 4 A.I.R. 1917 Cal. 824 : 35 I. C. 984 : 17 Cr. L. J. 424, Karalli Prasad v. Emperor.
11. (1900) 27 Cal. 990, Rahimuddi v. Asgar Ali.
12. ('09) 36 Cal. 865 : 4 I. C. 19 : 10 Cr. L. J. 471, Silajit Mahto v. Emperor.
13. ('14) 41 Cal. 743 : 1 A. I. R. 1914 Cal. 663 : 22 I. C. 766 : 15 Cr. L. J. 190, Mahomed Hassain v. Emperor.
14. ('12) 16 C. W. N. 696 : 14 I. C. 320 : 13 Cr. L. J. 224, Jharu Sheikh v. Emperor.

15. ('06) 33 Cal. 295 : 3 Cr. L. J. 153, Poresh Nath Siroar v. Emperor.
16. ('85) 11 Cal. 106, Behari Mahton v. Queen-Empress.
17. ('22) 26 C. W. N. 344 : 71 I. C. 247 : 24 Cr. L. J. 119, Hajari Sonar v. Emperor.
18. ('01) 23 All. 82, Queen-Empress v. Kanglee.
19. ('15) 37 All. 395 : 2 A. I. R. 1915 All. 178 : 29 I. C. 67 : 16 Cr. L. J. 435, Mulla v. Emperor.
20. ('20) 7 A. I. R. 1920 Pat. 590 : 56 I. C. 592 : 21 Cr. L J. 496, Raghu Singh v. Emperor.
21. ('21) 8 A. I. R. 1921 Pat. 217, Jadav Mahton v. Emperor.
22. ('35) 22 A. I. R. 1935 Pat. 129 : 155 I. C. 629 : 36 Cr. L. J. 829, Nihora Kahar v. Emperor.
23. ('28) 22 S. L. R. 466 : 16 A. I. R. 1929 Sind 17 : 111 I. C. 459 : 29 Cr. L. J. 875, Wali Mahomed v. Emperor.
24. (1935) 1935 A. C. 462 : 104 L. J. K. B. 433 : 153 L. T. 232, Woolmington v. Director of Public Prosecutions.
25. ('36) 14 Rang. 666 : 24 A. I. R. 1937 Rang. 83 : 168 I. C. 193 : 38 Cr. L. J. 524 (F. B.), Emperor v. U Damapala.
26. ('37) 41 C. W. N. 65 : 23 A. I. R. 1936 P. C. 289 : 164 I. C. 545 : 37 Cr. L. J. 963 (P. C), Stephen Seneviratne v. The King.
27. ('40) I. L. R. (1940) Kar. 249 : 26 A. I. R. 1939 Sind 209 : 184 I. C. 474 : 41 Cr. L. J. 28, Shewaram v. Emperor.
28. ('41) I. L. R. (1941) All. 843 : 28 A. I. R. 1941 All. 402 : 197 I. C. 525 : 43 Cr. L. J. 177 (F. B.), Emperor v. Parbhoo.

K. H. Nagrani — for Appellant.
Fatehchand Assudomal, Advocate-General of Sind — for the Crown.

Judgment.— This criminal appeal and confirmation case comes before me in consequence of a difference of opinion between my brothers Tyabji and Meher.

[2] The facts of the case, the findings of the Court below and the main points taken in the Appellate Court are set out in the judgment of Tyabji J. as follows :

"The appellant Waroo s/o Juman has been convicted by the Additional Sessions Judge, Larkana, at Hyderabad of offences under Ss. 458, 324 and 302, Penal Code. He has been sentenced to death under S. 302, to 12 months rigorous imprisonment under S. 458 and 18 months rigorous imprisonment under S. 324. He has appealed and the case also comes up before us for confirmation of the death sentence passed.

The offence, it is alleged, took place after mid-night during the early hours of 29-12-1945, at Hala, and the facts of the case are as follows: Deceased Misri lived in a house, consisting of a covered hall with a court-yard in front of it, with his wife Khatul, and three sons of Khatul by her former husband, Ali Mahomed. Of these, Abdulla and Kassim were in Misri's house on the night in question. Mussamat Wasul, a daughter of Khatul and Alimahomed, had also been staying for some days in the house. Alimahomed, the previous husband of Khatul, had died many years ago, and after his death Khatul had married Misri some 8 or 10 years ago. Thereafter Khatul and her sons lived in Misri's house. Misri had a cow which used to be kept in his courtyard. To the west and adjoining Misri's house was a house belonging to Jurio, who was a brother of Alimahomed and had died about a year before the incident. Jurio's house, as the sketch (Ex. 6) shows, consisted of two rooms, a 'soofo' (hall) in front of the two rooms and a court-yard in front of the hall. Misri's house was divided from Jurio's house by a wall, but there was an open space between the courtyard of Misri's house (called "verandah" in Ex. 6) and the court-yard of Jurio's house. The only entrance to Jurio's house was through the court-yard of Misri's house, which was to the south of the 'hall' in which the inmates of Misri's household lived, and the only entrance to Misri's house from the outside was through a door on the eastern side of the court-yard in front of Misri's house. The result was that any one wishing to go to Jurio's house had to enter through the door leading to Misri's court-yard and pass across the court-yard in front of Misri's house and then enter the court-yard of Jurio's house. Jurio's house was lying vacant. The tapedar in his deposition described Jurio's house in Sindhi as "sunjo" and "Wiran," (deserted and in ruins) which was inaccurately recorded in English : "not occupied by any one." Abdulla stated : 'At the time of this incident no one was living in his (Jurio's) house.' Wasul, (Ex. 11) described the house as 'Jurio's unoccupied house.' The Sindhi word actually used by Wasul, which was translated as 'unoccupied,' was 'phital,' which means in ruins, abandoned, deserted. On the death of Jurio, Jurio's daughter, who was 12 or 13 years old, became the owner of Jurio's house. At the time of the incident she was living with her mother, who had remarried, at Old Hala. Abdulla stated that the house of Jurio was 'in our possession' at the time of the incident. To the west of Jurio's house was the house of one Hamid Memon. There was a wall dividing Jurio's house and Hamid's house, which was 5½ feet high. To the south of the houses of Misri and Jurio was the house of Saleh. The southern and the eastern walls of the court-yard of Jurio's house divided the houses of Jurio and Saleh, and this wall was 6 feet and 10 inches in height.

The inmates of the house of Misri, namely Misri, Khatul, Abdullah, Kassim and Wasul, went to sleep in their house on the night of 28-12-1945, after closing the door by which one could enter into Misri's house. Khatul was waked up at about midnight and saw something as a result of which she waked up her husband Misri and her sons Abdullah and Kassim. Khatul has described what happened in these words :

'At midnight I woke up to give grass to the cow. I took the lamp and went into the court-yard. I saw my daughter in our court-yard. She had her child on her lap. I saw 4 persons in front of the room of Jurio's house. I enquired from my daughter what it was She made no reply and went to the hall of our house. I followed her there. I woke up Misri, Kassim and Abdullah'

Wasul (Ex 11) in her examination-in-chief, after stating that she had been intimate with the appellant about a year and a half before but had given up that connection some 5 or 8 months before the incident, explained the circumstances in which her mother Khatul woke up on that night and called out her brothers and Misri, in these words :

'At about 2 a. m. accused Waru came and woke me up and asked me to go out to the court-yard. He then went out to the court-yard. I took up my boy who was 1½ year old and followed him to the court-yard of Jurio's house. I saw accused 2, 3 and 4 there. Waru said that he had brought these three men to take me away. At that time my boy wept and I told Waroo that I would give him reply after making the boy stop from crying. I then went to the court-yard of my house. At that time I saw my mother in the court-yard with the lamp. She inquired what it was. I made no reply. My mother went and woke up Misri, Abdullah and Kassim and brought them. We then went to Jurio's court-yard where . . . .' What happened thereafter was described by Abdullah, Kassim, Khatul and Wasul in very similar

terms. They alleged that Misri, Abdullah and Kassim, on receiving the information from Khatul, immediately ran up to the court-yard of Jurio's house unarmed and carrying a lamp with them. There they saw the appellant and three of the relations of the appellant, Sono s/o Juman, Allahdino s/o Saleh and Mahomed s/o Kadirbux, of whom all except the appellant on seeing the witnesses, jumped over the wall into the house of Saleb. The appellant also tried to run away, but deceased Misri, who was ahead of Abdullah and Kassim, reached and tried to catch the appellant, whereupon the appellant gave Misri two blows with a hatchet as a result of which Misri fell down seriously injured. Abdullah then tried to catch the appellant, who also struck Abdullah with the hatchet. Then Abdullah with the assistance of Kassim caught hold of the hatchet, which was in the hands of the appellant, and wrested it from the appellant. On this the appellant took out a knife from the folds of his salwar and struck Abdullah and Kassim with the knife. Thereupon Abdullah struck the appellant on the head with the hatchet, which Abdullah had snatched from the appellant. After this the appellant scaled over the wall, jumped into the compound of Saleh and thereafter ran away, getting out of Saleh's compound by jumping over the wall of Saleh's compound on the eastern side. Witness Hamid, whose house was to the west of Jurio's house, stated that he was sleeping in his house, when he heard cries coming from Misri's house, whereupon he got up and saw everything that took place in Jurio's courtyard, from the time that Misri ran up to the appellant, up to the time when the appellant ran away. Witness Waru Sand (Ex. 18) lived in a house some 150 paces to the east of Misri's house. He stated that he woke up on hearing cries, and, taking up a hatchet, ran towards Misri's house and saw the appellant, as he jumped over the eastern wall of Saleh's house, and left Saleh's compound. This witness Waru Sand, stated that he did not see any weapon in the hand of the appellant when he ran away. These witnesses, Hamid, and Waru, immediately went to Misri's house where they were told all that had happened. A little later Abdullah went to the Hala Police station, which was a short distance away, and made a report about the incident at 3-30 a. m. in which he stated :

'The complaint is that I with my relations, uncle Misri Kassim and other members of my family after closing the outer gate and locking it at about 10 p. m., went to sleep. Around this house there is a small compound of Katcba bricks. At about 2 at night my mother Musammat Khatul got up to give fodder to cow. She saw one person near Sufa in the compound of house of my deceased uncle Jurio's house which was lying vacant. She informed me. Upon this I informed my uncle Misri and brother Kassim. After taking the lantern which was burning in our house we all three went to the thieves. We saw three persons coming out of the vacant sufa (main hall) of my uncle Jurio's house and tried to run away. The sufa has no door. In the light of the lantern we identified the three persons. They were Sono son of Juman, Saleh son of Kassim and Allahdino son of Saleh Junani and lived nearby. These three ran away by jumping over the wall. There remained Waru who had been caught by our uncle Misri. We two brothers had also reached the place. In the meantime Waru who had hatchet in hand gave a hatchet blow to uncle Misri which fell on his neck. Due to this blow uncle Misri fell down. We cried 'thief thief.' Kassim my brother tried to catch hold of Waru. Waru tried to strike hatchet blow to him also but my brother caught his hatchet and we snatched hatchet from him. Waru then gave 2-3 injuries of a knife which was in his hand to my brother. He also gave me one injury on my shoulder, with the knife. My brother also due to injuries fell down. I also gave one hatchet blow to Waru. By this time Hamid Memon on our cries came in our house by jumping over the wall. Seeing him coming Waru also ran away by crossing the wall. Hamid saw him scaling. After a short time Waru Sand also came there. On being asked by Waru Sand, I and Hamid Memon narrated the story of thieves. The condition of uncle Misri and brother Kassim is serious and they are lying on the scene of offence. I went to Fateh Mahomed my brother-in-law who lives here at Hala and told him about the occurrence and thereafter I have come here to lodge a report. I am making this report. Investigation may be held. The hatchet secured from Waru accused is also lying on the scene of offence. Nothing has been stolen.

It may be noted here-that there is no reference to Wasul, or to any intimacy between the appellant and Wasul in this report, in which the allegation, against the four offenders, was that they had entered Jurio's house for the purposes of committing theft, that they had been seen there before anything was stolen, that three of the offenders had then run away, but the fourth, the appellant who had been caught by Misri, had caused injuries to Misri, Abdullah and Kassim.

After recording the report, the Head Constable in charge went to the scene where he found Misri lying in a very serious condition. Misri died very shortly thereafter as a result of his injuries. Kassim and Abdullah were sent to the Hala dispensary for treatment. Two of the persons mentioned in the first information and one Mahmood s/o Kadirbux were arrested in their houses at 5 a. m. The appellant was not found in his house and the Head Constable on receiving information that the appellant had gone to his brother who lived at Khandu village, went to Khandu. On the way, when the Head constable was some 2 miles away from the scene of offence, he met the appellant, who appeared to be coming from the direction of Khandu. The appellant had an injury on his head and was wearing a shirt which was blood-stained. The Head constable then arrested the appellant and secured the shirt. The appellant then took the police and mashirs to Khandu village where he produced a pair of blood stained trousers and socks, which were also secured by the Head constable. The appellant was brought back to Hala by 9-30 or 10 a. m. and produced before the Sub-Inspector, who took charge of the investigation. The Sub-Inspector then proceeded to the scene of offence and made a mashirnama. A blood-stained hatchet, alleged to be the hatchet used by the appellant, was produced before the Sub-Inspector and was secured by him. The Sub-Inspector also found two keys lying at the scene in Jurio's courtyard. On visiting the house of the appellant later two locks were secured from the house and it was found that the keys secured at the scene fitted them.

The Medical evidence in the case shows that Misri had two injuries:

1. A curved incised wound $1\frac{1}{2}'' \times \frac{1}{2}''$ skin deep on the left angle of mandible.

2. An incised wound $4\frac{1}{2}'' \times 2''$ cutting the muscles and blood vessels of the 4th and the 5th cervical vertebrae extending from the middle part of the cervical part of the left side vertebral column up to 1" above the junction of the middle third and the inner third of the left clavicle.

The second injury which was on the neck was clearly sufficient to cause death, and there could be no question about this injury having actually caused the death of Misri.

Witness Kassim had two incised wounds on his shoulders, and one, an incised wound $\frac{3}{4}'' \times \frac{1}{4}'' \times 1''$ on the right scapula and the other $\frac{3}{4}'' \times \frac{1}{4}''$ skin deep on the left scapula; and a longitudinal contusion 6" × 10" on the left lumber region. The doctor who was examined

(Ex. 30) stated that the two incised wounds could have been caused by a hatchet and the contusion would have been caused by a blunt weapon such as a lathi.

Witness Abdullah had one incised wound $1\frac{1}{2}'' \times 2'' \times 2''$ on his left shoulder, which, in the opinion of the doctor "had been caused by some weapon such as hatchet."

The appellant had an incised wound $1\frac{1}{2}'' \times \frac{1}{4}''$ cutting the bone on the left parietal region, which was caused, in the opinion of the doctor, by a "sharp weapon such as hatchet." The doctor described this as a very serious injury, which was 'sufficient in ordinary course of nature to cause death,' and which would require more than three weeks to cure.

The charge framed by the Committing Magistrate against the four accused in this case was as follows: 'I, Harbuxrai Radhakrishin, Magistrate First Class, hereby charge you (1) Waroo Juman Junani, (2) Sono Juman Junani, (3) Allahdino Saleh Junani and (4) Mahmood Kadir Bux Junani as follows: That you, on or about the 29-12-1945, at Hala New, having made preparations to cause hurt, etc., committed house-breaking by night by entering into the building belonging to the complainant Abdullah and used as human dwelling in order to the commission of certain offence punishable with imprisonment to wit an offence of causing hurts, etc., and that you Waroo did commit murder by knowingly causing death of Misri and caused (voluntarily) hurts with sharp weapon such as hatchet to Abdullah and Kassim, and thereby committed an offence punishable under Ss. 302, 324 and 458, Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the Court of Sessions, Hyderabad, on the said charge.

Dated this 26th day of February 1946.'

This charge was not amended and was the charge on which the appellant and the other accused were tried before the Sessions Court.

The three other accused who were tried along with the appellant pleaded that they were not guilty as they were not present at the time of the alleged incident. The appellant in his statement before the Committing Magistrate attempted to show that the incident had taken place not in Jurio's courtyard, but on the street near the appellant's own house, a considerable distance away, where Kassim, Misri and Abdullah had gone in order to fight with the appellant, and where Abdullah had struck him with a hatchet. The appellant explained that Wasul was intimate with him and had gone to his house on that day. In the Sessions Court the appellant admitted that he had gone to Jurio's house on receiving a message from Wasul. His account of what took place was as follows : 'Wasul was intimate with me since 6 or 7 years. On the day of this incident she had sent me a message to meet her in Jurio's house. I went at 10 P. M., and was standing in front of the house of Saleh who is my brother-in-law, when Misri and Kassim came out from their house and fought with me. While grappling with each other I, Misri and Kassim fell inside the courtyard of Misri's house. I got up when Abdullah came and gave me a blow and Misri got on me and we fell down. When Misri was on my top he received an axe blow and he called out 'You killed me.' I do not know who gave him that blow. I was under him. I then got myself released from his hold and climbed over the wall between Jurio's house and Saleh's house and went to Saleh's house and from there I ran away to the Khad and fell down there after I had run a short distance. I became unconscious. In the morning I recovered consciousness. I then went to my house, saw the Jamadar and other police there. The Jamadar arrested me and secured my shirt, trousers and socks, articles K and M. I had no weapon. I did not cause any injury to any one. I have nothing more to say.'

The first information in the case and the charge framed by the Committing Magistrate have already been set out above. The intention with which the house, in which criminal trespass was alleged to have been committed, was entered, was stated in the charge as: "in order to the commission of certain offence punishable with imprisonment to wit an offence of causing hurts." It has already been pointed out before that the first information in substance showed that an offence of criminal trespass had been committed by four persons, who had entered the compound of the house of Jurio in order to commit theft, but who had run away, on being seen, before any theft had actually been committed. The evidence given by the prosecution witnesses in the case was entirely in accordance with these allegations. For instance, witness Abdulla stated : 'We went to the courtyard of Jurio's house, which adjoins our courtyard, taking the lamp with ourselves and saw 4 men there. They were present 4 accused in Court. Waru and Sono had axes, while Allahdino and Mahmood had ringed lorhs. We raised cries of 'thief thief' and on that Sono Allahdino and Mahmood ran away to Saleh's house by jumping over the intervening southern wall, Misri tried to catch Waru who . . . . .'

There was no allegation in Abdullah's evidence of the appellant or any of the other accused having gone to the house, in which criminal trespass, it was alleged, had been committed, in order that any one of the accused should commit adultery with any married woman. As a matter of fact this suggestion was repudiated by Abdullah in his examination-in chief, and he stated : "I was not aware of Wasul's intimacy with Waru." Similarly witness Kassim stated : 'When we went to Jurio's compound, I saw 4 thieves. They were the present four accused in Court. When we proceeded 2 or 3 paces towards them, accused 2, 3 and 4 jumped over the southern wall and ran away to Saleb's house. Misri was ahead. As he proceeded . . . . .'

He also stated: "I do not know if Wasul was intimate with accused Waru." Khatul (Ex. 15) made an evasive reply when she was cross-examined with regard to the intimacy between the appellant and Wasul, when she stated : "I had heard a rumour that Wasul was intimate with Waru. I heard this about a month or two before this incident." It is clear from the facts, that (1) there was no reference to, and much less any definite allegation of, any intention to commit adultery with any married woman in the charge, and (2) that no allegation was made by any of the prosecution witnesses in their examination-in-chief that the appellant had gone to Jurio's house that night for the purpose of committing adultery, that it was not the prosecution case that this was the intention of the appellant upon which the prosecution relied for the purpose of proving the charge against the appellant. On the contrary it was the appellant, who, in order to disprove the prosecution allegation, as set forth in the charge, that the appellant and the three other accused had gone that night to the house in question in order to cause hurt, tried to prove that he had not only gone that night in order to meet Wasul, but had done so by appointment with Wasul. The defence got Wasul to admit : "Waru used to meet me in Jurio's unoccupied house at night secretly." The defence also obtained an admission from witness Hamid: "About 20 days before this incident Khatul had told me that I should speak to Waru not to come to their house. Wasul was intimate with Waru since 2 or 3 years." This statement also shows that Wasul had been living in Misri's house for a much longer period than 2 or 3 days before the incident. From the notes of arguments kept by the learned Judge (Ex. 41) it is clear that the Assistant Public Prosecutor, who appeared for the Crown in the case, relied on the intention set out in the charge, and argued, that it was proved that the

intention with which the accused had committed criminal trespass was "to cause hurt." It is also clear from the notes of the arguments of the advocate who appeared on behalf of the defence (Ex. 42), that the advocate argued that there was no criminal trespass, because even according to the prosecution (witnesses) the appellant had gone to meet Wasul by invitation.

One other fact with regard to the evidence at the trial deserves to be mentioned. One of the offenders mentioned in the first information was "Saleh s/o Kassim." During the investigation Mahmood s/o Kadirbux was substituted for Saleh s/o Kassim. The explanation given by Abdullah was: 'There I have given the name of Saleh which is a mistake for Mahmood. In fact Saleh was not there and Mahmood was there. My head was reeling at the time when I made that statement.'

The other witnesses similarly implicated Mahmood and not Saleh. Accordingly Mahmood and not Saleh was challaned and tried along with the appellant.

The learned Sessions Judge came to the conclusion that the other accused, who were tried along with the appellant, were not at all present at the time of the incident and took no part in it, and he held: "It appears that Abdullah falsely implicated them, because they are near relations of accused Waroo. This sort of thing is not unusual." It may be mentioned that it was not only Abdullah who implicated the other three accused, but also Kassim, Khatul and Wasul. With regard to the case against the appellant, the learned Judge was of the opinion that the appellant had been clearly proved to be guilty of the offences with which he was charged. In arriving at this conclusion, the learned Judge accepted the defence allegation, that the appellant had gone that night to meet Wasul by previous appointment, for the learned Judge concluded: 'She (Wasul) admits that she was intimate with Waroo but had given up the connexion with him about a few months before this incident. I do not believe her on that point. To me it appears that she was still carrying on her love affairs with him and accused Waroo had come to meet her by previous appointment. In cross-examination she says that Waroo used to meet her in Jurio's house at night secretly and her relations did not know of it. It appears that on the night of this incident also he had come to meet her there and her child started crying, her mother woke up and saw them and informed her husband and sons who went and tried to catch Waroo and in the scuffle, Waroo first used his axe and when it was snatched from him, he took out a knife and caused injuries with it to them and then ran away.'

With regard to the question whether the appellant had committed an offence of house-breaking, the learned Judge concluded: 'I have no doubt in my mind that accused Waroo went to Jurio's house by climbing over the wall between Saleh and Jurio's house. The only entrance to that house is from the courtyard of Misri's house. As accused Waroo went to meet a married woman Wasul who was living with her brothers and mother at that time, who were surely not a party to this intrigue of hers, his offence would clearly be of housebreaking.'

It is clear that in the opinion of the learned Judge the intention of the appellant, which made his entry into Jurio's house a case of criminal trespass, was his intention to meet a married woman. On behalf of the appellant the words used 'to meet a married woman,' are stressed, and it is argued that the learned Judge did not even find that the intention of the appellant was to commit adultery with a married woman. But it is clear that that was what the learned Judge meant. As it was admitted that the appellant was attempting to run away and was not allowed to do so by Misri, who tried to catch him, in the first information it was stated that Misri had caught the appellant before the appellant struck Misri—the question, whether the appellant had the right to resist arrest in the exercise of the right of private defence, necessarily arose. The learned Sessions Judge dealt with this question in this manner: 'It may be mentioned here that some of the prosecution witnesses very foolishly tried to make out a case that Misri was struck before he had made any attempt to catch accused Waroo. Their original version, however, as shown in the first report and brought out in cross-examination from the police statements, is that Waroo was trying to climb over the wall when Misri reached him and on that he struck Misri. I think that is the correct version. This, however, does not give Waroo any right of private defence. He was a trespasser and he cannot plead right of private defence.'

With regard to the details of what actually took place, when Misri, Abdullah and Kassim approached the appellant and attempted to prevent him from escaping, the learned Sessions Judge accepted the evidence given by the witnesses in its entirety. He accepted their allegation that Misri, Abdullah and Kassim were wholly unarmed. He accepted their version that it was after the appellant had struck down Misri that Abdullah, who was unarmed, snatched the hatchet from the appellant. He accepted their allegation that the appellant thereafter took out a knife and caused injuries to Abdullah and Kassim with the knife, and that it was by way of self-defence that Abdullah then struck the appellant with the hatchet, which Abdullah had snatched from the appellant. The learned Judge's conclusion on these matters was stated by him in these words: 'We have had in evidence that Misri was not armed with any weapon. It appears that these three persons at dead of night hearing of Waroo having come to their house left their beds hurriedly and went to Jurio's house and tried to catch him. None of them appears to have been armed with a weapon, otherwise Waroo would have surely received some injuries besides the one which Abdullah gave him with his own hatchet after having snatched it from him. I am not prepared to believe the defence theory that in the dark either Abdullah or Kassim caused injuries to Misri when they actually wanted to hit Waroo. I have no doubt in my mind that the neck injury to Misri was caused by Waroo. His offence would clearly be that of murder. As regards the injuries caused to Abdullah and Kassim, there can also be no doubt that these injuries were caused to them by accused Waroo who after the axe was snatched from him took out a knife which he was carrying. The offence with regard to these injuries would fall under S. 324, Penal Code. It may be mentioned here that besides the incised injuries, Kassim had received one contused injury also which appears to have been caused with a blunt weapon. The defence, however, attached no importance to it and no questions were asked about this injury from Kassim. At the time of arguments I pointed out this to the Assistant Public Prosecutor in charge of prosecution, and he suggested that this injury may have been caused by a fall on some hard substance lying there. Considering the entire evidence I have no doubt that accused Waroo is guilty of having committed offences punishable under Ss. 302, 324 and 458, Penal Code.'

The learned Judge considered that the appellant was clearly guilty of murder, and passed the sentence of death under S. 302, because 'the evidence does not show that there was any mitigating circumstance.' He also passed the sentences under Ss. 324 and 458, which have already been mentioned before.

Mr. Nagrani, the learned advocate who appears on behalf of the appellant in this case, has in the main argued (1) that the learned Judge went beyond the charge

when he found that the appellant was guilty because his intention was 'to meet a married woman,' which was not the intention in the charge or alleged by the prosecution witnesses; (2) that on the evidence in the case the conviction for house-breaking under S. 458 could not be maintained; (3) that the appellant had acted in the exercise of the right of private defence; and (4) that he had not exceeded his right. He argued, therefore, that the appellant had committed no offence."

[3] With regard to the first argument referred to in the last preceding paragraph, Tyabji J. was of the view that since the appellant (and others) had been charged with house-breaking in order to the commission of the particular offence of causing hurt, he could not properly be convicted of house-breaking with the intention of committing adultery with Wasul. My learned brother summed up his discussion on this aspect of the case in the following words:

"The appellant is entitled to contend that, as the prosecution case stood, he was not at all called upon to show that Wasul was in fact not married to Phatu. It was enough for him to show that he had gone to Jurio's house by appointment with Wasul, and that the intention with which he was charged had not been proved by the prosecution. On the other hand, if it had been a part of the prosecution case that the appellant had gone to Jurio's house in order to commit adultery with Wasul, who was lawfully married to Phatu, it would have been necessary for the prosecution to allege and prove the marriage strictly as part of their case. The appellant is entitled to say that if he had been charged with such an accusation, it would have been incumbent upon him to meet it, and he would then have proved that Wasul was not in fact married to Phatu. In view of the prosecution evidence as actually given and the charge framed, it was quite unnecessary for the appellant to disprove the allegation that Wasul was married to Phatu. It was made quite clear that the marriage was disputed. The case could not, therefore, be dealt with as if the marriage was admitted or an undisputed fact. In my view there is great force in this argument. It may or it may not be true that Wasul was the married wife of Phatu. The marriage was not admitted and formed no part of the prosecution case, either as stated in the charge or as presented by the prosecution witnesses. Had I been otherwise satisfied that the appellant was guilty of the offences of which he has been convicted, I would still have regarded this defect in the charge and in the presentation of the Crown case as a very grave one, and the convictions, in so far as they were based on the allegation, that the appellant's intention was to commit adultery, as illegal, and would have considered it necessary to order a retrial. I do not think that an essential element in a crime, without proof of which the conviction for the crime cannot be maintained, which was not admitted but was clearly disputed, should be held to be proved against an accused person, in the manner done in this case, without the accused having clear notice of the fact that it was alleged against him as part of the offence with which he was charged, and for which he was being tried. The grave prejudice likely to be caused by such a procedure is, I think, quite obvious."

[4] With regard to the second point urged on behalf of the appellant, that on the evidence in the case the conviction for house-breaking could not be sustained. Tyabji J. was of the view that no house-trespass had been proved because Jurio's house was not a building used as a human dwelling at the time of the offence. He emphasised that the terms of S. 442 must be satisfied, and came to the conclusion that since Jurio's house was unoccupied and in a state of dilapidation, it was not a building used as a human dwelling at the material time. He was further of the view that Jurio's house and the courtyard was not properly in the possession of Misri within the meaning of S. 441, Penal Code. In this connection he distinguished the right to possession from actual possession. For these reasons, Tyabji J. came to the conclusion that the offence of house-breaking was not proved.

[5] On the third and fourth points urged by Mr. Nagrani, my brother Tyabji, was of the view that the appellant had acted in the exercise of the right of private defence. This conclusion is based on a finding that no house-trespass having been proved, the prosecution witnesses Misri, Abdullah and Kassim had no right to arrest the appellant, and that the appellant was entitled to resist arrest and to defend himself; and that in the circumstance of the case the appellant had reasonable ground for apprehending that he would be grievously hurt or murdered and had, therefore, not exceeded his right.

[6] On the facts relating to this aspect of the case Tyabji J. was of the opinion that at least one and probably more of the prosecution witnesses had been armed with a hatchet in trying to apprehend the appellant. I would refer on these points to the following observations of Tyabji J.:

"Further I agree with the learned advocate for the appellant that the appellant's right of private defence in this case was not merely that of a person who was under a risk of being unlawfully arrested for the purpose of being taken forthwith to a police officer or to a police station by private persons, who intended nothing more. In considering the extent of the appellant's right, it seems to me that it would be wholly (wrong?) to overlook the realities of this case, if one were to deal with this case on that footing. Clearly that was not the purpose which Misri, Abdullah and Kassim had in mind that night, when they made the very determined effort at grave risk to themselves to catch the appellant (who was armed with a hatchet and was ready to use it), and did not desist until Misri was struck down, and Abdullah and Kassim were both injured. For reasons which I shall presently explain, it seems to me to be probable that at least one of the witnesses, and probably Misri, was armed with a hatchet, and inflicted the extremely dangerous wound upon the appellant. The passions that are aroused and the dangers that a karo runs when caught with a kari in this Province hardly need to be emphasised. In my view the appellant clearly was in great danger of suffering death or grievous hurt at the hands of Misri and his companions from the moment when they attempted to catch him, and it is clear that in spite of all that the appellant could do, by using his hatchet, he was not able to get away without receiving a very grave injury, which might easily have been fatal. It is clear that the apprehension of danger

to the appellant's life continued right up to the moment when he was able to clear the wall and jump into Saleh's compound and thereby save himself . . . .

I also consider the account given to be an extremly improbable one intrinsically. If Abdullah and Kassim were able to wrest the hatchet from the appellant, after the appellant had struck down Misri, how was it that they did not then catch the appellant? I find it equally impossible to believe under these circumstances that after the hatchet was wrested from his hands, and when Abdullah and Kassim were right upon the appellant, the appellant was still able to take a knife out of the folds of his shalwar, and use it against Abdullah and Kassim who were now armed with hatchet, and that the appellant should have been able, after receiving a severe hatchet blow on the head, to get away from Abdullah and Kassim after scrambling over a 6'—10" wall. The hatchet injury received by the appellant, the injuries caused to Abdullah and Kassim, and the escape of the appellant are facts which cannot, in my view, be explained credibly on the assumption that the prosecution witnesses were unarmed, and were able to wrest the hatchet from the appellant. On the facts proved, it seems to me to be far more probable that Misri and/or his companions were also armed, that at least one of them had a hatchet, and that the injuries inflicted upon Misri, Abdullah and Kassim were all inflicted with a hatchet by the appellant. The story of the snatching of the hatchet, and of the use of a knife, in the manner alleged, appear to me to be pure inventions, calculated to show that the prosecution witnesses were unarmed, and had only struck the appellant with the appellant's own hatchet in self defence. The appellant was able to disable Misri who, I think, was the most likely person to have had a hatchet and to have struck the appellant' and was then able to keep Abdullah and Kassim sufficiently away, by striking at them with his hatchet, to be able to take an opportunity to make good his escape . . . . . That the prosecution witnesses should not like to admit that they were also armed, and had struck the appellant is exactly what one would expect. When faced with the fact that they had to explain how the appellant had received the very serious hatchet wound, which in fact was inflicted upon him, the first thing that was likely to occur to them, was to allege that they were themselves unarmed, that they had caused the injury to the appellant with the appellant's own hatchet after it had been snatched from him, and that they had done nothing more than act in self-defence, and explain the other circumstances accordingly. In order to make up a story of that kind, it was obviously necessary for them to allege that even after the hatchet had been snatched away from the appellant, the appellant had acted in such a way as to compel them to strike the appellant with the hatchet in self-defence. The story that the appellant, after his hatchet had been snatched, had taken out a knife and struck Abdullah and Kassim, had thus necessarily to be a part of the story, justifying the hatchet blow inflicted on the appellant. Once it is clear, as I think it is, that Misri and his companions also had at least one hatchet and used it, it is impossible in the circumstances of this case to say who was more likely to have struck first, the appellant or Misri or one of his companions. My conclusion, therefore, is that the version given by the prosecution witnesses cannot be accepted ; because the witnesses are unreliable and their story is improbable. The appellant had a hatchet, and also at least one of the prosecution witnesses. It seems to me to be clear that the appellant was under a reasonable apprehension that at least grievous hurt was likely to be caused to him from the moment when Misri and his companions approached him and attempted to catch him. The appellant was able to disable Misri, and keep Abdullah and Kassim at a distance only by the use of his hatchet. It is clear that he was unable even so to avoid a very serious injury being inflicted upon himself. It is clear that the appellant only wished to get away, and did get away by jumping over the wall as soon as he was able to do so. I do not think that the appellant did anything more than was necessary to save himself. There is no reason whatever to think, and it is not even suggested, that after he had disabled his opponents and assured his own safety, he had inflicted any further harm by way of retaliation. In my view, therefore, the appellant did not exceed his right."

[7] On these findings, Tyabji J. was of the opinion that the appellant is entitled to acquittal on both charges. He considered the question of a retrial on the house-breaking charge and came to the conclusion that it was inexpedient in the circumstances of the case to direct a retrial.

[8] Meher J. was of the view with regard to the first two arguments of Mr. Nagrani, that relating to the charge and also to the propriety of the conviction for house-breaking, that the charge was unexceptionable, that even though it specified that the intention of house-breaking was to cause hurt, the appellant was properly convicted on the finding that his intention was to commit adultery with Wasul, and that, on the facts, house-breaking with intention to commit adultery was proved. He was further of the view that even assuming that there was any defect in the charge or that the finding as to the intention was at variance with the specific intention imputed in the charge, there had been no prejudice to the appellant, and the defect was, therefore, immaterial.

[9] In arriving at these findings, Meher J. thought that the story told by the prosecution witnesses, except as to the presence of the three accused who were acquitted, was substantially true. He thought the witnesses Abdullah, Kassim, Wasul and Khatul were substantially corroborated by the evidence of Hamid and Waroo Sand, who in his opinion were witnesses to be relied upon. The learned Judge had no doubt that in the circumstances of the case house-breaking had actually been proved as Jurio's house and the court-yard were, at the time of the offence, in the possession of Misri.

[10] I would refer to the following observations of Meher J.:

"On that night Misri was in actual possession of the room and courtyard of Jurio's house in which there was property, and the entrance to which could only be effected through the closed door of Misri's house. I do not think it necessary to go into the case-law whether possession for the purposes of S. 441, Penal Code, may include constructive possession, for I am of the opinion for the reasons given above, that Misri was in actual possession of the whole house. The indicia of actual possession are not actual physical presence in every part of the house. Corporeal property is in a person's possession when he has such power over it that

he can exclude others from it, and intends to exercise, if necessary, that power on behalf of himself or some other person.

In the present case, the entrance to the portion of the building known as Jurio's house was closed at night by closing from inside the door of the court-yard of Misri's house. Assuming, however, for argument that Misri was not in possession of Jurio's house, still the act of the appellant would amount to house-trespass, even though Jurio's daughter was away on that night. It is not necessary to constitute trespass into a house used as human dwelling that on that particular night it must have been used as a human dwelling. Can it be said that house-trespass cannot be committed in a house because the owner has locked it and gone to a hill station for two months, or because a landlord has not been able to find a tenant after the last tenant left. In *R.* v. *Kirham* (quoted in Russel on Crimes, p. 748, Edn. 9) it was held that the offence of stealing in a dwelling house had been committed, although the owner and family had left six months before, having left furniture and intending to return.

A point is made by the learned advocate for the appellant about a vernacular word used by only one witness (the woman Wasul) in referring to Jurio's house as "phital" which may mean deserted or in ruins. The learned Judge translated it as "Jurio's unoccupied house." I have no doubt that the learned Judge, whose mother tongue is Sindhi, understood correctly what the witness stated and translated it correctly. The other witnesses and the tapedar have referred to it as unoccupied. It is true that a dilapidated house which is not used as a human dwelling nor for the custody of property would not come under the definition of S. 442, Penal Code. The mashirnama shows that in Jurio's courtyard, one foot from the scene of offence where there was a pool of blood, there was a cot on which there were blood stains; three paces from there was the entrance to the hall of Jurio's house in which there were one cradle, one box and other household things, and in the inside room there were jars and a jar stand. Can it be said that this was house not used as a human dwelling or even a place for the custody of property? Would theft of any of these articles not amount to theft in a building used as a human dwelling or a place for the custody of property within the meaning of S. 380, Penal Code because the legal owner, Jurio's daughter, was away that night, though the building was in the actual possession of Misri, and the entrance to it was closed from inside by Misri's people.

In the case reported in 54 Mad. 515,[1] it was held that the offence of criminal trespass may be committed even when the person in possession of the property is absent, provided that the entrance into the property is done with intent to do any of the acts mentioned in the section. In that the learned Judge stated: "Can it be pretended, if a man in Madras locks his house and goes for a walk to the beach and comes back a few minutes later, that anyone in his absence in circumstances from which an intention to annoy may be otherwise drawn cannot be guilty of criminal trespass because he was absent? The proposition has only to be stated to show how absurd the result would be if that were the law."

A similar view has been held by the Oudh Chief Court, 35 Cr. L. J. 964.[2] In the Full Bench case in I. L. R. (1938) 19 Lah. 462[3] where the facts were that at night time the accused unchained the outer door of the courtyard of *M's* house and was passing through it in order to reach the adjoining house occupied by a married woman *K* (with whom he had intimacy) with the object of committing adultery with her when he was seen by *M's* wife who raised an alarm and he was arrested in *M's* courtyard, it was held that he was guilty of lurking house trespass. On that case, the learned Judges observed: "The section (of criminal trespass) means that if a person enters upon property with intent to commit an offence on that property or any other property, or with respect to a person who is, or is not, in possession of the property entered upon, he is guilty under it."

As regards the argument that the intent specified in the charge "to cause hurt, etc.," is not proved, it may be that the Committing Magistrate framed the charge thus because he did not feel sure whether the entry into the house was in order to commit theft or adultery, but he framed the charge thus because the intention of the accused that could be inferred from his acts in going armed with a hatchet and knife and causing injuries to Misri, Abdulla and Kassim left it in no doubt that he did intend to cause hurt. The intent has to be judged from a man's acts and there may be a two-fold intent. Can it be said that a burglar who enters a house at night armed with a loaded pistol does not intend to cause hurt because his motive is only to commit theft and because he may even wish to avoid coming across the occupant, though he is prepared to use the pistol only if confronted? In Russel on Crimes, it is stated at page 756 (Edn. 9). "If the indictment charges a burglary with intent to commit felony, it will be supported by evidence of a felony actually committed. And in all cases where a felony has actually been committed, it is enough to allege the commission of it; as that is sufficient evidence of the intention." It might be mentioned here that S. 441, Penal Code also makes it an offence if a person "having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person or with intent to commit an offence" so that it would appear that the primary motive with which a person enters upon property in the possession of another is not the only one to be taken into consideration for the purposes of S. 441.

In this case the appellant, who must have known that it was a risky thing to enter into some one's house to commit adultery with a married woman, went armed with a hatchet and knife prepared to cause hurt, if necessary. There was an intent to cause hurt, and he did actually murder Misri as soon as Misri (who had no weapon) reached him. The intent specified in the charge has, therefore, been proved. Intention is to be distinguished from "motive" or "desire" but assuming for argument that for the purposes of S. 441, Penal Code, the law will only take into consideration the primary intent, the evidence on record clearly proves that the primary intent was to commit adultery with a married woman. Clearly he did not break into the house at dead of night armed with a hatchet merely to say, "How do you do?" to Wasul with whom he had contracted intimacy; obviously he intended to commit adultery and not merely to meet her. All the witnesses have referred to Wasul as Phatu's wife. Phatu, husband of Wasul, has been examined and has stated that Wasul is his wife and has three children by her. There is nothing in his cross-examination or in the cross-examination of the other witnesses to suggest that Wasul was not lawfully married to Phatu. The application (Ex. 12) relied upon by the defence purported to have been made by Wasul, was not proved to have the thumb impression of Wasul, and was produced not from the custody of the District Magistrate to whom the application purports to be made. It is a piece of paper having no evidentiary value and should not have been admitted in evidence without proof. The principal charge against the appellant was that of murder and it was not necessary in this case for the prosecution to examine as witnesses the priest who officiated at the marriage or other persons who attended the marriage of Wasul to prove the

marriage. Nor has the appellant been prejudiced in any way by the omission to state in the charge "with intent to commit adultery with Wasu." Section 537, Criminal P. C., cures any error or omission in the charge which has not in fact occasioned a failure of justice.

In the case reported in 22 Cal. 391[4] the facts were that the accused was found at night in the room of the complainant in which he and his wife were sleeping. Upon being detected, the accused was subjected to severe treatment but did not utter a word of protestation of innocence. In the charge the criminal intention alleged was that of committing theft, but the Magistrate found that the complainant had suppressed some facts, and that the intention was to commit adultery. It was urged in the High Court that such intention was not specified in the charge nor specifically proved. The High Court upheld the conviction and held that the contention was unsupportable for even if it had been necessary to specify the intention in the charge, it would have to be shown that the omission had occasioned a failure of justice, that though it was not certain what the precise intention of the accused was, it was clear that it must have been with one or other of the intents specified in S. 441, Penal Code, that it was impossible to suppose that the trespass could have been committed with any innocent intention, and that it must have been committed with the intention of committing some offence. In that case the learned Judge observed :

Though the prosecution must prove the existence of someone or more of the intentions mentioned in S. 441, Penal Code, the proof need not be direct, that is, by the confession of the accused, showing that his intention was one of those mentioned in the section, or by the evidence of witnesses proving that he admitted to them that such was his intention. It will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and surrounding circumstances.

In a Madras case also 12 Cr. L. J. 453[5] it was held that it is sufficient if evidence leaves no reasonable doubt that the accused wanted to commit an offence. It is not necessary for the Magistrate to find what specific offence the accused wanted to commit. In the present case, it is impossible to say that that appellant was prejudiced in his defence by the omission in the charge about intention to commit adultery. The appellant's defence was not that he had innocently trespassed into the house in a fit of somnambulism or for any purpose other than that which the character and circumstances of his acts suggest. His defence was that he wanted to meet Wasul, but before he went to that house, Wasul's relations fought with him in the street, and while fighting he and they fell in the house of Misri and Misri received a blow with the hatchet from someone."

Meher J. accepted the finding of the learned Sessions Judge that there was an attempt by Misri and his companions who were all unarmed to exercise the right to arrest an armed intruder who in their presence was committing the offence of house-breaking by night. In arriving at this conclusion Meher J. referred to the provisions of S. 105, Evidence Act, and emphasised that the appellant had not pleaded the right of private defence, but had denied striking Misri. He was, therefore, in the result, of opinion that the conviction on all counts should be sustained.

[11] I will now proceed to deal with the first point, that the charge having specified that house breaking was in order to the committing of the offence of causing hurt, the appellant could not be properly convicted of house-breaking with the intention of committing adultery.

[12] The first head of the charge appears to involve a combination of offences under Ss. 457 and 458, Penal Code. It is of an offence under S. 457 with the addition that it states that the accused had made preparations for causing hurt which comes within the purview of S. 458, Penal Code.

[13] To establish any form of criminal trespass, it must be shown that entry upon the property in possession of another is with one of the intentions specified in S. 441, Penal Code, that is to say, an intention to commit an offence or to intimidate, insult or annoy any person in possession of such property. The offence under S. 457 is merely an aggravated form of house-treapass or house-breaking by night and the intent must be the committing of an offence punishable with imprisonment. The offence under S. 458 is an aggravated form of the offences referred to in Ss. 452 and 455, Penal Code, house-trespass and lurking house-trespass or house-breaking, in each case after preparation for hurt or wrongful restraint.

[14] For offences under Ss. 452, 455 and 458, Penal Code, the initial intention need not necessarily be that of committing an offence; it may be one of the other intentions specified in S. 441, Penal Code. In this case, however, the prosecution have elected to frame a charge involving an offence under S. 457, Penal Code, and have in terms specified the intention of committing an offence punishable with imprisonment, to wit, that of causing hurt.

[15] A charge is defined in 28 Cal. 434[6] at p. 437 as "a precise formulation of the specific accusation made against a person, who is entitled to know its nature at the very earliest stage."

[16] Chapter XIX, Criminal P. C., relates to charges. Sections 221 to 232 cover matters relating to the form of the charge and also include provisions as to the alteration of charges and the effect of material errors and omissions. Sections 233 to 240 relate to the joinder of charges and provide for such matters as the conviction for an offence not charged and for a minor offence not charged and for a minor offence included in the offence charged.

[16a] In Chap. XLV which relates to irregular proceedings, is to be found S. 537 which, subject to the provisions of the Code therein before contained, cures an error, omission or irregularity in *inter alia* a charge, when such error, omission or irregularity has not in fact occasioned a failure of justice.

[17] These various provisions of the Code of Criminal Procedure contemplate that there shall be a charge for every distinct offence and that it shall be formulated with precision; that the precise charge framed is to be tried, and tried separately, (S. 233), except in the cases mentioned in Ss. 234 to 236 and S. 239; that where there is an imperfect charge or an erroneous charge, or where no charge has been framed, the Court may amend or add to the existing charge or frame a charge at any time before the judgment or in a case of a trial by jury before the verdict, or in a case of a trial by assessors upto the delivery of the assessor's opinion, but not thereafter. (Sections 226-231); that apart from a case of an erroneous or imperfect charge, or where no charge has been framed the defect is curable, an accused may only be convicted upon the precise charge framed and no other, except in the cases provided for in Ss. 237 and 238, Criminal P. C.; and that no mere errors or omissions may vitiate a charge, unless they are material in the sense that prejudice has been caused. (Sections 225, 232, 537.) In the trial of a criminal case, it is obviously not permissible to resort to procedure not sanctioned by law, and, in my view, the provisions of the Criminal Procedure Code, to which I made reference are exhaustive of the matters to which they relate.

[18] There is no doubt that in the present case the prosecution have failed to establish the house-breaking charge as laid against the appellant. The charge specified the offence of house-breaking by night by four armed persons with the intention of causing hurt. The finding of the Sessions Judge, upon which the conviction under S. 458 is based, is that one of the accused persons, the appellant, entered premises in the possession of Misri with intent to commit adultery. Both my learned brothers agree with this finding to the extent that the appellant had entered premises, not in his possession, with the object of having sexual intercourse with the woman, Wasul.

[19] The plain question which arises, therefore, on this aspect of the case, is whether, in the circumstances, the appellant can be convicted on the house-breaking charge, and this must be decided by reference to the provisions of the Code of Criminal Procedure alone. The charge as such is unexceptionable. It is based on the prosecution case as led, and fulfils the conditions as to the formulation of charges. It contains no error in the sense in which that expression is apparently used in Ss. 225, 232 and 537, Criminal P. C. The error referred to in these sections must, it appears to me, relate to the allegations of the prosecution upon which the charge is founded, and there cannot, I think, be said to be an "error" in a charge because the evidence for the prosecution is subsequently at the trial found to be false or insufficient to establish the charge. The sense in which the word "error" is used in S. 225 in relation to the particulars of the offence is shown by illustration (d) to that section which reads:

"*A* is charged with the murder of Khoda Bakhsh on 21st January 1882. In fact, the murdered person's name was Haider Bakhsh and the date of the murder was 20th January 1882. *A* was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Bakhsh. The Court may infer from these facts that *A* was not misled, and that the error in the charge was immaterial."

[20] The reference in this illustration to the enquiry before the Magistrate indicates that the error in question arose because of the failure to frame the charge in consonance with the prosecution allegations.

[21] The word "error" in Ss. 232 and 537 is, in my opinion, used in the same sense. Chapter 45 in which S. 537 is included is headed. "Of irregular proceedings." There is nothing irregular in the present proceedings by reason of the charge. I, therefore, entertain grave doubts that Ss. 225, 232 or 537, Criminal P. C. have any application to the present case, and the question does not arise for determination as to whether a failure of justice has been occasioned by any error or omission in the charge. In my view, however, were these sections applicable, there must be deemed to have occurred a failure of justice in the circumstances of the case. The question of adultery with a married woman was not in issue between the appellant and the Crown. Some of the witnesses including Phatu did incidentally mention that Wasul was the wife of Phatu, but it is manifest, in my opinion, from the trend of the trial that the point was never properly in issue. The appellant set up a liaison with Wasul but never admitted that she was a married woman, and the question of her being the wife of Phatu was never, in my view, attempted to be met by the appellant. The point would obviously have been contested had it been in issue.

[22] Another point arises in this connection. To sustain a conviction for adultery, it must be established *inter alia* that sexual intercourse was committed without the consent or connivance of the husband, and there is authority for saying that to sustain a conviction under S. 451, Penal Code for the offence of house-trespass with intent to commit an offence, the offence being adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman. I would refer,

in this connection to the judgment of Sir John Edge, C. J. and Aikman J. in 19 ALL. 74.[7]

[23] In the present case, the alleged husband, Phatu, who was examined as a prosecution witness, was asked no question at all on the point of consent or connivance. According to the evidence, Wasul had with Phatu's consent stayed with her relations 3 or 4 days before the offence, but is by no means certain that she had not been away from Phatu for a longer time than this The witness Hamid stated that twenty days before the incident one Khalil (not Phatu, the woman's husband) had asked him to ask the appellant not to come to the complainant's house, and that Wasul had been intimate with the appellant for 2 or 3 years. It may possibly be the case that the husband, Phatu, did consent to or connive; at any rate, the onus as to this point was on the prosecution, and there is nothing on the record to show that Phatu was not a consenting or conniving party to this wife's liaison with the appellant. Had the prosecution sought to put in issue the question of adultery with a married woman, it would have been open to the appellant to establish consent or connivance.

[24] In circumstances such as these which arise in this case, the prosecution could not be said to have been at a disadvantage with reference to the charge. They could have applied for the framing of an additional charge or an alternative charge or an amendment of the existing charge at any time before the assessors expressed their opinion. It would be illegal, however, to amend the charge after that stage.

[25] Were I of the view, therefore, that there had been an error or omission in the charge within the purview of Ss. 225, 232 or 537, I would have no hesitation in saying that it was a material error which had prejudiced the appellant and it would presumably have been necessary under S. 232 to direct a retrial, but, in the view I take, this question does not arise and it remains for me to consider whether a conviction may follow upon the charge as framed.

[26] In the words of Professor Kenny in his well known work 'Outlines of Criminal Law' p. 468 (12th Edn.) :

"As a logical rule, the evidence should of course establish, and the conviction also be for, the actual offence stated in the count which it concerns."

There are, however, exceptions to this rule, and in India they are embodied in Ss. 237 and 238, Criminal P. C. to which I will now refer.

[27] At the outset it may be observed that Sections 237 and 238, Criminal P. C. say nothing about prejudice to the accused and the obvious implication is that no prejudice can be deemed to arise when the conditions referred to in the sections are fulfilled. They relate to cases in which the formulation of the charge is unexceptionable. For example, with reference to S. 238, when the minor offence does in fact come within the purview of the major offence charged the question of prejudice does not arise.

[28] Section 237 manifestly has no application to the present case because it is not a case of conviction for an offence other than the one for which the appellant was charged. He was charged with an offence coming within Ss. 457 and 458, Penal Code and convicted of an offence under S 458, Penal Code. Section 237, Criminal P. C. does not, I think, cover the case of a conviction for another or more aggravated form of the same offence, but for another offence. Apart from this, S. 236, Criminal P. C. to which S. 237 is related does not, generally speaking, contemplate a case where there may be a doubt as to facts, which include the facts which constitute one of the elements of the offence.

[29] Pratt J C. in 5 S. L. R. 16,[8] expressed the view that offences charged in the alternative arise out of the same delictum and are, therefore, necessarily cognate offences, and that an alternative charge cannot be framed in respect of distinct offences nor even in respect of cognate offences when the difference is one of degree, i. e. as to the intention imputed to the accused as to some circumstance of aggravation. It was further held in that case that alternative offences must be such that can reasonably be inferred from the same set of facts.

[30] Section 238, Criminal P. C. is also, I consider, inapplicable to the present case. The principle underlying S. 238 was in my view correctly stated by West J. in 11 Bom. H. C. R 240.[9] He said with reference to S. 457, Criminal P. C. analogous to the present S. 238, Criminal P. C. :

"That section applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence. The graver charge in such a case gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when this is not the case, where the circumstances, embodied in the major charge, do not necessarily, and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter. The section is not intended to apply to a collateral offence."

[31] It is true that in the case before West, J. the accused had been charged with murder and had been convicted for abetment for murder, but nevertheless I consider that what he has stated is applicable in principle, and applying that principle, it seems to follow that S. 238 does not cover the present case because the circumstances embodied in the major charge under S. 458

i. e. house breaking with the intention to commit an assault do not constitute the offence of house-breaking with the intention of committing adultery. The latter is not arrived at by mere subtraction from the former.

[32] I do not consider that S. 238 has any application to a case in which the specific intent embodied in the charge is not established, but the conviction is based upon an another and altogether different intent.

[33] Section 238, Criminal P. C. has been relied upon in certain reported cases as justifying a conviction for house breaking or house-trespass where the intent specified in the charge has not been established. These include 44 Cal. 358:[10] to which more detailed reference will later be made. I would merely say at this stage that unless my view is correct, a considerable body of cases in which it has been ruled that a conviction under S. 147, Penal Code cannot be supported unless the common object of the assembly as established by the evidence agrees in essential particulars with that laid in the charge, must be deemed to have been erroneously decided.

[34] I would refer in this connection particularly to the judgment of Princep J. in 27 Cal. 990,[11] and that of Sir Lawrence Jenkins and Mookerjee J. in 36 Cal. 865.[12] In the former case, Princep J. said :

"The Sessions Judge has accordingly dismissed the appeal confirming the conviction and sentence, but on a different finding of fact from that to which the petitioners were called upon to plead and to defend themselves at the trial. *The petitioners have accordingly been convicted by the appellate Court of an offence for which they have never been tried. They are consequently entitled to an acquittal.*"

In the latter case it was said :

"It cannot be laid down as a general proposition of law that a conviction under S. 147 cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each individual case is *whether the common object established agrees in essential particulars with the common object as stated in the charge.* In the present case, there can be no doubt that the common object, as stated in the charge, has not been substantially established."

In neither of these cases in quashing the conviction was any reference made to the curative provisions of S. 537, Criminal P. C.

[35] I will now refer to certain decisions in which this question has arisen with regard to the offence of house-breaking or house-trespass. 22 Cal. 391[4] is a case in which the accused had been arrested upon a charge under S. 456, Penal Code, the allegation being that his intention was to commit theft. In the charge framed by the Magistrate no intention was specified. The Magistrate came to the conclusion that trespass had not been committed by the accused with the intention to commit theft, but nevertheless convicted the accused. In appeal, the Sessions Judge found that the Magistrate's views were against the evidence. He upheld the conviction without finding what specifically the intention was. In revision it was contended that the conviction was bad (1) because no guilty intention was set out in the charge; (2) because no intention was proved by the evidence and (3) because no such intention was specifically found by the Sessions Judge. As to the first point, it was held that it was not necessary in the case of an offence under S. 456, Penal Code, to specify the intention and that, in any event, the provisions of S. 537, Criminal P. C. applied, and there had been no miscarriage of justice.

[36] With regard to the second contention, it was held that though it was not certain what the accused's precise intention was, it must have been one of those specified in S. 441, Penal Code. And as regards the third point, it was held that the High Court exercising jurisdiction under S. 439, Criminal P. C. would not be justified in setting aside the conviction merely because the view taken of the evidence by the lower Court is not sustainable or that some fact which ought to have been found by that Court was not found or found incorrectly. That case is one of a series in which it has been held that it was not necessary to specify the intention of the accused in a charge under S. 456, Penal Code. It was however, pointed out that a charge under S. 457, Penal Code, would be bad for want of specification of intention in the charge. It has no application to the circumstances before me because the charge here was not under S. 456 but under S. 458 and it does specify the intention. I would in passing, however, observe that I am not satisfied that in any of the offences involving criminal trespass it is not necessary to set out the intention. As I have already pointed out, the entry into premises in possession of another is not punishable, unless it is made with one of the intentions set out in S. 441, Penal Code. In other words, intention is an essential element in the offence of criminal trespass and I consider that in all cases where this is so, the charge should specify the intention.

[37] It has been stated in Halsbury's Laws of England, Vol. 9, p. 134, para. 174 :

"Where any particular intent is a necessary ingredient of an offence, the intent must be stated in the indictment."

[38] Justice need never be defeated in a case in which the intention of the accused is uncertain, bearing in mind always that an accused person is the best judge of his own intentions, because, as I have already pointed out, charges may be framed in the alternative and the charge may be amended or added to at any time up to the ultimate stage of the trial. Moreover the

omission to set out the intention would always be curable provided no miscarriage of justice has occurred.

[39] In 41 Cal. 743,[13] it was held that where the case against the accused is one of theft or house-breaking to commit theft, and the Magistrate finds that it has broken down, but that there is another object apparent on the evidence, it is his duty to give the accused notice of that by drawing up a charge clearly stating what it is that he is accused of doing. The accused had been charged under S. 457 and the Magistrate had convicted him under S. 456. The Calcutta High Court held the trial to have been vitiated.

[40] In 16 C. W. N. 696,[14] it was held that an accused person who was being tried on a charge under S. 457 for house-breaking with intent to commit theft, could not be convicted of a charge under S. 456, Penal Code with an object unspecified but which was obviously of having intercourse with a woman, without amendment of the original charge. In the judgment it was observed :

"We think that there can be no doubt on the authorities that the charge under S. 456 of entering the house with an object not specified but which is presumed to be criminal cannot be sustained when the person is being tried for the specific charge of theft in a dwelling-house and house-breaking with intent to commit theft. It is obvious that he must be seriously prejudiced by not knowing what really is the charge against him. *Although it is not necessary under S. 456 to specify any particular offence when such particular offence is specified under S. 457 it is incompetent in our opinion, to convict of house-breaking with some other intent.*"

[41] In 44 Cal. 358,[10] already referred to above, the accused was tried for offences under Ss. 458 and 380, Penal Code on the allegation that he had entered the room of a widow to commit theft. He was tried summarily and he set up the defence of previous intrigue and that he had entered the room at the widow's invitation. The Court disbelieved the stories of theft and intrigue and found the entry to have been without her consent and in order to make immoral proposals to her to her annoyance. The accused was convicted under S. 456 and it was held by the High Court that the conviction was proper on the ground that S. 238, Criminal P. C. applied. It was sought to distinguish the last mentioned case, 16 C. W. N. 696,[14] but I am unable to discern any material point of difference such as to justify a different conclusion on principle. The only possible ground of distinction may be that *Karali Prasad's case*[10] was tried summarily and there may have been no charge although if this was so, it is difficult to see why S. 238, Criminal P. C. was invoked. One passage in the judgment, however, suggests that there was a charge because their Lordships have observed:

"We cannot consequently hold that merely because the intent imputed to the accused to sustain a conviction under S. 457 has failed, no conviction can be made under S. 458."

If there was no charge and the intent referred to was imputed in the evidence, the passage is comprehensible. If there was a charge imputing the specific intent, the passage is not comprehensible in view of the apparently irreconcilable observations which immediately follow, for their Lordships go on to say :

"*We are not now concerned with the question whether a conviction under S. 457 can be sustained when the specific intent imputed to the accused is not established, but another intent is proved.* We are accordingly not called upon to consider the applicability of the class of cases in which it has been ruled that a conviction under S. 147 cannot be supported unless the common object of the assembly as established by the evidence agrees in essential particulars with that laid in the charge : 36 Cal. 865[12] ; 33 Cal. 295[15] ;27 Cal. 990.[11] In that class of cases, the weighty observations in 11 Cal. 106,[16] may be borne in mind : 'an accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him and unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases, but it is more specially true in cases where (as in a case under S. 147) it is sought to implicate him for acts not committed by himself but by others with whom he was in company'."

Although their Lordships have relied on S. 238, Criminal P. C. there has been no discussion of the principles underlying that section.

[42] In 26 C. W. N. 344,[17] following 41 Cal. 743[13] and 16 C. W. N. 696,[14] it was held that although it cannot be laid down as a general rule that in all cases a prosecution for house-trespass with the alleged object of theft must fail if that object is not proved, when a charge has been definitely framed in which theft is alleged, the accused cannot be convicted of house-trespass with some other object without an amendment of the original charge, unless the Court is satisfied that he has not been in any way prejudiced in his defence by the omission to amend the charge.

[43] In 23 ALL. 82,[18] where on a charge under S. 457, Penal Code, it was proved that the accused entered the complainant's house in order to have sexual intercourse with a woman whom he knew was the wife of the complainant, and that he did so without the husband's consent, it was held that the conviction was proper and that it was not necessary that the complainant should bring a specific charge of adultery. It is clear from the facts of that case that the appellant admitted house-trespass with intent to commit adultery with a married woman and the facts are, therefore, not in point.

[44] In 37 ALL. 395,[19] the accused was apparently charged with having committed lurking house-trespass by night, the allegation being that

he intended to commit theft. He stated that he had entered the complainant's house as he was on intimate terms with the widowed aunt of the complainant and that he had been invited to the house by her. It was not proved that the intention of the accused had been to commit theft, but he was convicted and sentenced under S. 457, Penal Code. The High Court refused to interfere with the conviction in revision on the ground that the intent with which the appellant entered upon the complainant's premises was a matter within his own knowledge, the burden of proving which lay upon him, and that having failed to establish any illegal intimacy of any kind between him and the Brahmin widow, the conviction was proper. There was no discussion in the judgment as to whether there could be a conviction in a case of house-breaking where the charge specified an intention to commit theft, which allegation had been discredited, and the decision is at variance with 16 C. W. N. 696[14] and 41 Cal. 743.[13]

[45] In A. I. R. 1920 Pat. 590,[20] it was the case against the accused that he had committed lurking house-trespass by night in order to commit theft. It was found in appeal that it was not proved that the object of the trespass was to commit theft, and the Sessions Judge altered the conviction from one under S. 457 to one under S. 456, Penal Code. The High Court set aside the conviction, Das J. making the following observations :

"It seems to me that the petitioner has really not been tried for an offence of which he has now been convicted. The case in A. I. R. 1914 Cal. 663,[13] is in point."

[46] In A. I. R. 1921 Pat. 217,[21] Jwala Prasad J. took the view that if the accused was charged under S. 457 for house-trespass with the intention to committing theft, he could be convicted under S. 456 of house-trespass with the intention of committing adultery if he was not prejudiced.

[47] Varma J. in A. I. R. 1935 Pat. 129,[22] referring to the conflict of opinion on the point, followed the case last referred to above and expressed the view that S. 238; Criminal P. C. was applicable.

[48] The decisions to which I have made reference indicate that there is no unanimity of opinion, on the point involved and, for the reasons I have already given, I am in agreement with 16 C. W. N. 696,[14] 41 Cal. 743,[13] and the other cases in which a similar view has been taken. I am, therefore, of opinion that the conviction under S. 458, Penal Code cannot be sustained.

[49] It is unnecessary in this view to consider in any detail the question as to whether the appellant's entry in the premises amounted to house-trespass or house-breaking. "Building" has not been defined in the Penal Code, but it is coupled with "tent" or "vessel" in S. 442, and is apparently used in a comprehensive sense. It was held in 22 S. L. R. 466,[23] and other cases that a courtyard annexed to living rooms, the whole being entirely surrounded by a wall constitutes a building within the meaning of S. 442, Penal Code and this seems to be a reasonable view of the matter considering the climate, conditions of life and the types of dwellings in use in India. The place in which the appellant was found seems to fulfil the conditions mentioned in 22 S. L. R. 466[23]. There were living rooms to which were annexed open courtyards each courtyard leading into the other and the whole was surrounded by a comparatively high brick or mud wall provided with a door leading to the street.

[50] It does not seem to me to make any material difference that Jurio's courtyard and living room, i. e. the particular part of the premises formerly occupied by him, were at the time of the offence unoccupied. The point is that there was one common wall round the whole premises and one common outlet to the street.

[51] It seems to me, therefore, that it cannot be said that the first charge was not sustainable because there was no house-trespass or house-breaking.

[52] In view of my finding as to the charge under S. 458, Penal Code, it is not necessary to consider the question as to whether, had there been a charge correctly specifying the intention, the evidence on record is sufficient to sustain a conviction. I do not consider the point in this form arises at all, although a consideration of the entire evidence is involved when dealing with the murder charge to which I will now direct my attention.

[53] The appellant was properly charged and tried for murder and no fault can be found with the charge under S. 302, Penal Code. It does not follow that because the house-breaking charge has failed, the murder charge need necessarily fail. It is a separate charge to be treated separately on its merits although by reason of S. 235, Criminal P. C. there has been one trial.

[54] There is no doubt that the appellant did intentionally strike Misri with an axe and caused his death and did intentionally strike Abdullah and Misri causing certain incised wounds. The question is as to whether in inflicting these injuries he was acting in the exercise of the right of private defence within the meaning of S. 96 and ancillary sections of the Indian Penal Code. It has not, and with justification, been suggested that any of the exceptions to S. 300,

Penal Code apply. Under S. 105, Evidence Act, the onus lies upon the appellant to establish the existence of circumstances bringing his case within the general exception provided for in S. 96, Penal Code, but the principles underlying S. 105 are sometimes difficult of application.

[55] Before dealing with the particular facts of this case. I will make some reference to these principles. In 1935, the case in 1935 A. C. 462,[24] came up before the House of Lords and there appears in the judgment of Viscount Sankey, in regard to the burden of proof in criminal cases, the following well-known passage :

"Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence ..... Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

[56] The effect of the decision in 1935 A. C. 462[24] in relation to S. 105, Evidence Act, has been the subject of discussion by certain High Courts in India, and in particular, has been considered by Full Benches of the Rangoon and Allahabad High Courts.

[57] In 14 Rang. 666,[25] two of the four points of reference submitted to the High Court were:

"(1) Where a person is accused of any offence and alleges the existence of circumstances which bring the case within the General Exceptions of the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, does S. 105, Evidence Act or any other rule of law provide that when facts *prima facie* constituting the offence are proved by the prosecution, and from the examination of the accused or evidence tendered by the defence in attempted discharge of the burden of proof then laid upon the accused by the said section (105), the Court has a reasonable doubt as to whether the said burden of proof has been discharged by the accused person, or as to the truth of the statement of the accused, or evidence tendered, the Court should convict the accused?

(2) Is the decision of the House of Lords in (1935) A. C. 462[24] inconsistent with the law of British India, or should it be regarded as explaining the meaning of the phrase 'the burden of proving the circumstances is upon him, and the Court shall presume the absence of such circumstances' in S. 105, Evidence Act, 1872?"

[58] The answer to the first question was found in the negative. On this point I refer to the following observations of Roberts C. J.:

"The answer to the first question is one of great importance because it involves a fundamental principle of Criminal law common to England and to British India. The main proposition may be laid down simply as follows: *in all criminal cases where there is a reasonable doubt as to the guilt of an accused person at the close of the whole of the evidence the accused is entitled to be acquitted*

Section 105, Evidence Act, runs thus: 'When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.'

There has been in some quarters much confusion as to the meaning of the words "burden of proof." In criminal cases the burden of proof, using the phrase in its strictest sense, is always upon the prosecution and never shifts whatever the evidence may be during the progress of the case: if on a review of all the evidence the prosecution has failed to establish the guilt of the accused beyond reasonable doubt, he is entitled to be acquitted. Some references were made in the argument to a popular theory that Courts give to the accused what is known as "the benefit of the doubt;" the phrase is misleading and should be avoided in any attempt at accurate expression. The accused does not receive a benefit, nor does humanity grant him some boon dictated by the instinct of mercy in opposition to the ends of justice Where there is an element of genuine doubt then there must be an acquittal as a matter of right and not as a matter of grace or favour.

Now, it is not for the prosecution to examine all the possible defences which might be put forward on behalf of an accused person and to prove that none of them applies. In order to make this clear, S. 105, Evidence Act, says that the Court shall presume the absence of such circumstances as may bring the case within the ambit of a possible defence. *But if the evidence adduced by the prosecution is itself consistent not only with the guilt of the accused but with his possible innocence, it is clear that there can be no conviction.* In the same way if such evidence is consistent not with innocence but with the commission of a lesser offence than that with which the accused person is charged, it is clear that the conviction (if any) must be restricted to a conviction for such lesser offence.

In many instances little or no evidence in favour of the accused will have transpired at the end of the case for the prosecution. When this is so, then in another and quite different sense the burden of proof is cast temporarily on the accused; when sufficient proof of the commission of a crime has been adduced and the accused has been connected therewith as a guilty party, the burden of proof in the sense of introducing evidence in rebuttal of the case for the prosecution is laid upon him. If evidence is then adduced for the defence which leaves the Court in doubt as to whether the accused ought to be excused from criminal responsibility, or found guilty of a lesser offence than that with which he stands charged, *then at the conclusion of all the evidence it must still be remembered that it is incumbent upon the prosecution to have proved their case.* Put shortly, the test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Indian Penal Code, but whether in setting up his defence he has established a reasonable

doubt in the case for the prosecution and has thereby earned his right to an acquittal.

By S. 106, Evidence Act, when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. The burden of proof referred to here is that of introducing evidence merely and the phrase is used in the same sense as in S. 105. Section 106 does not cast any burden on an accused person to prove that no crime was committed by proving facts specially within his knowledge: *nor does it warrant the conclusion that if anything is unexplained which the Court thinks the accused could explain, he ought therefore to be found guilty*: 41 C. W. N. 65.[26]

I would answer the first question in the negative."

[59] As to the second point, it was held that the decision in 1935 A. C. 462[24] is in no way inconsistent with the law in British India, but that on the contrary the principles there laid down form a valuable guide to the correct interpretation of S. 105, Evidence Act.

[60] This Court in I. L. R. (1940) Kar. 249[27] (by which decision I am bound) also took the same view as to the effect of *Woolmington's case*.[24]

[61] In I. L. R. (1941) ALL. 843,[28] the effect of the decision in *Woolmington's case*[24] and its bearing upon the interpretation of S. 105, Evidence Act, came up for consideration before a Full Bench consisting of not less than 7 Judges. Four of these, including the Chief Justice, Sir Iqbal Ahmed, took the view in consonance, generally speaking, with that of the Rangoon High Court in 14 Rang 666[25] that the decision in *Woolmington's case*[24] is in no way inconsistent with the law in British India, and that it furnishes a valuable guide to the correct interpretation of S. 105, Evidence Act, and it was further held that, to quote a portion of the headnote:

"The burden of proving the existence of circumstances bringing the case within a general or special exception is no doubt cast upon the accused by S. 105, Evidence Act, *but this does not in any way absolve the prosecution of the burden laid on it by S. 102, so far as the entire 'proceeding' is concerned.* There is nothing in the Evidence Act to justify the conclusion that the failure of the accused to discharge the burden under S. 105 is tantamount to 'disproof' of the existence of circumstances bringing the case within the general or special exception pleaded: all that can be said is that those circumstances are 'not proved.' *The presumption laid down in S. 105 might come into play, but it does not follow therefrom that the accused must be convicted even when the reasonable doubt under the plea of the right of private defence or any other general or special exception pervades the whole case. The Court at the end of the trial, has still to see whether having regard to the entire evidence and the circumstances of the case, the charge is proved beyond reasonable doubt.*"

[62] The dissenting Judges (Collister, Allsop and Braund) took a more restricted view of S. 105, Evidence Act.

[63] There is no doubt that the principles stated in 14 Rang. 666[25] and by the majority of the Court in I. L. R. (1941) ALL 843[28] apply also to the situation which arises when the accused denies *in toto* the actual act alleged and does not, whether owing to ignorance or bad advice, plead the exception. Whether the exception is actually pleaded is immaterial so long as on all the facts of the case, including admissions made by the prosecution witnesses, there is reasonable doubt as to the guilt of the accused at the close of the whole evidence. I refer on this point to the observations of Dunkley J. in the Rangoon case.

[64] Being guided, therefore, in the interpretation of S. 105, Evidence Act by the decision in 1935 A. C. 462[24] and accepting the principles stated in 14 Rang. 66,[25] and the majority view in I. L. R. (1941) ALL. 843,[28] the question befor me resolves itself into whether upon a consideration of the evidence as a whole, a reasonable doubt has been created as to whether the appellant is entitled to the benefit of the general exception as to the right of private defence; or put another way, whether the prosecution case is itself consistent not only with the guilt of the accused but with his possible innocence.

[65] In this connection a difficulty immediately arises because the eye-witness evidence for the prosecution is deliberately false in material particulars and cannot, in my view, be relied upon in any respect. All the eye-witnesses support the story that there were four armed intruders whom they have named. The reluctance to conceal the true reason for the appellant's visit is comprehensible though not justifiable but that all these witnesses were prepared to inculpate three innocent persons in a case involving a long term of imprisonment is some indication of the extent to which they were prepared to prevaricate. The learned Sessions Judge found that this part of the story was untrue, but he and Meher J. were prepared nevertheless to place some reliance on the evidence of these eye witnesses as to the circumstances in which Misri was assaulted. Meher J. thought that whereas Abdulla, Kassim, Wasul and Khatul might be said to be interested and false witnesses, their evidence received corroboration from two 'independent' witnesses, Hamid and Waru Sand. Hamid's evidence is, to my mind, manifestly false, because he supports the story of the four armed intruders. He is also shown in cross-examination to be interested in Abdulla. He admits that his mistress Saran is Abdulla's father's sister. The evidence of Waru Sand carries the case no further because he is not an eye witness He is said to have come after the appellant had escaped over the wall.

[66] Certain admissions made by Wasul her mother Khatul and the witness Hamid, indicate,

beyond any doubt, that Wasul had been carrying on an intrigue for a considerable time with the appellant and that this must have been known to the prosecution witnesses. Wasul admitted that she used to meet the appellant secretly in Jurio's unocccupied house. Hamid has admitted that some 20 days before the incident, he had been asked to remonstrate with Waroo. Although the prosecution witnesses have sought to make out that the woman Wasul had only been living in Misri's house for 2 or 3 days before the incident, it appears to be the case that she had been living there much longer.

[67] The story put forward by Wasul and corroborated by the prosecution witnesses, as to the circumstances in which Wasul went to the outer courtyard to talk to the appellant on the night in question, and how the crying of her child aroused her mother, is dubious. Perhaps the most material point on this aspect of the case was however, as to whether Misri and/or his companions were armed, and I am unable to accept the prosecution evidence that they were unarmed. I am in entire agreement with Tyabji J. that at least one of the witnesses must have been armed with a hatchet when they went to apprehend the appellant. Apart from the cogent reasons put forward by Tyabji J., I cannot conceive that in the conditions prevailing in Sind Mahomedan rustics would set out unarmed to apprehend intruders at night. Axes and lathis are readily available and are invariably taken up on such occasions. The fact is that the appellant did receive a blow from a hatchet and the witnesses have put forward the specious story that this was caused by the appellant's own hatchet which Abdulla was able to seize from him.

[68] In my opinion, the relations of Wasul knowing of her intrigue with appellant, in all probability either lay in wait for him or discovered during the course of the night that Wasul was with him, and three of them, Misri, an able-bodied man of 40 and Abdullah and Kassim, both young men, made a concerted onslaught upon the appellant who was then in the outer courtyard. There is no doubt that they knew it was the appellant they were attempting to attack or seize and that his presence was only accountable by the fact that he had come there to meet Wasul.

[69] With regard to what actually took place in the ensuing struggle therefore, I consider that no reliance of any kind can be placed upon the oral testimony of the prosecution witnesses. Not only is the whole fabric of their story entirely untrustworthy as indicated above but material details as to what occurred during the struggle are, I consider, false as, for instance, the alleged seizing of appellant's hatchet by Abdulla and the appellant then extracting a knife from the folds of his trousers and the use of it on the witnesses. None of them are proved to have sustained any stab wounds which is the normal type of wound inflicted by a knife. If Abdulla were standing by appellant armed with appellant's hatchet he would obviously neither permit appellant to fumble in his trousers for a penknife nor indeed permit him to escape over the wall at all, and particularly so when the appellant is said already to have seriously injured and knocked down Misri.

[70] The only safe and reasonable course in this case is to fall back upon the circumstantial evidence and to decide whether upon it the conviction can be sustained. The circumstances are that there was a pool of blood in Jurio's courtyard and blood on the wall. Of the four men engaged in the struggle, two of them, the appellant and Misri, had sustained serious incised injuries which in the opinion of the medical officer had been caused by a weapon such as a hatchet. The appellant received a cut on the left parietal region cutting the bone, and in the opinion of the doctor, it was sufficient in the ordinary course of nature to cause death. Misri in addition to a serious injury on the neck, which caused his death, had a simple cut. Kassim had a simple incised injury and small contusion. Abdulla had one simple incised injury.

[71] Assuming as I do that Misri's party knowing of the presence of appellant in the outer courtyard (for the purposes of his intrigue with Wasul) advanced to seize or attack him, at least one of them being armed with a hatchet and that it was the appellant's desire to escape, the circumstances indicate nothing more than that a fight ensued in which each side sustained injuries. There is nothing to show who struck the first blow. The circumstances are consistent with the appellant having been struck first and then by use of his hatchet having extracted himself from a very dangerous position, and escaped. In the circumstances I consider the appellant had reasonable cause to apprehend death.

[72] It is true that there is no right of private defence under the Penal Code against an act which is not in itself an offence under the Code, and if the facts had indicated that Misri and his companions were entitled to arrest the appellant, and in attempting to do so, did not resort to more force than was necessary, the case might be different.

[73] But I am not prepared in the particular circumstances of this case to hold that Misri and his companions had the right to arrest the

appellant under S. 59, Criminal P. C. For the reasons already given, I have no doubt that they were aware of the appellant's liaison with Wasul and that the appellant was in the habit of meeting Wasul secretly in Jurio's abandoned premises. Assuming the marriage of Phatu and Wasul to have been proved, I am not prepared also to assume without some evidence that Wasul was carrying on her intrigue without the knowledge or assent of Phatu. The prosecution, as I have siad, examined Phatu but failed to ask him any question on the point of consent or connivance. The right of arresting appellant has certainly not been established by the prosecution and it cannot be assumed in this case. This is not a case where there could have been any uncertainty in the minds of the prosecution witnesses as to appellant's intention in entering Jurio's courtyard. They have elected to conceal the true state of affairs and even when the facts of Wasul's intrigue were elicited in cross-examination, the prosecution made no attempt to establish that it was without Phatu's consent.

[74] I consider, however, that even assuming Misri and his companions had the right to arrest the appellant, the facts are consistent with an attack upon him in which they resorted to excessive violence justifying the appellant in apprehending that he would be killed. The appellant was doing what to the knowledge of the prosecution witnesses he had often done before—meet Wasul in Jurio's court-yard—when he was set upon by three of them one of whom at least was armed with an axe.

[75] This case might have assumed an entirely different aspect had it been possible to place some reliance on the testimony of the eye-witnesses as to the circumstances in which Misri and the appellant were injured and in particular as to who struck the first blow. But I wish again to emphasise that the whole fabric of the prosecution case is false and I am not prepared to sustain the conviction for murder because of appellant's failure to establish any more circumstances in his favour than those already on record. In my view the murder charge must fail on the ground that the guilt of the appellant has not been established beyond all reasonable doubt.

[76] Concurring, therefore, with Tyabji, J., I acquit the appellant of all the offences with which he has been charged and direct that he be set at liberty.

R.G.D. *Appellant acquitted.*

A. I. R. (35) 1948 Sind 57 *[C. N. 15.]*

O'SULLIVAN AND THADANI JJ.

The Municipality of Kotri — Applicant v. *Abdul Rahman M. Qureshi —Opponent.*

Criminal Revn. Appln. No. 55 of 1947, Decided on 26-5-1947, to revise order of First Class Magistrate, Kotri, D/ -16-12-1946.

(a) Bombay District Municipal Act (3 [III] of 1901), S. 77 (2)—Terminal tax levied by Kotri (Sind) Municipality in pursuance of S. 59 (1) (xi) — Non-payment of, if punishable under S. 77 (2).

When the Bombay District Municipal Act, 1901, came into force, the word "octroi" meant octroi as defined or described in cl. (iv) of S. 59 (1), and the same meaning must be given to word "octroi" in S. 77 (2) of the Act. The word "octroi" used in the rules and bye-laws framed by the Kotri Municipality in Sind in describing terminal tax levied in pursuance of cl. (xi) of S. 59 (1) is nothing more than a tax as described in S. 73 (1) (v), Bombay Municipal Boroughs Act, 1925. The word "octroi" used in the description of terminal tax is an octroi which is not liable to be refunded, on the other hand, "octroi" referred to in cl. (iv) of S. 59 is clearly refundable. The connotation of the word "octroi" in the description of terminal tax in the rules and bye-laws of the Kotri Municipality is something quite different from the connotation of the word octroi used in cl. (iv) of S. 59 (1). It is a recognised canon of construction that where in an enactment a word is defined or described, it must have the same meaning wherever it occurs in the enactment. Manifestly the word "octroi" used in rules and bye-laws of the Kotri Municipality in Sind has not the same meaning as it has in cl. (iv) of S. 59 (1), Bombay District Municipal Act. Consequently, what is punishable under S. 77 (2), Bombay District Municipal Act is the non-payment of octroi with the particular intention described in sub-s. (2) of S. 77, and not the non-payment of terminal tax which the Kotri Municipality is competent to lewy: 22 Bom. 843; 13 A. I. R. 1926 Bom. 231 ; 26 A. I. R. 1939 All. 736, *Disting.*

[Paras 6, 7 and 8]

(b) Bombay District Municipal Act (3 [III] of 1901), S. 77 (2)—Intention to defraud is essential.

Before a person can be convicted of an offence under S. 77 (2), it must be proved that the person importing the goods had intention to defraud the municipality. [Para 13]

Cases referred :—

1. ('98) 22 Bom. 843, In re Rahim Bhanji.
2. ('26) 50 Bom. 174 : 13 A. I. R. 1926 Bom. 231 : 98 I. C. 407 : 27 Cr. L. J. 1335, Emperor v. Harjivan Valji.
3. ('40) I. L. R. (1940) All. 4 : 26 A. I. R. 1939 All. 736 : 187 I. C. 468, Hardwarimal Harnathdas Firm v. Municipal Board, Dehra Dun.

Kishinchand T. Bijlani—for Applicant.
Hardayal Hardey—for Opponent.
Fatehchand Assudomal, Advocate-General of Sind —for the Crown.

Thadani J.—This is an application by the Kotri Municipality under the provisions of Ss. 435 and 439, Criminal P. C. to set aside the judgment of acquittal passed by the learned Mukhtiarkar and first class Magistrate of Kotri in which he acquitted one Mr. Abdul Rahman, M. Qureshi, proprietor of Messrs. Qureshi and Company, of an offence punishable under the provsions of S. 77 (2), Bombay District Municipal Act, 1901.

[2] The case of the Kotri Municipality is that on 17-7-1946, Mr. A. M. Qureshi drove, or caused to be driven a lorry containing some iron plates to Hyderabad Sind without paying terminal tax to the Naka Munshi of the Kotri Municipality. The defence of Mr. Qureshi was that he holds a license from the Provincial Government to run a lorry service between Karachi and Hyderabad Sind on the Provincial road called the National Highway; the district boundary marks show that it is a P. W. D. road; the goods carried on the lorry on the day in question were not intended for consumption or use within the limits of the Kotri Municipality; the Kotri Municipality was therefore not entitled to charge a terminal tax in respect of them.

[3] We think Mr. Qureshi was properly acquitted by the trying Magistrate, and we see no reason to interfere with the acquittal.

[4] Section 77 (2), Bombay District Municipal Act reads as follows:

"If goods passing into a municipal district are liable to the payment of octroi, then every person who, with the intention to defraud the municipality, causes or abets the introduction of, or himself introduces or attempts to introduce within the octroi limits of the said district, any such goods upon which payment of the octroi due on such introduction has neither been made nor tendered, shall be punishable with fine which may extend to ten times the value of such octroi or to fifty rupees, whichever may be greater."

The learned Magistrate took the view that the goods had not passed into the limits of the Kotri Municipality, and that, in any case, the goods carried by Mr. Qureshi were not liable to octroi within the meaning of s. 59 (iv), Bombay District Municipal Act, 1901.

[5] Section 59 is contained in Chap 7, Bombay District Municipal Act, which deals with "Municipal Taxation." The permissible taxes are enumerated in cls. (i) to (xi) on goods or animals or both brought within the Kotri Municipal limits for consumption or use therein. Clause (xi) is a residuary clause which empowers a municipality to levy "any other tax to the nature and object of which the approval of the Governor in Council and/or the Governor-General in Council shall have been obtained prior to the selection contemplated in sub-cl. (i), of cl. (a) of S. 60."

[6] The manner in which octroi and tolls are levied is laid down in the same chapter in S. 75 of the Act. Section 75 says:

"Every municipality, when submitting for sanction a proposal for the imposition of octroi, shall submit therewith for sanction a draft of bye-laws for the purposes of cl. (j) of S. 48, after observing the requirements of subss. (2) and (3), of that section."

Clause (j) of S. 48 (1), of the Act, which occurs in Chap 4, deals with "Rules and Bye-laws" in the matter of:

"Fixing octroi limits and stations; providing for the exhibition of tables of octroi; regulating, subject to any general or special orders which the Governor-General in Council may make in this behalf, the system under which refunds are to be made on account thereof, when the animals or goods on which the octroi has been paid, or articles manufactured wholly or in part from such animals or goods, are again exported, and the custody or storage of animals or goods declared not to be intended for use or consumption within the Municipal district; and prescribing a period of limitation after which no claim for refund of octroi shall be entertained, and the minimum amount for which any claim to refund may be made."

We think when the Bombay District Municipal Act, 1901, came into force, the word 'octroi' meant octroi as defined or described in cl. (iv) of S. 59 (1), and the same meaning must be given to the word "octroi" in S. 77 (2) of the Act.

[7] It is contended on behalf of the Kotri Municipality that as in its Rules and Bye-laws, sanctioned under the Commissioner-in-Sind's No. 507-G, dated 8-1-1924, terminal tax has been described as octroi levied on certain articles shown in Sch. A imported within the terminal tax limits of the Kotri Municipality, such octroi not being liable to be refunded on the export of such goods from such limits, the word "octroi" referred to in the description of terminal tax in the Rules and Bye-laws must be interpreted in a wide sense and is not to be restricted to the "octroi" contemplated in cl. (iv) of S. 59 (1), Bombay District Municipal Act. We do not think it can be properly contended that the word "octroi" used in describing terminal tax levied in pursuance of cl. (xi) of S. 59, can have the same meaning as the word "octroi" in cl. (iv) of S. 59. It is important to bear in mind that the word "octroi" used in the description of terminal tax is an octroi which is not liable to be refunded. On the other hand, "octroi" referred to in cl. (iv) of S. 59, is clearly refundable. We think the connotation of the word "octroi" in the description of terminal tax in the Rules and Bye-laws of the Kotri Municipality is something quite different from the connotation of the word octroi used in cl. (iv), of S. 59 (1). It is a recognised canon of construction that where in an enactment a word is defined or described, it must have the same meaning wherever it occurs in the enactment. Manifestly the word "octroi" used in the Rules and Bye-laws of the Kotri Municipality has not the same meaning as it has in cl. (iv) of S. 59 (1), Bombay District Municipal Act of 1901.

[8] It is to be remarked that the Bombay District Municipal Act of 1901, nowhere defines terminal tax. The Bombay Municipal Boroughs Act, 1925, however, not only defines or describes "octroi," but also describes terminal tax. Section 73, cl. (1) (iv), Bombay Municipal Boroughs

Act, 1925, deals with "Municipal Taxation-Imposition of Taxes," and cl. (v), mentions, among other taxes, "a terminal tax on goods imported or exported from the terminal tax limits." We think the word "octroi" used in the Rules and Bye laws framed by the Kotri Municipality in describing terminal tax, is nothing more than a tax as described in S. 73 (1) (iv), Bombay Municipal Boroughs Act, 1925.

[9] It follows, then, that what is punishable under S. 77 (2), Bombay District Municipal Act is the non-payment of octroi with the particular intention described in sub-s. (2) of S. 77, and not the non-payment of terminal tax. We wish to make it plain that we do not accept the view that the Kotri Municipality has no power to levy terminal tax on the goods in question. All we wish to say is that a terminal tax is not an octroi within the meaning of cl. (iv) of S. 59 (1), or sub-s. (2) of S. 77, Bombay District Municipal Act, 1901. In other words while the Kotri Municipality is competent to levy a terminal tax, its evasion is not punishable under the provisions of S. 77 (2), Bombay District Municipal Act, 1901.

[10] Mr. Kishinchand Bijlani for the Kotri Municipality has relied upon a decision of the Bombay High Court in 22 Bom. 843.[1] But the facts of that case are entirely different to the facts before us. The learned Judges of the Bombay High Court were dealing with S. 84, Bombay District Municipal Act (6 [VI] of 1873). It has not been shown to us that S. 84 corresponds to S. 59 (1) (iv) or S. 77 (2), Bombay District Municipal Act, 1901. In any case, the learned Judges of the Bombay High Court were dealing with the interpretation of the word "imported" and not the validity or otherwise of a conviction under S. 77 (2), Bombay District Municipal Act, 1901.

[11] In 50 Bom. 174,[2] another case upon which Mr. Bijlani has relied, the Kalyan Municipality had made bye-laws under the powers given to it by S. 48 (1) (j), Bombay District Municipal Act, 1901, providing that persons taking goods liable to octroi through its limits should deposit the amount of the octroi at the in-going Naka, obtain the certificate of exit at the out-going Naka, and claim refund of the amount paid; the lorry-driver, in each case, instead of going through the above procedure, drove the lorry straight past both Nakas without stopping. We do not see how this case is of any assistance to the Kotri Municipality.

[12] In I. L. R. (1940) ALL. 4[3] the learned Judges of the Allahabad High Court were not dealing with the interpretation of any section corresponding to S. 77 (2), Bombay District Municipal Act, 1901.

[13] There is yet another aspect of the case which is fatal to the success of the revision application. Before a person can be convicted of an offence under S. 77 (2), Bombay District Municipal Act, 1901, it must be proved that the person importing the goods has intention to defraud the Municipality. In this case, intention to defraud was not even alleged. Indeed, it appears that Mr. Qureshi raised, what we consider to be, a *bona fide* contention in refusing to pay the terminal tax demanded. There was nothing in the conduct of Mr. Qureshi to warrant any inference of intention to defraud the Kotri Municipality. On any view of the case, we think Mr. Qureshi was properly acquitted, and we decline to interfere with the acquittal. The revision application is accordingly dismissed.

R.G.D. *Revision dismissed.*

A. I. R. (35) 1948 Sind 59 *[C. N. 16.]*

TYABJI C. J. AND CONSTANTINE J.

Emperor v. *Hansraj Dindayal*

Criminal Ref No. 54 of 1947, Decided on 3-7-1947 made by Addl. Dist. Magistrate, Karachi.

(a) Criminal P. C. (1893), S. 264 — "Substance of the evidence"—Meaning of—Substance how to be recorded — Object of section.

In order to comply with the provisions of S 264, the judgment must contain a sufficient record of the substance of the evidence given in the case. The expression "substance of the evidence" implies a judicious selection or precis of that part of the evidence which was really material. The question whether the substance of the evidence had been sufficiently recorded in a particular case must depend upon a consideration of the nature and relevance of the various pieces of evidence given in the case, regard being had to the issue raised or involved in the particular case. Section 264 does not require the Magistrate to embody in the judgment a gist of the evidence of each witness examined separately irrespective of the character, quality and relevance of such evidence. A judgment could not be regarded as sufficiently embodying the substance of the evidence, unless the substance was so recorded that there was no likelihood of any prejudice resulting to the accused, when exercising his right of appeal. An omission to refer in a reasonably sufficient manner to any piece of evidence which was of a character likely to affect the decision of any important point involved in the case might easily be an omission likely to prejudice the accused : *Case law referred.* [Para 16]

Per *Constantine J.* — The object of S. 264 is that an appellate Court should be able to form its opinion on the merits of the case and for that purpose have before it the Magistrate's statement of the substance of the evidence. To extract the substance of a witness's evidence is a matter of discretion and judgment on the part of the Magistrate, having regard to the points at issue, and if the substance can be expressed briefly and during the course of a reasoned argument, so much the better. But Magistrates should remember that to state the effect of the evidence is not the same thing as to state the substance, though the distinction may be fine. It is undesirable that an appellate Court should be reduced to ascertaining the substance by inference. [Para 24]

Annotation. — ('46-Com) Cr. P. C., S. 264 N. 1 pts. 1 to 8.

Cases referred :—

1. ('26) 19 S. L. R. 136 : 12 A. I. R. 1925 Sind 284 : 87 I. C. 914 : 26 Cr. L. J. 1026, Rahimutullah v. Emperor.
2. ('36) 23 A. I. R. 1936 Sind 40 : 161 I. C. 267 : 37 Cr. L. J. 455, Emperor v. Hemandas Devansingh.
3. ('27) 14 A. I. R. 1927 Mad. 298 : 99 I. C. 346 : 28 Cr. L. J. 138, Nagoor Kanni Nadura v. Sithu Naick.
4. ('28) 15 A. I. R 1928 Mad. 597 : 109 I. C. 897 : 29 Cr. L. J. 625, Chokalinga Pandaram v. Emperor.
5. ('24) 11 A. I. R. 1924 Oudh 167 : 72 I. C. 948 : 24 Cr. L. J. 484, Salim v. Emperor.
6. ('28) 30 Bom. L. R. 954 : 15 A. I. R. 1928 Bom. 433 : 112 I. C. 221 : 29 Cr. L. J. 1005, Nurudin Sheikh Adam v. Emperor.
7. ('29) 30 Cr. L. J. 557 : 16 A. I. R. 1929 Oudh 151 : 116 I. C 57, Jamna Prasad v. Emperor.

Fatechhand Assudomal, Advocate-General —for the Crown.

Balkishen H. Lulla — for the Accused.

Tyabji C. J. — This is a reference made by the Additional District Magistrate of Karachi who has forwarded to this Court the record and proceedings of a case, Crown v. Hansraj and two others, in which the Second Additional City Magistrate of Karachi convicted the three accused, Hansraj and Madanlal under S. 6 read with S. 13, Hoarding and Profiteering (Prevention) Ordinance (XXXV [35] of 1943), and Naraindas under the same sections read with S. 109, Penal Code, and sentenced Hansraj and Madanlal to pay a fine of Rs. 1000 each, and Naraindas to pay a fine of Rs. 250. The Additional District Magistrate recommends that the sentences, which he described as ludicrously inadequate, be enhanced.

[2] The facts which the Magistrate held to be proved were as follows: Hansraj and Madanlal are the proprietors of a shop run in the name of Ramesh & Co., in the Gordhandas Cloth Market in Karachi. Naraindas is a broker. One Ghulamnabi made a complaint to the Enforcement Officer that Ramesh & Co., were demanding a very unreasonable price for certain pieces of woolen goods. On this the Enforcement Officer proposed a trap and decided to utilize Ghulamnabi as a bogus purchaser. Ghulamnabi was to purchase 6 lengths of cloth, each measuring 14 yards, which were offered at Rs. 36 per yard. Rupees 3,030 in marked currency notes of Rs. 100 and Rs. 10 were handed over to Ghulamnabi. After this, according to an appointment, the broker Naraindas met Ghulamnabi, and accompanied him to the shop in question. The Sub-Inspector (Enforcement Branch) along with two *mashirs* followed Ghulamnabi and Naraindas to the shop in a *gharry*. There Ghulamnabi in the presence of the Sub-Inspector and the *mashirs*, who were also at the shop, picked out certain samples from a sample book and then a boy went and brought four pieces according to the samples. The price of three pieces sold at Rs. 36 per yard was Rs. 1575 and the price of the fourth piece sold at Rs. 33 was Rs. 231. The pieces were handed over to Ghulamnabi who paid Rs. 1806 using the marked notes. At this stage, the Sub-Inspector came up with the *mashirs*, secured the cloth and the money and the piece of paper on which the price was calculated, and prepared a *mashirnama*. Both Hansraj and Madanlal were present at the shop at the time when this transaction took place, as also Naraindas, who had come with Ghulamnabi. Immediately after preparing the *mashirnama* the Sub-Inspector searched the houses of the three accused, made a report and obtained sanction to prosecute the three men.

[3] During the investigation, it became clear that three out of the four pieces sold to Ghulamnabi corresponded with samples, Exs. F/1, F/2 and F/3, which were in the sample book, Ex. F, kept at the shop, which had the number 10,287 imprinted on it and showed the name of the importers, Messrs. Dhan Mohan of Amritsar. The invoice, Ex. N, was secured from Messrs Dadabhoy Hormusji & Sons, the clearing agents of the importers at Karachi. The invoice showed that 8 cases containing woolen textiles bearing serial Nos. 10,282 to 10,289 had been imported, and that the sample book, Ex. F, secured at the shop related to the contents of the case No. 10,287. The eight cases imported were shown in the manifest, Ex. 5, bearing No. 574/2, dated 21-12-1945 and Index No. 151 dated 29-12-1945. The Landing Cost Certificate regarding the goods contained in the eight cases, Ex. J, was issued, by the Assistant Director of Civil Supplies on 31-1-1946, and fixed the importers' price at Rs. 14-13-3 per yard, and the retail price at Rs. 16-10-11 per yard. Rupees 36 per yard was, therefore, an unreasonable consideration charged for these goods, very much in excess of the 20 per cent. allowed.

[4] The main evidence in the case given on behalf of the Crown was that of the Enforcement Officer, Mr. Nagarwalla, the bogus purchaser, Ghulamnabi, the *mashir* Gobindram and the investigating Sub-Inspector Autarsingh. The case was summarily tried by the Magistrate.

[5] On behalf of the defence two main contentions were set up : (1) that in this case there was no sale to Ghulamnabi at all; the accused contended that some time before the date of the alleged sale, Ghulamnabi had pledged the four pieces in question with the accused Hansraj and Madanlal and obtained Rs. 1800 from them on the pledge, accused Naraindas acting as broker, and that, at the time of the alleged sale, Ghulamnabi only paid the amount due by him on the pledge, and was allowed to take away the pieces which had been pledged; (2) that the

Landing Cost Certificate, EX. J, did not relate to the goods which, it was alleged, had been sold to Ghulamnabi.

[6] Two defence witnesses were examined by the accused in support of the pledge story. In addition one Shanti Saroop the proprietor of Messrs Dhan Mohan of Amritsar, who had imported the goods, was also examined as a defence witness.

[7] The learned Magistrate found the pledge story set up by the accused to be clearly false, and he held that the goods sold to Ghulamnabi had been clearly identified as goods covered by the Certificate, EX. J.

[8] As this is a matter in which an enhancement of the sentences has been proposed, it is open to Mr. Lulla, who appears on behalf of the three opponents, to show that their convictions were not proper.

[9] Mr. Lulla made some sort of an attempt to argue that the evidence actually led before the learned Magistrate did not justify the convictions, but he was unable to support his argument by anything which could be regarded as a good reason. His main contention before us, however, was that the judgment of the learned Magistrate was not a judgment which satisfied the provisions of S. 264, Criminal P. C. He contended that the learned Magistrate had failed in this case to embody the substance of the evidence given, and that this failure had caused grave prejudice to the accused. He contended that the three opponents should therefore be acquitted, or, in any case that a retrial should be ordered.

[10] Section 264, Criminal P. C., clearly requires a Magistrate trying summarily a case in which an appeal lies, such as the present, before passing sentence, to record a judgment embodying the substance of the evidence, and it also lays down that such judgment shall be the only record in such a case.

[11] Mr. Lulla referred us to a number of cases in which it was emphasised that unless the substance of the evidence was sufficiently embodied in the judgment, grave prejudice was likely to be caused to the person convicted when exercising his right of appeal, including 19 S.L.R. 136;[1] A. I. R. 1936 Sind 40;[2] A. I. R. 1927 Mad. 298;[3] and A. I. R. 1928 Mad. 597;[4] and he particularly relied on A. I. R. 1924 Oudh. 167;[5] and 30 Bom. L. R. 954[6], contending that unless the substance of the evidence of every witness examined was stated in the judgment, there would be failure to comply with S. 264, Criminal P. C.

[12] In A. I. R. 1924 Oudh 167,[5] it was stated:

"Section 264, Criminal P. C., requires that in such a case the Magistrate shall write a judgment embodying the substance of the evidence on both sides. It is clear from a perusal of the judgment that the Magistrate has not complied with this requirement. As regards the prosecution witnesses, all he says is that the witnesses support the statement of the complainant. This is hardly sufficient. The record should at least have shown how the witnesses came to be on the spot and how much of the affair they saw. When I come to the defence evidence, the record is still more insufficient. It appears that thirteen witnesses were examined in support of the cases set up by the defence. The learned Magistrate gives no indication of what these witnesses said and the only remark he makes about them is that the statement of the witnesses examined by Muhammad is very conflicting and he does not believe them."

[13] In 30 Bom. L. R. 954[6] it was stated:

"This section (S. 264, Criminal P. C.) says that the Bench shall record a judgment embodying the substance of the evidence, whereas the judgment contains no reference to any evidence that may have been given on behalf of the Municipality, such as that of the complainant, D. M. Daru; and although there is a reference to certain defence evidence the substance of it is not stated, but merely the fact that the Bench consider it unreliable. No doubt, it can be inferred that evidence was given in support of the accused's statement that the connection had been made some twelve years ago. But the provisions of S. 264 required that the substance should be plainly stated and not that the Court should be driven to inferences in order to find out the substance of the evidence."

On the facts of the case the learned Judges found that the failure of the Magistrate to state the substance of the evidence sufficiently had, in fact, caused prejudice to the accused, because it prevented a proper disposal of the appeal which the accused was entitled to make. They said:

"The appellate Court should know the substance of the evidence that had been given, so as to be in a position to decide the appeal on the merits, and it is not proper to decide the appeal in the way the District Magistrate has done, viz., he merely finds that the Bench did address themselves with due diligence to the question of fact that arose, and says he was not, at that stage, prepared to question the discretion which they exercised in determining it. To decide the appeal required more than a refusal to interfere with a discretion; it required a decision on the evidence as to the facts proved. In our opinion this is a case where there is an omission to comply with the provisions of S. 264, which cannot be deemed immaterial under S. 537 of the Criminal P. C."

[14] The learned Judges then expressed their opinion that if the accused had not died, they would have ordered a retrial.

[15] The learned Advocate-General referred us to a case, later than the one cited by Mr. Lulla, of the Oudh Chief Court, 30 Cr. L. J. 557,[7] in which Raza, J. dealing with a contention similar to that of Mr. Lulla before us stated:

"I think there is no force in the first ground. I have read the judgment of the learned City Magistrate carefully. It contains the substance of the evidence which is quite sufficient for convicting the accused persons under S. 4, Gambling Act. It is true that the judgment does not contain the substance of every separate deposition; but the Magistrate was not bound to record the substance of every deposition under S. 264, Criminal P. C.

He had to state generally what was the substance of the witnesses' evidence and this he had done. I agree that the substance of the evidence is a matter distinct from the facts which may be considered as proved by the evidence I agree also that the substance of the evidence should be recorded in such a manner that a superior Court acting in appeal or revision may be in a position to judge that there were sufficient materials before the Magistrate to support the conviction. The evidence might profitably have been summarized more fully in this case, but it cannot be said that the judgment is not a legal judgment when it contains the substance of the evidence which I think is sufficient for convicting the accused persons under S. 4, Gambling Act."

[16] It is clear that the judgment must contain a sufficient record of the substance of the evidence given in the case. The meaning of the expression "substance of the evidence" is, we think reasonably clear and implies a judicious selection or precis of that part of the evidence which was really material. The question whether the substance of the evidence had been sufficiently recorded in a particular case must, we think, depend upon a consideration of the nature and relevance of the various pieces of evidence given in the case, regard being had to the issues raised or involved in the particular case. Section 264 does not require the Magistrate to embody in the judgment a gist of the evidence of each witness examined separately irrespective of the character, quality and relevance of such evidence. A judgment could not be regarded as sufficiently embodying the substance of the evidence, unless the substance was so recorded that there was no likelihood of any prejudice resulting to the accused, when exercising his right of appeal. An omission to refer in a reasonably sufficient manner to any piece of evidence which was of a character likely to affect the decision of any important point involved in the case might easily be an omission likely to prejudice the accused.

[17] Mr. Lulla referred us to the following passage in the judgment of the learned Magistrate: "The two defence witnesses are obviously lying and it was easy to see that they were friends of the accused who had come to oblige him" and he argued that this was all that was stated with regard to the substance of the evidence of the two defence witnesses referred to, and he contended that these defence witnesses had given important evidence, and that the failure of the learned Magistrate to state what these witnesses had stated, had made it impossible for him to show us that they had been wrongly disbelieved. This passage, however, occurs at the very end of a long paragraph in which the learned Magistrate discussed the evidence with regard to the contention of the accused that, as a matter of fact, the accused had not sold the goods to Ghulamnabi, but had only returned goods which had been pledged with them on payment of the amount advanced. This paragraph is as follows:

"On the evidence before me I have no hesitation in holding the sale proved and in holding the pledge story to be absolutely false. In the first instance there is no reason why Ghulam Nabi should lie and falsely implicate accused 3. He had no motive against the accused. Accused Naraindas has not alleged any reason. On the contrary according to him (Naraindas) Ghulam Nabi was his (Naraindas's) permanent customer. Accused Madanlal states that Ghulam Nabi was set up by some rival businessmen. Who these businessmen were and why they wanted to implicate the accused and why had Ghulam Nabi consented to do a dirty turn to the accused is not vouchsafed by Madanlal. According to accused Hansraj the reason was quite different. They (the accused) were importers of lining cloth and Ghulam Nabi being a tailor wanted them to increase his lining quota and as they had refused to do so, Ghulam Nabi had framed them. This allegation of Hansraj remains an allegation. In fact beyond the bare word of each of the accused — each giving a different reason — there is nothing to show that Ghualm Nabi wanted to frame the accused. The story of the pledge is inherently improbable and false. That the accused Madanlal on his own would part with a sum of Rs. 1800 for cloth worth about less than Rs. 800 (for the accused being dealer could gauge the approximate price) and without taking any writing from Ghulam Nabi is against the normal routine of a businessman and cannot possibly be true specially when Ghulam Nabi was dissatisfied with them on the issue of the lining cloth quota It is false to say that while, as stated by Hansraj, Hansraj reported to Mr. Pearce about the conduct of Ghulam Nabi, Hansraj's brother and partner would fork out Rs. 1800 to the same Ghulam Nabi and that without a writing. And again if it was a pledge then there was no reason for Naraindas to go after Ghulam Nabi and take him to Ramesh & Co., and be present at the time of the redemption when he was not to benefit at all by the transaction. For does he not state that he was not to get any commission on the alleged pledge transaction, nor did he get any? The conduct of Naraindas in seeking out Ghulam Nabi in Camp and taking him to Ramesh & Co., is absolutely incompatible with the pledge stuff. The two defence witnesses are obviously lying and it was easy to see that they were friends of the accused who had come to oblige him."

[18] It appears to us to be very clearly indicated that the two defence witnesses gave evidence to show that the goods were pledged with the accused by Ghulam Nabi in their presence. Taking the entire paragrah as it is, we think it cannot be reasonably urged that there was no clear indication of what these defence witnesses had stated. The reasons given by the learned Magistrate for disbelieving this pledge story, and the evidence of the two defence witnesses who deposed to it, have been very fully stated. Under the circumstances, we do not think that there is any justification for holding that the substance of the evidence of the two defence witnesses was so insufficiently stated as to prejudice the accused, although, it would have been more satisfactory and more in accordance with S. 264 if the substance of their substance had been summarised.

[19] Shanti Saroop, the proprietor of the firm of Dhan Mohan of Amritsar, was also examined as a witness for the defence. It is clear that he was examined in connection with the defence contention that the goods sold to Gulam Nabi had not been sufficiently identified as goods covered by Ex. J, the certificate of landed cost. The learned Magistrate referred to the evidence of Shanti Saroop in his judgment in this manner:

"I may here refer to the evidence of D. W. Shanti Saroop of Messrs. Dhan Mohan of Amritsar (the importers). His evidence is of a general character and cannot detract from the documentary evidence placing the 3 pieces sold in the said manifest and therefore covered by the landed cost certificate."

It is true that what Shanti Saroop actually stated was not set out in the judgment. It is, however, clear that he gave evidence, which the Magistrate described as 'evidence of a general character,' which did not in any manner affect the documentary evidence given particularly with regard to the actual goods in question, as goods covered by Ex. J. Here again, we think that although it may, in one sense, be true to say that the learned Magistrate did not state what Shanti Saroop had actually said, the nature and character of that evidence which was the real thing which mattered, was sufficiently indicated, and the reasons of the Magistrate for not regarding that evidence as in any way affecting the strength of the Crown evidence regarding the identity of the goods, have been so stated that there is no justification whatever for saying that the accused have in any manner been prejudiced. It is not necessary to know anything more about Shanti Saroop's evidence to decide whether the learned Magistrate's conclusion was or was not correct on the point under consideration. We do not think that the Magistrate was bound to give any further details of the evidence which, on the very face of it, was of a character which made it worthless and even irrelevant, although it would have been better if he had done so.

[20] We are therefore of the opinion that this is not one of those cases where prejudice had or was likely to have been caused. We are satisfied that on all the points which actually arose for consideration the Magistrate had very fully stated the substance of the relevant evidence in the case, and we find no difficulty here in disposing of this matter on merits, in arriving at our conclusions on all the points which matter after hearing this matter in the manner in which an appeal ought to be heard and disposed of.

[21] We are satisfied that the three opponents were properly convicted. It is clear that the three opponents were concerned in carrying out a transaction, which was clearly an offence under the Hoarding and Profiteering (Prevention) Ordinance. This Court has always taken a serious view of such offences. We therefore agree with the learned Additional District Magistrate that the sentences passed in this case were inadequate.

[22] We therefore maintain the fines imposed on the three opponents, and the sentences imposed in default of payment of the fines; and in addition we sentence each of the three opponents to suffer rigorous imprisonment for three months. The opponents may be placed in "B" Class

[23] **Constantine J.** — I agree, and would add the following remarks.

[24] The object of S. 264, Criminal P. C. is that an appellate Court should be able to form its own opinion on the merits of the case and for that purpose have before it the Magistrate's statement of the substance of the evidence. To extract the substance of a witness's evidence is a matter of discretion and judgment on the part of the Magistrate, having regard to the points at issue, and if the substance can be expressed briefly and during the course of a reasoned argument, so much the better. But Magistrates should remember that to state the effect of the evidence is not the same thing as to state the substance, though the distinction may be fine; it is undesirable that an appellate Court should be reduced to ascertaining the substance by inference. In this case the learned Magistrate might well have indicated the substance of the evidence of the three witnesses in question more directly and less allusively. But the context shews that the first two supported a story of pledge which on the face of it was untenable and it is clear from the Magistrate's statement that the evidence of the third witness had no bearing on the actual documents which provided cogent proof of the cost of the goods in question. No prejudice has been caused to the appellants.

V.R. *Accused sentenced.*

A. I. R. (35) 1948 Sind 63 *[C. N. 17.]*

O'SULLIVAN AND THADANI JJ.

Hiromal s/o Chuharmal — Appellant v. *Emperor.*

Criminal Appeal No. 58 of 1947, Decided on 15-5-1947, from order of Addl. Sessions Judge, Nawabshah.

(a) Penal Code (1860), S. 302—Grave provocation —Accused's father while under influence of drink abusing accused and his sisters — Accused on several occasions remonstrated with liquor shopkeeper and asked him not to supply liquor to his father—Shopkeeper paying no attention to accused's request—On accused's father coming home drunk, accused rushing to the shopkeeper with knife and causing injuries which resulted in death of shopkeeper Accused held acted under grave provocation when he struck the shopkeeper. [Para 4]

(b) Bombay Children Act (13 [XIII] of 1924), S. 22 — Murder case — Age of accused hardly 15 years—Sentence of transportation held illegal.

In a murder case, where the age of the accused when he committed the offence was hardly fifteen years, it was held that the sentence of transportation for life passed upon him was illegal as he clearly came within the definition of "child" as given in the Act.

[Paras 8, 9]

Khemchand R. F. Khilnani — for Appellant.

Parmanand Kundanmal, Public Prosecutor of Sind — for the Crown.

O'Sullivan J. — This is a very unusual case. A boy called Hiromal, a resident of Sinjhoro in the Nawabshah District, has been convicted of an offence under S. 302, Penal Code, by the Additional Sessions Judge of Nawabshah and sentenced to transportation for life. He has appealed and the appeal, which was admitted to regular hearing, has come before us today.

[2] The prosecution case was that the father of the appellant was addicted to drink which he obtained at the shop of a liquor licensee called Sirumal who sold country liquor and intoxicating drugs in Sinjhoro town. It is the prosecution case that Hiromal was upset at the manner in which his father used to drink liquor at Sirumal's shop and come home drunk and that he remonstrated with Sirumal for selling his father drink. On the evening of 31-8-1946, the appellant's father came home the worse for liquor which had been supplied at Sirumal's shop. This exasperated the boy who seized a knife and went to Sirumal's shop and remonstrated with him, and when Sirumal expressed an intention to continue to supply liquor to appellant's father, the appellant struck him with the knife inflicting four injuries in consequence of which Sirumal died.

[3] The facts of the case are not in dispute because the prosecution has relied upon a confession made by the appellant as being both true and voluntary. This confession reads as follows:

"My father started drinking liquor before my birth. My mother used to prevent him from doing so. My father was partner of Seth Perumal. He left that place. Thereafter when we opened our own shop in Deh 39 my father again began to drink liquor. For the last about two years I had been telling Seth Sirumal Gutawalla not to sell liquor to my father because my father used to abuse me and my sisters after getting drunk. With all that Sirumal used to give him liquor. Yesterday at about 5-0 p. m. I told Sirumal that he was still not keeping back from giving liquor to my father and he replied that he would not keep back from doing so and would give liquor to him. Again at 7 p. m., my father came home drunk and he abused my sisters. I could not bear that. I picked up the knife in my house and I went to Sirumal's shop and asked him "you have again given liquor to my father". He replied that he would give him liquor. I got annoyed at it and attacked him with knife and caused him four injuries. I then ran away. Thereafter the Police came at night and searched for me. I went running to the pond of water and put off my clothes and threw the same in it. I passed the night at the pond and came home in the morning. I put on other clothes in the house. Then the police came and took me away. Every one is self-respecting."

[4] This confession is supported by the first information report in the case and we have no doubt that the facts are true. The circumstances reveal a good deal of the family life of this unfortunate boy who has in a graphic language described the state of affairs caused in the family by the unfortunate habits of his father. He has said that his father started drinking before he was born and continued to do so and apparently ruined his business. When he used to come in drunk he was very unpleasant to the appellant's sisters. It is manifest that this state of affairs must have continued for a good many years and the effect on the mind of the growing youth developing a sense of responsibility who was no doubt endeavouring to keep the family together can be well imagined. Finally the climax came on the night in question when the father came home drunk and abused, as the confession stated, the appellant's sisters. The appellant had already asked Sirumal not to supply liquor to his father. There is no reason to disbelieve that when the appellant remonstrated with Sirumal on the night in question, Sirumal replied that he would continue to supply liquor to the appellant's father. Sirumal was of course entitled to supply liquor to whomsoever he liked, but a wise liquor licensee has undoubtedly a wide scope to refuse more liquor to a customer than that customer can stand, and there is no doubt that the appellant, as the learned Judge has found, acted under grave provocation when he struck Sirumal.

[5] The facts, as has been stated, are very unusual. Sirumal himself in a dying declaration has admitted that the appellant asked him not to supply liquor to his father, but said that he said to the appellant that he was required to supply liquor to everybody according to law. He added however that if the appellant wished he would give instructions that liquor should not be supplied to the appellant's father. It is difficult to believe that Sirumal did take up this attitude. Had he done so, it is probable that the tragedy would never have occurred.

[6] The learned Sessions Judge has taken no pains whatever to ascertain the real age of the appellant. There was upon the record a certificate from a medical officer stating that he was about 16 years of age. But the learned Sessions Judge dealt with him on the assumption that he was about 17 to 19 years of age and sentenced him to transportation for life. He is undergoing the sentence in an ordinary jail for adults.

[7] The Sessions Judge, we consider, should have exercised considerably more care in the

matter The appellant was before him and it should have been obvious to him as indeed it is obvious to us when we now have the appellant before us, that he is a youth of 15 or 16 years of age. He was probably 15 or little over at the time of the offence.

[8] When this appeal was admitted, we directed that the medical officer of the jail in which he was then undergoing sentence should report as to his age, and we have his report before us to the effect that he is now about 15 or 16 years of age. The offence took place nearly a year ago in last August and it is safe to assume that he was then hardly 15 years of age. He looks to us now barely 16 In the circumstances, the sentence was illegal. The learned Judge made no reference to the Bombay Children Act, 13 (XIII) of 1924 which clearly applied to the case, as the appellant comes within the definition of "young person" in that Act, being a person who is 14 years of age and upwards but under the age of 16.

[9] This being so, the sentence of transportation for life is illegal, and it was a most unfortunate sight to see this 'young person" led into this Court in heavy shackles on his legs and handcuffs, a most inappropriate treatment for a boy of this age.

[10] Section 26, Bombay Children Act, refers to detention in the case of serious crime committed by children and young persons and as to the action to be taken when in the opinion of the Court the nature of the offence is so serious that no punishment which the Act provides, is sufficient

[11] The crime with which the appellant has been properly convicted is murder which is a very serious offence, but in the very unusual and extraordinary circumstances of the case, we consider that the appellant may appropriately be dealt with under S. 27, and that it is unnecessary to take action under S. 26.

[12] We consider that the interests of justice would be entirely met by making an order under S. 27 (b) of the Act, remitting the appellant to the care of two fit adult persons from the town where he resides who will execute a bond to be responsible for his good behaviour and conduct. We think such a course would completely meet this case. On all the facts before us, we have good reason to believe that this boy is responsible for the welfare of his family, his sense of responsibility having been developed by the unfortunate habits of his father. There is nothing whatever to suggest that he had been of the least trouble hitherto and on our observation of him he appears to be a normal, pleasant looking youth.

[13] Mr. Khemchand Khilnani who appears for him states that he would procure in this Court the attendance of two respectable and responsible residents of Sinjhoro to stand surety in this behalf. He undertakes that they should attend before this Court on 21-5-1947.

[14] In the meantime we direct that the appellant be returned to the custody of the jail with directions to the Superintendent that the shackles should be removed from his person and intimation also to the effect that immediately the sureties are accepted he should be released. He may in the meantime be treated in an appropriate manner, as one who is about to be released on the execution of the necessary bonds. The Superintendent of the jail is directed to produce the appellant in this Court on 21-5-1947.

[15] *21 5-1947.* — In accordance with our judgment of 15 5 1947 two sureties, Tirathamal son of Lilaram and Sitaldas s/o Mulchand have been produced. They have filed affidavits as to their status and both are willing to execute the necessary bonds under S 27 (b), Bombay Children Act, to be responsible for the good behaviour of the appellant. The learned Advocate General submits they are fit persons to be accepted as sureties and we agree.

[16] We therefore direct these two persons to execute bonds under S. 27 (b) in the sum of Rs 5000 each to be responsible for the good behaviour of the appellant Hiromal s/o Chuharmal for a period of three years. The appellant is to be released and handed over to the sureties on execution of the bonds.

N.S.D. *Order accordingly.*

A. I. R. (35) 1948 Sind 65 *[C. N. 18.]*

O'SULLIVAN AND THADANI JJ.

Kundan s/o Tillumal — Applicant v. *Emperor.*

Criminal Revn. Appln. No. 63 of 1947, Decided on 26 5-1947, from judgment of Constantine J., D/- 28-1-1947.

(a) Evidence Act (1872), S. 30 — 'Same offence', meaning of—Offences under S. 457/330 and S. 411, Penal Code are not same.

The words 'same offence' in S. 30 have not the same meaning as the words 'offences of the same kind' in S. 234, Criminal P. C They mean identical offence.

Hence where two persons are jointly tried, one for an offence under S. 457/380, Penal Code and the other for an offence under S. 411, Penal Code a confession made by one accused person cannot be taken into consideration against the other who has been implicated in the confession. The fact that both were challaned under S. 457/380, Penal Code is immaterial.

[Paras 8 & 9]

Annotation.—('46-Man.), Evidence Act, S. 30. N. 2.

(b) Evidence Act (1872), S. 133 — Person knowingly receiving stolen property but subsequently disclosing fact to police if accomplice.

A receiver of stolen property is not necessarily an accomplice of a thief. [Para 12]

Where a person received stolen property for safe custody from the accused with knowledge that it was

stolen property but subsequently realising the danger of withholding the information disclosed it to the police:

Held that the evidence of such a person could not be regarded as that of an accomplice. [Paras 11 & 12]

Annotation.—('46-Com.) Cr. P. C. S. 44 N. 5.

Kimatrai Bhojraj—for Applicant.

Parmanand Kundanmal, Public Prosecutor for Sind—for the Crown.

Thadani J. — This is a revision application against the decision of Constantine J., in which he upheld the conviction and sentence passed on the applicant under S. 411, Penal Code by the First Additional City Magistrate, Karachi.

[2] On the night of 2-10-1946, a theft occurred on the ground floor of a building occupied by the firm of Kewalram Topandas, carrying on business near Boulton Market. The firm employed a chowkidar called Ramsingh who used to live on one of the upper floors of the building. On the night in question, after closing the office for the day, Ramsingh retired upstairs to sleep and kept the key of the office under his pillow. When he woke up at 5-30 A. M., he found the key missing. He went downstairs and found the office door and safe open. Immediately he informed his masters and one of the partners called Kishinchand lodged a report at the Karachi City Police Station at 8 in the morning.

[3] In the evening one Lilo went to Chandiram, a partner in the firm of Kewalram Topandas and told him that some property had been kept with him by the applicant. Chandiram sent for his partner Kishinchand, and the two partners accompanied by the police went to Lilo's room where they found a bedding and a bag In the bag were found some gold, cash and ornaments, the property of the firm of Kewalram Topandas. Lilo also handed to the police a sum of Rs. 515 which he said had been given to him by the applicant.

[4] In the course of the investigation the police searched the room of one Chanderbhan who handed over to the police a large sum of money belonging to the firm of Kewalram Topandas and made a confession to the City Magistrate, Karachi. On the completion of the investigation, the applicant and Chanderbhan were sent up for trial. Chanderbhan was charged and convicted under S. 457/380, Penal Code and the applicant under S. 411, Penal Code. Chanderbhan did not appeal.

[5] At the hearing of the appeal, it was brought to the notice of Constantine J. that Chanderbhan's confession had not been exhibited. The Public Prosecutor requested the Judge to call for the confession and admit it under the provisions of S. 428, Criminal P. C., as Chanderbhan in his confession had implicated the appellant. The Learned Judge acceded to the request of the Public Prosecutor.

[6] It is contended on behalf of the applicant that Chanderbhan's confession should not have been brought on the record under the provisions of S. 428, Criminal P. C., firstly, because the applicant and Chanderbhan were not tried for the same offence as required by S. 30, Evidence Act, and secondly, because the applicant was never questioned about it, when he was examined under the provisions of S. 342, Criminal P. C. and that if the confession of Chanderbhan cannot be taken into consideration against the applicant, the only evidence in the case is the uncorroborated evidence of Lilo, an accomplice.

[7] We think the learned Judge was in error in admitting the confession on the facts of this case.

[8] There appears to be consensus of judicial opinion that where two persons are jointly tried, one for an offence under S. 457, Penal Code and the other for an offence under S. 411, Penal Code, a confession made by one accused person cannot be taken into consideration against the other who has been implicated in the confession. The words "same offence," we think, must mean identical offence, and not offence of the same kind. For instance, S. 234, Criminal P. C. refers to offences of the same kind, and offences of the same kind are defined in sub-s. (2) of S. 234, Criminal P. C. as offences punishable with the same amount of punishment under the same section of the Indian Penal Code or any special or local law. We think that the words "same offence" in S. 30, Evidence Act have not the same meaning as the words "offences of the same kind" in S. 234, Criminal P. C.

[9] It was pointed out to us by the learned Advocate-General that the challan against the applicant and Chanderbhan was sent to the Magistrate under S. 457/380, Penal Code. We do not think that makes any difference in view of the fact that the charge against the applicant was framed under S. 411, Penal Code, and he was convicted of receiving stolen property with the requisite knowledge.

[10] The second objection raised on behalf of the applicant, to the effect that before the confession of Chanderbhan could be taken into consideration against the applicant, the applicant should have been questioned about it must also prevail. We would accordingly exclude the confession of Chanderbhan from our consideration.

[11] The only other point which requires consideration is whether the evidence of Lilo is the evidence of an accomplice. We have scrutinized the evidence of Lilo, and have come to the conclusion that his evidence is not to be regarded as the evidence of an accomplice. The learned City Magistrate who tried the case has carefully considered the evidence of Lilo and

come to the conclusion that Lilo's evidence is not to be regarded as the evidence of an accomplice. Lilo's evidence is that the applicant came to him at 7 A. M. on the morning of 3-10-1946 with a bedding and asked him to keep it, and that he would call for it later; the applicant came at 2 P. M. and asked for the key of his room; he gave it to him; the applicant then returned to him Rs. 15 which he had borrowed from him and gave him a sum of Rs. 500 for safe custody; in the evening he read in the "Hindu Sansar" about this theft; he went to Kishinchand, and Kishinchand and Chandiram made a report to the police.

[12] It is true Lilo says that when he kept the property given to him by the applicant, he knew from the applicant himself that the property was stolen. But a receiver of stolen property is not necessarily an accomplice of a thief. Lilo apparently was a friend of the applicant, but when he read about the theft in "Hindu Sansar," he appears to have realised the danger of withholding information, and so he decided to disclose the information to Chandiram, one of the partners in the firm. We think the subsequent conduct of Lilo was the conduct of an honest man. It was he who informed the police that the applicant had given him Rs. 515. We agree with the view of the Courts below that Lilo's evidence is not to be regarded as the evidence of an accomplice. Lilo's evidence having been believed by both the Courts, it is not for us to reject his evidence in revision. We accordingly decline to interfere in revision and dismiss the application.

K. S. *Revision dismissed.*

A. I. R. (35) 1948 Sind 67 *[C. N. 19.]*

TYABJI C. J. AND MEHAR J.

Pandhikhan Nandokhan and another — *Appellants* v. *Emperor.*

Criminal Appeal No. 57 of 1947, Decided on 22-7-1947, against judgment of 2nd Addl. Sessions Judge, Hyderabad, D/- 15-2-1947.

(a) Penal Code (1860), S. 220—Offence under, by head-constables held proved — Fact that accused were acting under instructions of superior officers should be considered on question of sentence—Sentence reduced.

The accused who were police head-constables were charged under S. 220, Penal Code. The charge against them was that they went to the house of the complainant with about 10 policemen and handcuffed him and also handcuffed his servant with the same pair of handcuffs and tied a rope round their wrist, maliciously and knowing that they were acting contrary to law. The motive for the offence suggested in the complaint was that the complainant who was the manager of a cinema had refused free passes to police officers and the accused had acted under the instigation of those officers. The defence case was that a certain boy had made a complaint against the cinema manager under Ss. 147, 323, Penal Code, and the accused had gone to investigate the matter and having been obstructed and driven out by the manager and his staff they had to arrest the complainant. The evidence showed that no investigation was made and when the complainant asked as to why he was being arrested he was asked to shut up. The report made by the boy was found to be substantially false and inspired by same police officers. The accused were convicted and sentenced to two years' rigorous imprisonment:

Held, that the accused had no right to arrest the complainant either Ss. 157 (1), 54 or S. 46, Criminal P.C. They were, therefore, rightly convicted. [Para 18]

Held further that the circumstances that the accused were acting under the instructions of their superior officers and that they were not known before to the complainant and had no particular personal grudge of their own against him should be taken into consideration on the question of sentence. One year's rigorous imprisonment would meet the ends of justice. [Para 19]

(b) Criminal P. C. (1898), S. 46—Confinement and rough handling are not permissible when there is submission to custody.

Under first part of S. 46, confinement and rough handling are not permissible and are contrary to law, when the person to be arrested submits to the custody, that is, to the restraint which is necessary and sufficient for the purposes of the arrest. An arrest is completed when there is a submission to the custody by word or action. Every police officer, knows that in making an arrest he must not subject the person to be arrested to unnecessary brutality, and that he cannot confine any person unless the person refuses to submit to custody and it becomes necessary to confine him, and cl. 2 of S. 46 is brought into application. [Para 28]

Annotation. —('46-Com.) Criminal P. C., S. 46, N 2.

B. H. Lulla (for No. 1) and A. K. Brohi (for No 2) — for Appellants.

Fatehchand Assudomal Advocate-General of Sind — for the Crown.

Mehar J.—The appellants in this case have been convicted by the learned Second Additional Sessions Judge, Hyderabad of the offence under S. 220, Penal Code, and sentenced to rigorous imprisonment for two years. The appellant Pandhikhan was further convicted under S. 323, Penal Code, and sentenced to pay a fine of Rs. 100 or in default to undergo rigorous imprisonment for one month.

[2] The appellants were Head Constables of the City Police Station, Hyderabad. The charge against them was that on the evening of 29-5-1944 they went to the house of the complainant Gori Shanker, handcuffed and tied with a rope Gori Shanker and his servant Kassim, maliciously and knowing that they were acting contrary to law. The appellant Pandhikhan was further charged with having caused an injury to Gori Shanker with a dandi while handcuffing him.

[3] The complainant, Gori Shanker was the Manager of Empire Talkies, Hyderabad. The prosecution case, as set out in the evidence of Gori Shanker, is that on that evening at about 8-30 P M. he was with his friends whom he had invited to dinner and that they were preparing to take meals when there was a knock at the door.

The two appellants with a number of policemen entered. He found his Makrani servant Kassim handcuffed and a rope had been tied round his wrist. Pandhikhan put the same handcuffs round Gori Shanker's hand, i.e., his hand and Kassim's hand were joined by the same pair of handcuffs. The appellant, Jan Mahomed then tied the rope round his wrist. The complainant enquired why he was being arrested, Pandhikhan said that he could enquire at the police station and struck him with a dandi on the middle finger of the right hand. His guests Kalidas and Shantidas also asked the policemen what it was about and offered to stand surety; but they were told that he would be taken to the police station. After some time, witnesses Tikamdas, Assudomal and others came up and talked with the police officers. After about an hour Sub Inspector Kanayalal came and got the handcuffs removed.

[4] The motive for the offence suggested in the complainant's evidence was that he had not been giving free passes to police officers. Gori Shanker has stated that at first he used to give free passes to the police, but that after the second week of May 1944, when the picture 'kismat' was running and there was a lot of rush, he asked Inspector, Samuel Ghani and Sub-Inspector Sahibdino, who had been taking free passes from him, to wait till the rush days were over. On one evening Mr. Samuel Ghani sent four men whom he refused admission. He rang up Mr. Samuel Ghani and told him that the rush was there still. Then these men went away. On 21 5-1944 he refused admission to five men who had been sent by Mr. Samuel Ghani. He also refused admission to some men sent by Sub-Inspector Sahibdino. On 21st May Sahibdino had brought four men and given them seats without his knowledge. But he refused to admit them and they paid for the tickets.

[5] It might be mentioned here that one Kishno had on the evening of 29-5-1944 sought admission to the first show on a ticket which had expired, having been of the previous evening, and was refused admission. This Kishno went to the City Police Station accompanied by one Hiranand, brother of Sub-Inspector Kanayalal, who is a defence witness in the case, and Pribhdas, a police Munshi. There he made a complaint under Ss. 147 and 323, Penal Code, against Gori Shanker, the Manager of the Cinema, Kassim, Brijlal, Kishinchand and two other persons whose names were not given. In that complaint he alleged that he had purchased a first class ticket and sought admission, but he was not admitted by the gate-keeper Kassim, that Kassim dragged him to the Manager that the Manager slapped him and called 5 or 6 of his servants, who gave him fist blows and kicks on the arms and the back, saying that he had brought an expired ticket. It is the prosecution case that this false complaint was inspired by the police, who used it as a handle to disgrace the complainant by handcuffing him and tying him with a rope along with his Makrani servant and trying to march him through the town of Hyderabad to the police station and thus to teach him a lesson for refusing free passes to superior police officers and their friends.

[6] The appellant, Pandhikhan stated before the Committing Magistrate that he did not handcuff the complainant and Kassim, that he came to the Cinema at about 9-45 P. M. with Sub-Inspector Kanayalal, and that he and Kanayalal got the handcuffs removed. In the Sessions Court, he further elaborated his statement and said that constable Harpaldas of the City Police station came to him and said that he had gone with Head Constable Jan Mahomed to investigate a complaint filed by Kishno against Gori Shanker and others, that they did not permit the investigation and there was a quarrel and that Gori Shanker and Kassim were handcuffed at the orders of Jan Mahomed. He further said that they had been beaten and their clothes torn. He (the appellant Pandhikhan) rang up Sub-Inspector Kanayalal and Kanayalal said that he would be coming. He then went to the cinema where Kanayalal asked him to remove the handcuffs. He got the key from Jan Mahomed and removed the handcuffs and released Gori Shanker and Kassim. Thereafter Kanayalal asked Jan Mahomed to proceed with the investigation.

[7] The appellant Jan Mahomed stated before the Committing Magistrate that he had gone for the investigation of Kishno's case that he and the policemen were obstructed and pushed so he ordered the constables to handcuff Gori Shanker and Kassim. In the Sessions Court he adhered to that statement and in reply to questions by the Court admitted that he ordered his constables to tie Gori Shanker and Kassim with a rope.

[8] A number of witnesses have been examined in support of the prosecution version, and the defence also examined witnesses in support of their version. The learned Additional Sessions Judge believed the evidence of the prosecution witnesses which he considered, was borne out by the circumstances and the probabilities of the case, and disbelieved the version of the defence witnesses, whom he has referred as 'police pimps." He held that the complaint filed by Kishno was imaginary and was inspired by someone and was merely used by the appellants as a handle for their ill-treatment of the complainant. He further held that the appellants abused their position as police officers and deliberately moles-

ted and humiliated the complainant, that the alleged obstruction to the police, on which ground the appellant Jan Mahomed justified his action, was imaginary, and that the incident took place as alleged by the prosecution and that the defence version was false.

[9] It has been urged by Mr. Lulla for the appellants that the prosecution version should have been disbelieved and that the defence version that Gori Shanker and Kassim were handcuffed and tied together with a rope because they obstructed the police in the investigation of the complaint filed by Kishno, should be believed. Mr. Lulla has further urged that the evidence of the complainant should not be relied on because of certain discrepancies and because the complainant tried to involve also three other police officers, namely, Inspector, Samuel Ghani and Sub-Inspectors, Kanayalal and Sahibdino, on a charge of abetment of the offence in a complaint made by him 15 months after the offence. We do not think that there are any such discrepancies in the evidence of the complainants to discredit his evidence, nor do we see any reason to reject his evidence because it gives more details than the account given in the written complaint which was filed by him on the day after the offence. It is not that the complainant has tried to involve three other superior police officers for the first time 15 months after the original complaint, for it is in evidence that on 6-7-1944, i. e, a few days after the offence, he made an application to the Inspector General of Police in which he has made a complaint against these police officers. In that application he stated :

"There can be no manner of doubt that these Head Constables in the town of Hyderabad would not ordinarily be so highhanded as they have been unless they were engaged to perpetrate the crime by their Superior Officers whose antecedent and subsequent conduct makes out a complete case of conspiracy against them. These officers are Messrs Ghani, Sahibdino and Kanayalal."

In the formal complaint made by him to the Magistrate against these police officers (EX. 36) he has given his reasons for believing that the appellants acted in the manner they did because of abetment by the three superior police officers It may be noted that these three officers were also committed for trial along with the appellants but the commitment was quashed by a Bench of this Court on the ground that it was not likely that any Court could properly convict an Inspector and two Sub-Inspectors on a complaint made after a lapse of so many months when in the first complaint they were not involved But the circumstances that the commitment of these three officers was quashed does not throw doubt on the prosecution case against the appellants. The learned Additional Sessions Judge has in his judgment stated :

"The three police officers are therefore happily out of the scene and it is the two head constables of police who obviously at their bidding went to disgrace Gori Shanker for his checkiness in refusing passes to the police, who are undergoing this trial."

[10] In this appeal we are not concerned with the question of the complicity of these officers, the committal proceedings against whom have already been quashed. But the fact that these police officers were committed for trial along with the appellants is of some relevance in assessing the evidence of Kanayalal and Sahibdino who have given evidence as defence witnesses and who can, by no means, be considered as disinterested witnesses.

[11] The complainant's evidence is supported by the evidence of respectable witnesses. (After discussing the evidence the judgment proceeded.)

[12] We may now refer to the evidence of some of the defence witnesses, who have supported the appellants' case. (After referring to defence evidence the judgment continued :)

[13] It is not credible that the complainant, who is a cinema Manager, a retired accountant of the B. B. C. I. Railway and a person of some social status, should have acted in the manner alleged by the defence witnesses, merely because police officers wanted to make a mashirnama in respect of the complaint filed by Kishno. It is the defence case that all the police officers were thrown out of the cinema by the complainant and his men and the gate closed. If they had succeeded in overpowering the police party and throwing them out, it is not believable that the complainant would submit to himself and his servant Kassim being handcuffed and tied with a rope. If he was so powerful and so many men were at his disposal, he would not have allowed himself to be humiliated in this manner. If the appellant, Jan Mahomed went to the cinema to make a bona fide investigation into the complaint filed by Kishno, it was not necessary that another Head Constable and so many other policemen should accompany him, nor was it necessary for them to take a pair of handcuffs and a rope. Such a large police party was not needed in the investigation of a petty offence It may well be that such a large police party was taken because it was apprehended by the appellants and the superior officers who inspired this proceeding that the highhanded and outrageous proceeding on which they were about to embark might meet with opposition and they might not otherwise be be able to carry out their object of marching Gori Shanker in handcuffs through the town of Hyderabad to the police station.

[14] It has been urged that as a complaint of a cognizable offence had been filed against Gori Shanker and his men, the appellants had a right to arrest Gori Shanker and Kassim. Section 54,

Criminal P. C, lays down that a police officer may arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists of his having been so concerned. It is, therefore, relevant to consider whether in this case the police regarded the first information report of Kishno as credible information. In that complaint, the boy Kishno stated that he purchased a first class ticket for 15 annas and sought admission when the gate-keeper Kassim said that the ticket was not valid, dragged him to the Manager, slapped him and called 5 or 6 of his servants and they, including the manager, gave him fist blows and kicks on the arms and back. Kishno was accompanied to the police station by Hiranand, brother of Sub-Inspector Kanayalal, and Pribhdas, a police Munshi. Hiranand had come to see the picture 'kismat' which had a long run and had attracted a large crowd, but did not see it, and interested himself in the boy's complaint and went to the police station. While Pribhdas, who had come from Dadu, also denied himself the pleasure of seeing the picture, so that he could champion the cause of the boy. The evidence of the complainant supported by the record of the cinema shows that Kishno had sought admission on an expired ticket which had been issued the previous day. He was admittedly refused admission. It is difficult to believe that the cinema Manager would find it necessary to require the services of 5 or 6 men to beat. Kishno who appears from the record to be a boy aged 13 years. No cinema Manager would act in such an unbusiness like manner, nor was there any occasion for so many people to beat the boy. It was sufficient to refuse admission to him, Kishno was given a letter by the police to the Civil Hospital. But he did not go on that day. Dr. Mohandas (Ex. 54) has stated that Kishno had some injuries which appeared to have been caused by finger nails, that the injuries were trivial and did not need treatment. As already pointed out above, in the first information Kishno has stated that he was given fist blows and kicks, an allegation which is not borne out by the medical evidence. It is probable that these injuries with the finger nails were subsequently manipulated to support the false first information report. It might be mentioned that Gori Shanker and some others of the cinema staff were prosecuted by the police, as a result of the complaint filed by Kishno, and were discharged, the Magistrate holding that there was no case against them. In the present case the defence cited Kishno and Hiranand as witnesses but did not examine them. They, however, examined Pribhdas This Pribhdas, who is a police Munshi, has stated that he was present when the boy sought admission, that the Manager called out to his men, that 5 or 6 men came and the boy was kicked out, that he remonstrated with Kassim and asked him not to drag the boy. While he has given evidence that it was Kassim who dragged the boy, when he gave his evidence before the Committing Magistrate he was unable to identify Kassim but pointed out some other person, and his explanation is "I did not know Kassim much. I therefore picked out another Makrani in his stead who looked like him." Before the Committing Magistrate he had stated that he could not say what picture he had gone to see. It appears that Pribhdas was not at all present in the cinema when Kishno sought admission, and that he is a got-up witness.

[15] It is the defence case that the appellant Jan Mahomed went to investigate this offence. No investigation was done and the appellants at once without giving any reason handcuffed Kassim and Gori Shanker, tied them together with a rope and tried to march them to the police station We have no doubt that they did so not in the bona fide performance of their duties, but with the improper motive of disgracing and humiliating Gori Shanker. As regards the alleged obstruction of the police and escape from custody it may be noted that though the offence is alleged to have been committed at 8-30 P. M. the first information report in respect of this alleged obstruction was not filed till 1.30 A.M. The defence relied on mashirnamas, which were made to show that the clothes of police constable Varis were torn and that there was an injury on the person of constable Jan Mahomed. Of these mashirs, Shafi Mahomed (Ex. 54) is a taxi driver. who keeps his taxi at the City Police station. He is obviously a man at the beck and call of the police. While the other mashir is one Abdullah, whose name, it is in evidence, had been suggested to the police by the taxi driver Shafi Mahomed. In the mashirnamas this mashir is described as a resident of Tando Wali Mahomed, Hyderabad Sind, but he has admitted that at that time he was living at Tando Adam and had come to Hyderabad on a visit. This mashir is referred to by the learned Additional Sessions Judge in his judgment as a police pimp. An examination of the mashirnama (Exs. 85 and 86) shows that the dates on both these mashirnamas have been altered. In Ex. 86 it is clear the date written first was 30th May and that it has been subsequently changed to 29th May. We have already given our reasons for our view that no injury was caused by any of the complainant's party to constable Jan Mahomed. We have no doubt that these mashirnamas about the torn clothes and injury caused to constable Jan Mahomed have been subsequently

fabricated and that they were not in fact prepared at the time of the incident as alleged by the mashirs, and it appears to us that the evidence of the mashirs is false. It might be mentioned here that the complainant and his men were prosecuted by the police for the offence of obstructing the policemen and escaping from lawful custody and were discharged, the Magistrate holding there was no case against them. There can be no doubt that the story of the alleged obstruction to the police and escape from lawful custody is an imaginary one. It appears that after the appellants had acted in a high-handed and illegal manner and were unable to carry out their object of marching Gori Shanker handcuffed through the town, they lost their nerve; when Gori Shanker refused to go to the police station in that condition handcuffed and roped with his servant, it would have been necessary to carry or drag him to the police station. The appellant Pandhikhan went out to send a "phone message" to Sub-Inspector Kanayalal of the Market Police station. It is significant that Pandhikhan did not endeavour to get any help from the City Police station within the limits of which the cinema is situated, nor did he communicate to the Cantonment police station which, it is in evidence is also nearer to the cinema than the Market Police station. Sub-Inspector Kanayalal of the Market Police station, to whom Pandikhan sent the 'phone message' is the brother of Hiranand, who had a hand in inspiring the false complaint filed by Kishno.

[16] It has been urged by Mr. Lulla that as the complainant has admitted that he did not know the appellants before, and that the appellants had not themselves asked for free passes and as the learned Judge himself found that the appellants did what they did at the bidding of the superior police officers no offence was committed in merely carrying out orders of their superiors, if those orders were to bring the complainant and Kassim handcuffed to the police station, particularly as first information report of a cognizable offence had been registered. It was sought to develop this point by arguing that the appellants were entitled to carry out their superiors' orders and they could not be convicted under S. 220 Penal Code, merely because of the manner in which they performed their task. In the first place, it is not the appellants' case that they were ordered to arrest and bring the complainant handcuffed to the police station. Pandhikhan's case is that he was not present when the police party went to the cinema to arrest Gori Shanker. While it is the case of the appellant Jan Mahomed that he handcuffed Gori Shanker and Kassim because they obstructed him. His case was that he went there to make a mashirnama when he was obstructed in the investigation. We have already given our reasons for the view that this story of obstruction and injury caused to policeman Jan Mahomed is imaginary. The appellant Pandhikhan went out of his way to cause injury to the complainant. Section 46, Criminal P C., lays down that in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. Section 50 lays down that the person arrested shall not be subjected to more restraint than is necessary to prevent his escape. The appellants did not give out why they were arresting Gori Shanker, gave no opportunity to him to submit to custody and at once proceeded to handcuff him and tie him with a rope. It was not at all necessary to handcuff Gori Shanker as if he was a dacoit and would have escaped if this was not done. Still less was it necessary to cause an injury to him. In handcuffing Gori Shanker and tying him with a rope, the appellants intended to disgrace and humiliate a respectable man. They were acting maliciously i. e., with an improper motive and knowing that their action was contrary to law. They did not go with a large police party taking handcuffs and a rope merely for the investigation of an obviously trivial complaint, which they very well knew was without foundation. In fact no investigation was done. They have not tried to justify their act on the ground that they had the right to arrest Gori Shanker under S. 157 (1) or S. 54, Criminal P. C., and they sought to justify their act by setting up a false story that the police party were obstructed in the investigation. The circumstance that the same pair of handcuffs was used for handcuffing the complainant and his servant and that they were tied with a rope also shows that the appellants were out to humiliate the complainant.

[17] Next it was urged by Mr. Lulla that we should accept Pandhikhan's defence that he was not present when Jan Mahomed ordered the complainant to be handcuffed and that he came afterwards with Sub-Inspector Kanayalal. It is further urged that his case has not been separately considered by the learned Judge and so he has been prejudiced. The learned Judge has in his judgment dealt with the part played by Pandhikhan and with the evidence in support of it. He rejected the version of Pandhikhan that he was not present when the incident happened and came afterwards with Sub-Inspector Kanayalal. We have already dealt with the evidence of the prosecution witnesses, which clearly shows that appellant Pandhikhan was present when

Gori Shanker and Kassim were handcuffed and that it was Pandhikhan who hit the complainant with a dandi. Pandhikhan's name was given as one of the two accused persons in the complaint made by Gori Shanker on the day after the offence. It is true that in that complaint it is not stated specifically that Pandhikhan caused the injury to the complainant, but it is stated that the appellants gave him the injury. It would have been better if when examining the complainant under S. 200, Criminal P. C., a question had been asked as to which of the two appellants had caused this injury. But the circumstance that it is not specifically stated in the complaint which of the two accused gave the injury does not falsify the evidence of the complainant and other prosecution witnesses against Pandhikhan. We have already pointed out the significance of Pandhikhan sending a 'phone message' to Sub-Inspector Kanayalal after the situation had gone out of control on account of the high-handed and outrageous conduct of the police party. It is also significant that when Kanayalal came he asked Pandhikhan and not Jan Mahomed to remove the handcuffs Pandhikhan's case is that constable Harpaldas came to inform him that there was a quarrel and that the policemen had handcuffed Gori Shanker and that thereafter he went to the City Police station and 'phoned' to Kanayalal. Harpaldas was not examined as a witness in support of this allegation. It may be noted that according to Pandhikhan's evidence in the obstruction case against Gori Shanker, which has been brought on record and is relevant as an admission, Pandhikhan was not on duty on that day and stated that he was not well. It is strange that Harpaldas should not go to the City police station to get help but should go to the house of this Head Constable, who was not on duty and lying ill. We have no doubt that Pandhikhan had accompanied the police party and that he took part in the offence as alleged by the prosecution witnesses. If Pandhikhan came only with the Sub-Inspector and the only thing he did was to remove the handcuffs at the request of Sub-Inspector Kanayalal, there was no reason for the complainant to implicate Pandhikhan.

[18] We, therefore, accept the prosecution evidence and the finding of the learned Additional Sessions Judge that the two appellants maliciously confined Gori Shanker and Kassim, knowing that they were acting contrary to law. We also accept the prosecution evidence that Pandhikhan caused hurt to the complainant.

[19] It has been urged before us that the sentence passed in this case should be reduced, for according to the finding of the learned Judge himself the two appellants had no particular personal grudge of their own against Gori Shanker, and were not known before to the complainant and that they had been instigated by the superior police officers and were fighting their battle and that the conviction of these appellants will mean loss of service and pension. The offence committed is a very serious one. But we think we ought to take into consideration on the question of sentence, the circumstance that the appellants were it was clear acting under the instructions of their superior police officers. Taking all the circumstances into account, we are of opinion that the ends of justice would be sufficiently met if the sentence imposed is one of one year's rigorous imprisonment and we accordingly reduce the sentence to that period.

[20] We therefore confirm the convictions of the appellants under S. 220, Penal Code, but reduce the sentence passed on each of the appellants to rigorous imprisonment for one year. The additional conviction and sentence of fine of Rs. 100 or in default one month's rigorous imprisonment passed on the appellant Pandhikhan under S. 323, Penal Code, is confirmed.

[21] An application has been made to us that if the convictions and sentences are confirmed, the appellants should be classified as 'B' Class prisoners. Affidavits have been filed to the effect that the appellant Pandhikhan has been drawing a salary of Rs. 129 a month and has had 29 years service in the police department, and that the appellant Jan Mahomed has been drawing a pay of Rs. 90 per month and owns immovable property. The two appellants were head constables and are obviously not of the class of the ordinary jail population. We recommend that they be treated as 'B' Class prisoners.

[22] **Tyabji C. J.** — I agree with what has just been said by my learned brother and will only add a few short remarks.

[23] I agree that in this case the main allegations which constituted the prosecution case, have been proved beyond any doubt, and that the pleas set up by the two appellants were entirely untrue.

[24] There can be no doubt that the report Ex. 43, made by the boy Kishno, alleging an offence of rioting, was substantially a false report, inspired by some police officers, superior to the two appellants. There is no doubt that this report was made with the object of providing a pretext for harassing and humiliating Gori Shanker, which was the main object of those who inspired this report and instigated the two appellants to act as they acted. It is clear that the two appellants accompanied by 8 or 10 other police officers marched up to the Empire Cinema House, handcuffed the gate-keeper Kassim and

bound him with a rope, took him in that condition inside the house of Gori Shanker, where he was entertaining some guests at dinner, and then handcuffed Gori Shanker, with the same fetters with which Kassim had been handcuffed, and also tied him with a rope, beating him during the course of the rough handling. When Gori Shanker attempted to question the appellants why and on what authority the appellants were so acting, he was told to shut up and to proceed to the police station with them. The refusal of Gori Shanker and Kassim to march to the police station, in that condition, and the sensation created in the place, brought a number of people, including several influential men, to the spot. This unnerved the appellants and prevented them from proceeding further with their object. They then sent information to Sub-Inspector Kanayalal, whose brother had accompanied Kishno when he had made his report, and who, it is significant, was not attached to the police station where Kishno's report was made but worked at another police station Sub-Inspector Kanayalal then came there, and ostensibly befriended Gori Shanker and Kassim in their plight, and had the fetters and the ropes removed from their persons. But this was after Gori Shanker and Kassim had been outrageously illtreated and humiliated and kept in confinement for a very considerable time, more than an hour.

[25] My learned brother has dealt with the facts of this case very fully and stated the reasons why it is impossible to accept the explanations given on behalf of the appellants. The story, that the appellants and the large force of policemen they took with them had only gone to the Cinema in order to inquire into Kishno's report, and had been obstructed when they attempted to carry out their investigation that they had even been pushed out and beaten by Gori Shanker and his men, was clearly a fantastic one, having regard to the proved circumstances. It is also impossible to accept the plea of appellant Pandhi Khan, that he was not there with appellant Jan Mahomed at the time when Kassim and Gori Shanker were handcuffed and bound up, beaten and confined. His plea was that he only came there later with Sub-Inspector Kanayalal and, under the order of Kanayalal unfastened the handcuffs and removed the ropes with which Gori Shanker and Kassim had been bound. This plea was proved to be false by the evidence of reliable witnesses, and would attribute to Gori Shanker and the witnesses a desire to implicate falsely, and without any reason, one to whom they if the plea were to be accepted, had every reason to be grateful. It is unthinkable that the witnesses would immediately after the incident have falsely implicated Pandhi Khan, if he had only come later, accompanying the Sub-Inspector and had released Gori Shanker and Kassim. Every fact in the story which the appellants were constrained to allege in their defence, has been clearly shown to be false on the facts and circumstances proved in this case.

[26] As the main charge against the appellants was one under S. 220, Penal Code, it was necessary for us to enquire very carefully into the question whether it had been satistactorily established that what the appellants did was contrary to law, and known to the appellants to be contrary to law. We are satisfied that these essentials were clearly established beyond any doubt in this case.

[27] It was argued that even if the main prosecution allegations be accepted as proved, the appellants were still entitled to contend that they did not act contrary to the law, when they carried out the orders of their superiors, and arrested Gori Shanker and Kassim, against whom information had been given at the police station, that they had committed an offence of rioting falling under S. 147, Penal Code, which was a cognizable offence. But it must be emphasised that before any arrest can be made by the police without a warrant, either under S. 54, or under 157, Criminal P C., it must be shown that there was credible information given to the police, or that the officer in charge of a police station had reason to suspect the commission of a cognizable offence. In this case Kishno's complaint, we are satisfied, was a false one inspired by police officers and known to them to be false. It is impossible under these circumstances to accept the contention that there was either credible information or reason to suspect that a cognizable offence had been committed. It was known that that was not the case. The appellants had, therefore, no right to arrest Gori Shanker or Kassim. But even if one were, for one moment, to assume that the appellants were not aware of the fact that Kishno's comp aint was false, not aware that they were asked to make an arrest in a case where no arrest could legally be effected at all, and even if it be assumed that the two appellants were sent to the Empire Cinema with instructions to arrest Gori Shanker and Kassim—it may be mentioned that this was not at any time the case of the two appellants who contended that they had only been sent to make an enquiry—the deliberate rough handling handcuffing and confining was still contrary to law, and must have been known to them to be contrary to law. Section 46, Criminal P. C., has to be read together with S. 50. Section 50 lays down:

"The person arrested shall not be subjected to more restraint than is necessary to prevent his escape."

The first part of S. 46 says:

"In making an arrest the police-officer or other person making the same shall actually touch or confine the

body of the person to be arrested, unless there be a submission to the custody by word or action."

[28] It is clear, therefore, that confinement and rough handling are not permissible and are contrary to law, when the person to be arrested submits to the custody that is to the restraint which is necessary and sufficient for the purposes of the arrest. An arrest is completed when there is a submission to the custody by word or action. Every police officer, we are entitled to presume, knows that in making an arrest he must not subject the person to be arrested to unnecessary brutality, and that he cannot confine any person unless the person refuses to submit to custody and it becomes necessary to confine him, and cl 2 of S. 46 is brought into application. We are satisfied that cl. 2 of S. 46 never came into application in this case. The evidence abundantly establishes that at the time when the two appellants handcuffed Kassim and Gori Shanker and tied them up with a rope, and kept them in confinement, nothing was said or done by Kassim or by Gori Shanker which justified the appellants to think that they would not submit to custody, if an attempt to arrest them in a legal and proper way was made. The appellants knew that they were not entitled to act in the manner they did and their subsequent conduct, the false pleas put forward on their behalf, and their unwillingness to own what they actually did, clearly shows that. It has been proved that Kassim and Gori Shanker were never required to submit to an arrest, that when Gori Shanker asked them why the appellants were acting in the manner in which they acted, the appellants merely asked him to shut up. It is quite clear that the appellants had no intention at all of arresting Gori Shanker and Kassim in a legal and proper manner. This was also not a case where the appellants, though acting in an improper manner, still did something which the law permitted them to do. The law did not permit them to rough-handle and confine Kassim and Gori Shanker.

[29] Under these circumstances it is clear that what the appellants did was contrary to law, and known to them to be contrary to law.

S.C. *Sentence reduced.*

A. I. R. (35) 1948 Sind 74 *[C. N. 20.]*

THADANI J.

Motandas Tourmal — Plaintiff v. *Wadhumal J. Wadhwani — Defendant.*

Suit No. 19 of 1946, Decided on 15-7-1947 and 18-7-1947, respectively.

(a) Arbitration Act (1940), S. 15—"Modify or correct an award"— Application under O. 23. R. 3, Civil P. C.—Granting of—Effect of — Modification contrary to section—Civil P. C. (1908), O. 23, R. 3.

The modification or correction referred to in S. 15 is not one which arises by reason of anything external to the award such as an application under O. 23, R. 3. Therefore, if the effect of the Court's granting an application under O. 23, R. 3 would be to modify the award in such a manner as would be contrary to the provisions of S. 15, the Court will not grant the application. [Para 7]

Annotation.—('44-Com.) C. P. C., O. 23, R. 3, N. 13.

(b) Civil P. C. (1908), O. 23, R. 3—"Suit" — Suit does not include award which is registered as suit. [Para 10]

Annotation.—('44-Com.) C. P. C., O. 23, R. 3, N. 13.

(c) Civil P. C. (1908), O. 23, R. 3—Applicability to award—Arbitration Act (1940), S. 41.

The provisions of O. 23, R. 3 do not apply to an award by reason of S. 41, Arbitration Act, and hence after an award is passed, a decree cannot be passed in terms of a compromise arrived at between the parties: 24 A. I. R. 1937 Cal. 201 and 11 A. I R. 1924 Cal. 722, *Rel. on*; 32 A. I. R. 1945 Pesh. 41; 1 A I. R. 1914 Lah. 313; 8 A. I. R. 1921 Lah. 34 and 9 A. I. R. 1922 Oudh 189, *Dissent.* [Paras 11 and 15]

Annotation.—('44-Com.) C. P. C., O. 23, R. 3, N. 13.

Cases referred :—

1. ('45) 32 A. I. R. 1945 Pesh. 41 : 221 I. C. 537, Attar Singh v. Bishan Singh.

2. ('14) 1 A. I. R. 1914 Lah. 313 : 23 I. C. 591, Mt. Sohamari Bai v. Chatta Ram.

3. ('21) 8 A. I. R. 1921 Lah 34 : 2 Lah. 114 : 61 I. C. 628 Dwarka Das v. Krishan Kishore.

4. ('22) 9 A. I. R. 1922 Oudh 189 : 25 O. C. 213 : 68 I. C. 209, Fazal Ahmad v. Enayat Ahmad.

5. ('37) 24 A. I. R. 1937 Cal. 201 : 171 I. C. 507, Brindaban Chandra v. Kashichandra.

6. ('24) 11 A. I. R. 1924 Cal. 722 : 51 Cal. 432 : 83 I. C. 606, Dooly Chand v. Mohanlal.

Tikamdas Bassarmal — for Plaintiff.

G. P. Shahani — for Defendant.

Judgment.—This is an application made by the defendant under O. 23, R. 3, Civil P. C. under the following circumstances.

[2] The plaintiff Motandas Tourmal and the defendant Wadhumal J. Wadhwani executed a reference to arbitration on 11-8-1945 in the matter of their disputes which had arisen and were still pending between them in regard to the premises in the occupation of the defendant in favour of Mr. Fatehchand Assudomal, Advocate-General of this Court, as their sole arbitrator.

[3] On 15-12-1945 Mr. Fatehchand made an award by which the defendant was to vacate the premises in his occupation within one month from the passing of the decree in terms of the award. It was stated in the award that the defendant, was, however, free to find accommodation elsewhere if he desires to do so and will not be obliged to accept the alternative accommodation provided in the award.

[4] On 21-5-1946, Mr. Bhagwandas S. Raheja, advocate of the plaintiff, made an application under O. 23, R. 3, Civil P. C, stating that the plaintiff and the defendant had compromised the subject-matter of Suit No. 19 of 1946, on the terms mentioned in a compromise application filed before the Rent Controller of Karachi in March 1946, and prayed that the compromise be

recorded and a decree passed in its terms. Upon this application a notice was ordered to issue to the defendant, who filed his objections on 5-9-1946. On 21-1-1947, however, the plaintiff withdrew his application under O. 23, R. 3, Civil P. C. and it was dismissed with no order as to costs.

[5] A fortnight later, on 5-2-1947, Mr. Shahani, advocate of the defendant, filed an application under O. 23, R. 3, Civil P. C., to which Mr. Tikamdas for the plaintiff has raised a number of objections.

[6] Mr Tikamdas contends that an application under O. 23, R. 3, Civil P. C. does not lie if it purports to modify or vary an award as is sought to be done in this case. His argument is that although S. 41, Arbitration Act, 1940, says that—"the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act," it expressly lays down that it is subject to the provisions of the Arbitration Act itself and the rules made thereunder. Mr. Tikamdas has invited my attention to the relevant provisions of the Arbitration Act which tend to show that an application under O. 23, R. 3, Civil P. C. is not competent in the matter of a pending award.

[7] Section 15, Arbitration Act, 1940, reads :

"The Court may by order modify or correct an award
(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or
(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or
(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission."

It is clear that the modification or correction referred to in S. 15, Arbitration Act is not one which arises by reason of anything external to the award such as an application under O. 23, R. 3, Civil P. C. The effect of my granting an application under O. 23, R. 3, Civil P. C., would be to modify the award in such a manner as would be contrary to the provisions of S. 15, Arbitration Act.

[8] Under S. 16, Arbitration Act, the Court has power to remit an award from time to time. If the Court neither corrects nor modifies an award under S. 15 and does not remit an award under S. 16, Arbitration Act, or set it aside under S. 30, the only course left to the Court is to act in accordance with S. 17, Arbitration Act, which says :

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award "

[9] Now upon an application made under O. 23, R. 3, Civil P. C. the Court has to satisfy itself

"that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit the Court shall order such agreement, compromise or satisfaction to be recorded, *and shall pass a decree in accordance therewith so far as it relates to the suit.*"

[10] If I were to entertain the present application, whether made by the parties jointly or individually, and if I am satisfied that the agreement is a lawful agreement and the plaintiff has been partly or wholly satisfied by the defendant, I would have to pass a decree in accordance with the compromise so far as it relates to the suit. But it is common ground that there is no suit before me. It is true the award has been registered as a suit under R 282, cl. (iii) of the Rules of the Chief Court (Original Side); but I do not think the "suit" referred to in O. 23, R. 3, Civil P. C., includes an award which has been registered as a suit. But apart from this, if I were to pass a decree in terms of the compromise, I would have to pass a decree awarding the entire premises to the defendant and give the defendant credit for rent for the month of May 1946, and make a further provision in the decree that future rent of the premises will be Rs. 127 8-0 plus ten per cent., whereas, if I were to pass a decree in terms of the award, which I am bound to do under the provisions of S. 17, Arbitration Act, if I do not set aside, remit or modify the award, the decree would require the defendant to vacate the premises in his occupation within one month from the passing of the award decree, and on his getting alternative accommodation. In other words, by granting the application under O. 23, R. 3, Civil P. C., I would be doing something contrary to the provisions of S. 17, Arbitration Act.

[11] It is true that in A. I. R. 1945 Pesh. 41,[1] Almond J. C and Mir Ahmad A J. C., took the view that the provisions of O. 23, R. 3, Civil P. C. apply to an award by reason of S. 41, Arbitration Act. But with great respect, I am unable to agree with this view. Mir Ahmad A. J. C. concedes in his judgment that S. 41, Arbitration Act would not empower the Court to interfere with the award except under conditions laid down in the Arbitration Act. But the learned Judge thought that the Arbitration Act did not preclude a plaintiff from withdrawing his claim or the parties from adjusting their dispute even after the award was made. The learned Judge, therefore, came to the conclusion that the parties had a right to ask the Court to set aside an award

and substitute another agreement in its place. The difficulty I have in accepting this position is that its acceptance would furnish another ground for setting aside an award, a ground which is not a ground mentioned in S. 30, Arbitration Act. For instance, the parties to the award might agree to have the award set aside by consent and ask the Court to pass an order accordingly. Plainly the Court would decline to act in this manner as there is no provision in the Arbitration Act which authorises a Court to set aside an award by consent of the parties. If the award could not be set aside by consent of the parties, it could be adjusted by their consent except after an award decree is passed. Where the parties have adjusted their differences after an award has been made, the proper course for them is to allow a judgment and decree to be passed in terms of the award, and then to make an application under the provisions of O. 21, R. 2, Civil P. C., notifying the adjustment.

[12] Mir Ahmad A. J. C. referred to two decisions of the Lahore High Court, one in A. I R. 1914 Lah. 313,[2] and another in A. I. R. 1921 Lah. 34,[3] in which apparently the view taken was that proceedings under para. 17 of Sch. 2, Civil P. C., could be compromised and a decree passed on the compromise.

[13] A Division Bench of the Oudh Judicial Commissioner's Court in A. I. R. 1922 Oudh 189,[4] has also taken the same view as was taken by the learned Judges of the Lahore High Court.

[14] Jack and Patterson JJ. however in A.I.R. 1937 Cal. 20.,[5] have taken a different, and, in my opinion, the correct view of the provisions of O 23, R. 3, Civil P. C., in their application to an award. In that case, after the award was filed in Court and before a decree was passed in its terms, one of the parties contended that the matter had been settled, and prayed that a decree be passed in terms of the compromise. According to the alleged compromise, one of the parties had given up its rights under the award and had made an amicable settlement of all the disputes. The Court in which the award was filed refused to pass a compromise decree. The matter came up before a Division Bench of the Calcutta High Court, and the learned Judges held that the Court below had rightly refused to pass a compromise decree, in proceedings under Sch. 2, Civil P. C, and that upon an application for the filing of an award, the only form which such a decree should take was an order that an award should be filed, and as the parties did not unite in praying that the application should be dismissed, it was the duty of the Judge to proceed to consider whether the award, which had been submitted, should be filed.

[15] It is true the Calcutta High Court was considering the question of passing a compromise decree in variation of the award before it with reference to the applicability of S. 115, Civil P. C.. but as the learned Judges held that the Court below had jurisdiction to pass the decree which it did, and upheld the order of the Court below, it manifestly took the view that after an award is passed, a decree cannot be passed in terms of a compromise arrived at between the parties.

[16] In an earlier decision of the Calcutta High Court in A. I. R. 1924 Cal. 722,[6] Sanderson C J. and Richardson J. had occasion to say:

"The argument presented on behalf of the respondent is that the matters in dispute in this suit were referred to arbitration ; that reference has never been superseded, and, under those circumstances, it is not competent to the Court to record the terms of compromise."

The observation suggests that an application under O. 23, R. 3, Civil P. C, to record a compromise and pass a judgment in terms thereof, during the pendency of objections to an award, is incompetent.

[17] I would accordingly dismiss the application under O. 23, R. 3, Civil P. C., with costs.

V.R. *Application dismissed.*

A. I. R (35) 1948 Sind 76 *[C. N. 21.]*

O'SULLIVAN AND THADANI JJ.

Hemandas Mulchand and another—Applicants v *Emperor.*

Criminal Revn. Appln. No. 59 of 1947, Decided on 9-5-1947, from order of 2nd Addl. Sessions Judge, Hyderabad, D/- 10-12-1946.

(a) Penal Code (1860), S. 193 — Judicial proceedings — Inquiries by Magistrate outside Court, under S. 4 (1), Sind Suppression of Hur Outrages Act.

Quære :—Whether the private inquiries embarked upon by the Magistrate under Cl. (1) of S. 4, Sind Suppression of Hur Outrages Act, constitute a judicial proceeding within the meaning of S. 193, Penal Code. [Paras 10 & 11]

(b) Penal Code (1860), S. 193, Part 2 — Question whether statement by accused is intentional fabrication of false evidence is question of fact.

Generally speaking, the question whether the statements given by the accused amount to intentional giving or fabrication of false evidence in any other case than judicial proceeding, is a pure question of fact. [Para 13]

Held on facts and circumstances that the statements did not fall under part 2 of S. 193. [Para 17]

Case referred :—

1. Cri. Revn. Appln. No. 344 of 1945, D/- 13-2-1946, Emperor v. Ghousbakhsh Khan.

Dharamdas Mulchand—for Applicants.

Parmanand Kundanmal, Public Prosecutor for Sind—for the Crown.

Order.—This is a revision application by two Hindu Zamindars, Hemandas and Gehimal, both residents of Shahdadpur, Nawabshah district, seeking the intervention of this Court in a case in which the Additional Sessions Judge of Hyderabad has confirmed their convictions under S. 193, Penal Code, and sentences of imprisonment upto the rising of the Court and fines of Rs. 1000 each, or in default rigorous imprisonment for six months, passed by the Special First Class Magistrate, Tando Allahyar.

[2] The proceedings out of which this application arises commenced as far back as 1943, and relate to the part the applicants are said to have taken in connection with certain proceedings under the Sind Suppression of Hur Outrages Act (1 [I] of 1942).

[3] It would appear from the facts on record that on 25th February 1943, the police arrested two men Dhaniparto and Laik, and sent them up on the following day, 26th February 1943, before a Magistrate for the purpose of an enquiry under S. 3 of the aforesaid Sind Suppression of Hur Outrages Act. The situation in Sind at the time, arising out of the activities of the Hurs and the circumstances under which the Sind Suppression of Hur Outrages Act, 1 [I] of 1942 was passed have been set out in the following words by a Bench of this Court in Cri. Revn. Appln. No. 344 of 1945,[1] decided on 13th February 1946 :

"In 1942 there existed in this Province a state of grave crisis arising out of the criminal activities of the Hurs. Acts of sabotage and violence were committed on an extensive scale in certain areas of the Province. These included attacks on Railway and Police Stations, the murder of police officers, the breaching of canal banks and similar outrages

The Sind Government took steps to meet this situation. Special Officers were appointed for the areas concerned, and on 8th April 1942, there was brought into force the Sind Suppression of Hur Outrages Act (1 [I] of 1942), the Preamble of which reads :

'Whereas it is expedient to make special provisions for the purpose of suppressing the criminal activities in which persons commonly known as the Hurs or Lurs in Sind are at present engaged and for the trial, and punishment of certain offences .....'

The state of affairs continued, however, and assumed the proportions of an armed rebellion. In May 1942, there occurred the derailment of the Lahore Mail train and the murder of a number of the passengers and orgy of looting. On 1st June 1942, so grave was the emergency, that Martial Law was introduced into the affected areas. The situation was aggravated because a grave state of national emergency arising out of the War then existed."

The Magistrate acting in the present case under S. 3 of the Act pursued his inquiries against Dhaniparto and Laik and examined a number of police officers. Before the completion of the inquiry, however, he extended it under S. 4 (1) of the Act which has since been abrogated and which read :

"4. (1) An inquiry for the purpose of S. 3 may be conducted so far as may be necessary, out of Court."

These words are far from precise. They might in one sense be read to mean that the Magistrate was at liberty, perhaps for the purpose of obtaining a little fresh air, to hold his Court outside the precincts of the ordinary Court building. It appears however, that the words were intended to mean and interpreted as meaning that a Magistrate holding an inquiry under S. 3 of the Act was entitled privately, in the absence of the accused, and not at the time he was actually sitting in Court, to make private inquiries of any person as to the necessity for the execution of a bond by the accused.

[4] Acting thus under cl. (1) of S. 4 of the Act, the learned Magistrate examined the two applicants Gehimal and Hemandas. Gehimal was examined on 19-4-1942 and Hemandas on 20-4-1942, and their statements, details of which will hereinafter be referred to, were taken on oath and reduced to writing. The Magistrate subsequently completed his inquiries in Court.

[5] Clause (3) of S. 4 of the Hur Act, provides for an inquiry in the presence of the accused :

"Every person in respect of whom the inquiry is made shall have an opportunity of showing cause in Court why such bond should not be required and of having his witnesses examined there and of cross-examining any witness not called by himself who may testify there to the necessity for the execution of such bond."

It is not very clear how sub-cls. (1) and (3) of S. 4 were to be worked together. The presumption is that if the Magistrate in pursuing inquiries under sub-cl. (1) of S. 4 of the Act obtained any useful information or any information upon which he proposed to rely for the purpose of binding over the accused before the Court, he was to recall the witnesses from whom this information was obtained and examine them in Court in the presence of the accused, who would then be entitled to cross-examine them.

[6] Gehimal and Hemandas were never called as witnesses in Court and never examined in the presence of the accused. In due course, Laik and Dhaniparto, the accused, were discharged on 22nd June 1943. On 7-9-1943 the Public Prosecutor of Nawabshah presented in the Court of the Additional District Magistrate, Nawabshah, a complaint under S. 476 Criminal P. C., against Gehimal and Hemandas of offences under Ss. 193, 211, 182 and 120B, Penal Code, based on the statements made by them to the Special Magistrate on 19th and 20th April 1942 respectively. The false statements attributed to each of the applicants were set out in an appendage to the complaint. Those attributed to Gehimal were four in number and are as follows :

(a) "Hurs live in this Shadi Panji village and other Hurs visit them there."

(2) "They (accused) harbour Hurs of Dhingano Kirio and Darhun Machi."

(3) "Laik, Dhaniparto, gang of Darhun and gang of Dhingano, have committed dacoities of wheat granneries."

(4) "The age of Laik is about 35-36 years and the age of Dhaniparto is less than 40 years. The beards of both are perhaps shaven and cut with scissors. I know them since 4-5 years."

And that attributed to Hemandas is as follows :

"I know Dhaniparto and Laik Machhi. They are brothers The age of accused Dhaniparto is 46-48 years. The age of Laik is about 40 years. They both used to render help to the Hur dacoits' gang of Darhun Machhi. These both brothers are scoundrels."

It was asserted in the complaint that not only did these statements constitute false evidence in judicial proceedings within the meaning of S. 193, Penal Code, but also that upon these statements the Magistrate's Court had instituted proceedings against Dhaniparto and Laik under the Hur Act, and it was, therefore, complained that Gehimal and Hemandas had also committed an offence under Ss. 182 and 211, Penal Code.

[7] This complaint was sent by the Additional District Magistrate, Nawabshah, to one Mr. Sobhraj, who was a Special Magistrate to try these cases under the Hur Act, and Mr. Sobhraj in due course made a complaint against Gehimal and Hemandas in compliance with the application of the Public Prosecutor of Nawabshah. Gehimal and Hemandas were eventually tried for the offences specified in the complaint by the Special First Class Magistrate, Tando Allahyar, and both convicted of offences under Ss. 120B, 193 and 182, Penal Code, and in addition Gehimal was convicted of an offence under S. 211, Penal Code. They appealed, and the learned Second Additional Sessions Judge of Hyderabad, acquitted them of all offences except those under S. 193, Penal Code.

[8] Mr. Dharamdas, who appears on behalf of the applicants, in the first place set out to argue that assuming that the applicants had made false statements, they have not committed any offence within the purview of S. 193, Penal Code. He contended that the statements having been taken out of Court under S. 4, cl. (1), Sind Suppression of Hur Outrages Act, they were not taken at any stage of a judicial proceeding; he emphasised that at the time the statements were taken, the accused persons Laik and Dhaniparto were not present, and that, in fact these statements were never used in the inquiry against these persons.

[9] Explanation 2 to S. 193, Penal Code, says:

"An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of justice."

In S. 4, cl. (m), Criminal P. C., a "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath.

[10] As has been indicated, the terms of cl. (1) of S. 4 of the Hur Act were peculiar, and envisaged some sort of private inquiry outside the Court, the result of which might never see the light of day, and although the definitions referred to above are made as to the scope of the expression "judicial proceeding", there may be something in Mr. Dharamdas' proposition that the private inquiries embarked upon by the Magistrate under cl. (1) of S. 4 of the Hur Act did not constitute a judicial proceeding.

[11] It is, however, totally unnecessary to consider further this aspect of the case, because, assuming the statements given by Gehimal and Hemandas were not made in the course of a judicial proceeding, they would still come under the second part of S. 193, Penal Code, which penalises the intentional giving or fabrication of false evidence in any other case than a judicial proceeding.

[12] Mr. Dharamdas, therefore, eventually conceded that the sole point at issue in this application is whether in the circumstances, the applicants could be said to have intentionally given false evidence.

[13] Generally speaking, this would be a pure question of fact, but we consider that this case has been approached in an erroneous way by the Courts below. In the first place, it is obvious that the proceedings which the Public Prosecutor of Nawabshah set in motion to prosecute the applicants were based on the assumption that they instituted false proceedings under the Hur Act. It is clear from the facts stated above that they did no such thing. The proceedings against Laik and Dhaniparto had already two months before the applicants gave evidence been instituted or set in motion by police officers, and the applicants have been properly acquitted of offences under Ss. 211 and 182, Penal Code. In the next place, the Courts below failed in our opinion, to take into consideration the circumstances under which these statements were given, and that, they were in the nature of hearsay.

[14] At that time there existed much confusion caused by the Hurs, and the authorities were having considerable difficulty in obtaining information upon which to take action under the Sind Suppression of Hur Outrages Act. It is established in the proceedings before us that Gehimal definitely knew Dhaniparto. Dhaniparto in his evidence has himself admitted that he knew Gehimal for two or three years, that they used to see each other in Shahdadpur; and Dhaniparto is the father of Laik. The false statements attributed to Gehimal and Hemandas, set forth above, amount to nothing more

than that they knew Dhaniparto and Laik, and that Dhaniparto and Laik were associated with Hurs. It is true that Hemandas said that they were brothers, whereas they were actually father and son; but this, we think, is totally immaterial once it is admitted that these banias knew them. The convictions under S. 193, Penal Code, have apparently proceeded upon the assumption that the falsity of the statements was as to the ages of Dhaniparto and Laik, and that they were brothers. The fact that they were not brothers but father and son is immaterial and any bania might have made the same mistake not knowing them very well. Apart from this, the evidence of Gehimal and Hemandas clearly appears to be of a general and hearsay nature.

[15] Apart, again, from this aspect of the matter, the learned Magistrate appears to have arrived at the conclusion that the statements were false on the ground that Dhaniparto and Laik themselves have denied that they are true, and that the defence witnesses have failed to establish that they are true. This seems a very peculiar way of approaching the matter. Dhaniparto and Laik would actually deny that they were Hurs or that they were associated with Hurs, and if it was sought by the prosecution to establish that Dhaniparto and Laik were not the associates of Hurs, the prosecution should, we think, have in the circumstances produced affirmative evidence to prove this other than the evidence of Dhaniparto and Laik themselves. It appears to us that this was never a case in which it was expedient to have prosecuted Gehimal and Hemandas. The case seems to have been a trivial one in the extreme, and it was never a case which should have wasted the time of Courts.

[16] Another aspect of the matter is that at the time local zamindars were expected to give all sorts of help to the police and any information within their knowledge as to the activities of Hurs and their associates, and this would include anything in the nature of rumour, and any zamindar, whether a Hindu or otherwise, who was not prepared to come forward with information would be looked upon with disfavour by the police. Moreover, the fact that Dhaniparto and Laik were discharged by the Magistrate does not necessarily give rise to the inference that they were never associated with Hurs. It is clear from the evidence of Mr. Bhagwandas, who was at that time an Inspector of Police, that Laik and Dhaniparto were suspected of being Hurs or the associates of Hurs long before they were actually sent up for inquiry under the Sind Suppression of Hur Outrages Act, and that Mr. Bhagwandas himself had been endeavouring to trace them. It was further established that a number of their relations had previous to the proceedings against them been apprehended and placed in the Hur concentration camp at Sanghar.

[17] In all the circumstances of the case, we have no hesitation in concluding that the charge under S. 193, Penal Code, against the applicants has not been established to our satisfaction. That assuming that there were inaccuracies in the applicant's evidence, it was not intentionally false evidence within the meaning of S. 193, Penal Code. We accordingly set aside the conviction of the applicants, and direct that the fines paid by them, if any, be refunded to them.

R.G.D. *Convictions set aside.*

A. I. R. (35) 1948 Sind 79 *[C. N. 22.]*

THADANI J.

Madangopal Radheylal a firm — Respondent No. 1 v. *Sanwaldas Madhavdas, a firm — Respondent No. 2.*

Judicial Misc. No. 64 of 1943, Decided on 24-7-1947, from order of Sub-Judge, Hyderabad.

Arbitration Act (1899), Ss. 14, 15—Submission to arbitration on behalf of firm, unauthorised — Ratification by one partner only—Award against firm—Validity—If can be enforced against ratifying partner —Contract Act (1872), S. 196.

Where the submission to arbitration on behalf of a firm was unauthorised and there has been no ratification of the unauthorised submission by all the partners of the firm, the award against the firm based upon such a reference is not binding on the firm and cannot even be enforced as a decree against one of the partners who has ratified the unauthroised submission. (1677) 2 Mod. 227 and 19 A. I. R. 1932 Bom. 516, *Disting.* [Para 27]

Cases referred :—

1. (1677) 2 Mod. 227 : 86 E. R. 1041, Strangford v. Green.
2. ('32) 19 A. I. R. 1932 Bom. 516 : 140 I. C. 519, Bhagwan Manaji v. Hiraji Premaji.

Parmand Thakurdas — for Respondents 1.
Suganlal Hassanand — for Respondents 2 (1 to 3).

Order.—On 30-3-1937, 31-3-1937 and 5-4-1937, respondents 1 and 2 entered into three contracts at Karachi whereby the respondents 1 agreed to buy from respondents 2300, 200 and 300 tons of turia seed, and in respect of which delivery was to be given in July 1937. The three contracts contained a submission clause to the effect that in the event of any disputes arising between the parties, they were to be referred to the arbitration of two persons who were members of the Managing Committee of the Karachi Indian Merchants' Association, one to be chosen by each party.

[2] Respondent 2 carries on business at Karachi but has an office in Cawnpore in which is employed one Sunderdas as a clerk on a monthly salary of Rs. 50. On 14-7-1937 this Sunderdas and one Goverdhandas Dasani, describing him-

self as the proprietor of Messrs. Sanvaldas Madhavdas, respondents 2, signed a letter addressed to respondents 1 in these terms:

"Cawnpore, 14th July 1937.
Messrs. Madan Gopal Radheylal,
Naya Gunj, Cawnpore.
Dear Sirs,
Re. 800 tons toria seeds July, Karachi.

In continuation of the correspondence between us re: the above mentioned contract, we request you to pay us Rs 10 000 (rupees ten thousand only) to enable us to clear the consignment at Karachi and despatch the goods to Calcutta as instructed by you. We undertake to despatch the same as soon as possible and we shall draw on you at Calcutta in proportion of Rs. 1250 (rupees one thousand and two hundred fifty) for every hundred tons so as to adjust the said 10,000 rupees towards the price of the goods proportionately. Further we undertake to charge you commission at the rate of As. 8 per cent. and only actual expenses that we shall make in your account.

Should any dispute arise between us in respect of the contract in regard to delivery, despatch, payment, expenses, charges, etc., then the same shall be referred to the sole arbitration of Mr. S. Bhasin, Advocate, Cawnpore, under the Indian Arbitration Act, and the decision he will give shall be binding on us.

We hope you agree to the aforesaid terms and in token whereof you will write and confirm this letter along with a cheque for the sum of Rs. 10,000.

We are,

Yours very faithfully,
Savaldas Madhavdas.
S. M. Ruth.

Confirmed:
Goverdhandas Dasani.
Proprietor."

Paragraph 2 of the letter contains the submission clause in dispute. It is the case of respondent 2 that this submission clause is not subscribed to by any of the partners in respondent 2 firm; indeed, it is signed by the clerk of the second respondent's office at Cawnpore and by one Goverdhandas Dasani who has described himself as the proprietor of respondents 2, but who is in no way connected with the firm of respondent 2.

[3] Some nine or ten months later, Mr Bhasin acted as the arbitrator in pursuance of the alleged submission clause contained in the letter of 14 7-1937 upon an allegation made by respondent 1 that disputes had arisen in regard to short delivery of the contract goods, expenses charged by respondent 2, rebate on freight, insurance, interest and other matters.

[4] On 6-5-1938, one Mulchand, an employee of respondent 2 at Karachi, wrote to the arbitrator Mr Bhasin, informing him that their statement would be posted within three days. On 8-5-1938 a statement signed by Mulchand was sent to Mr Bhasin. On 19-5-1938 Madangopal Radheylal, respondent 1, wrote to Mr. Bhasin to fix a date of hearing after the first week of June 1938. On 19-5-1938, Mulchand requested Mr. Bhasin to send him a true copy of the letter dated 14-7-1937. On 23-5-1938 Mr. Bhasin wrote to respondents 2 that he was not in possession of the letter dated 14-7 1937.

[5] On 28-5-1938, Mr. Dasani writing from Sukkur to Mr. Bhasin asked him to adjourn the arbitration proceedings till 20-6-1938; meanwhile he requested Mr. Bhasin not to send any communication to the Karachi office as there was nobody competent to deal with the correspondence in the matter in his absence.

[6] On 8 6-1938, Messrs. Suganlal & Co., advocates of Karachi, wrote a letter to respondent 1 that a sum of Rs. 167-14-9 was due to respondent 2 in respect of the three contracts made in March and April 1937, and informed respondent 1 that in case they disputed their liability, respondent 2 nominated Lala Ruplal Shankerdas, managing partner of the firm of Shankerdas Ruplal of Karachi, as their arbitrator, and called upon respondent 1 to nominate their arbitrator who should be a member of the Karachi Indian Merchants' Association within seven days from the receipt of the letter.

[7] On 17-6-1938, respondent 1 replied to Messrs. Suganlal & Co, advocates of respondent 2, denying their liability and intimated to them that the submission clause in favour of two merchants of the Karachi Indian Merchants' Association had been modified and that the dispute was before the new arbitrator Mr. Bhasin, who had fixed the hearing of the case on 20-6-1938.

[8] On 20-6-1938, Messrs. Suganlal & Co. appeared before Mr. Bhasin and demurred to his jurisdiction. In Para 5 of the application which Messrs Suganlal & Co. filed before Mr. Bhasin, they set out, what were according to Messrs. Suganlal & Co, the true facts of the case. It was contended before the arbitrator that the privity of contract was between respondents 1 and 2, and not between the Cawnpore office of respondent 2 and respondent 1, and that the Cawnpore office of respondent 2 had no authority to refer any disputes to arbitration arising out of the contracts; that the alleged submission clause in the letter dated 14-7-1938, signed by Mr. Sunderdas and Mr. Dasani did not supersede the arbitration clause contained in cl. 15 of the three contracts made at Karachi in March and April 1937; that, in fact, arbitration proceedings were going on between respondents 1 and 2 at Karachi, pursuant to cl. 15 of the three contracts.

[9] Various other objections were taken, to which it is not necessary to refer. The main objection is that neither Mr. Sunderdas nor Mr. Dasani had any authority to refer any matters in dispute affecting the firm of respondent 2.

[10] Second statement was filed by Messrs. Suganlal & Co. before Mr. Bhasin on 4-7-1938 also under protest. On 19-7-1938 Mr. Bhasin informed Messrs. Suganlal & Co. that the

arbitration proceedings were again fixed for 24-7-1938. Messrs. Suganlal & Co. pointed out to Mr. Bhasin that 24-7-1938 was a Sunday, and that the proceedings held on 24th of July would be void.

[11] On 22-7-1938, Messrs. Suganlal & Co., informed Mr. Bhasin that respondent 2 had filed a suit against respondent 1 at Karachi and that a notice had been ordered by the then Court of the Judicial Commissioner of Sind against respondent 1 for 4-8-1938 to show cause why an injunction should not issue to restrain Mr. Bhasin from proceeding with the arbitration.

[12] On 25-7-1938, however, Mr. Bhasin passed an award whereby he awarded a sum of rupees 8261-2-9 from respondent 2 to respondent 1. In due course, respondent 2 filed their objections to the award, and these are before me for disposal.

[13] The main ground on which I propose to set aside the award is that there has been no valid submission to arbitration in favour of Mr. Bhasin. Mr. Bhasin was examined on commission and his evidence has been brought on the record as Ex. 73. According to the evidence of Mr. Bhasin, he was told in July 1937 that there were contracts for turia seed between respondents 1 and 2, and that certain differences had arisen out of these contracts between them; this information was given to him, by Mr. Dasani, who was then at Cawnpore. Mr. Bhasin says that Mr. Dasani told him that he was the proprietor of the firm of Savaldas Madhavdas, respondent 2, and asked Mr. Bhasin to act as the sole arbitrator in the matter of disputes between respondents 1 and 2; Lala Radheylal of the firm of respondent 1 and Mr. Dasani met in his office and Lala Radheylal said that if all disputes between the parties were referred to arbitration immediately, he would make payments in respect of the three contracts. This was agreed to by Mr. Dasani, and according to Mr. Bhasin, Mr. Dasani gave to Lala Radheylal the letter dated 14-7-1937. Mr. Dasani and Lala Radheylal exchanged letters, the draft of which was dictated by Mr. Bhasin; after the two letters were exchanged, Lala Radheylal gave to Mr. Dasani a cheque for Rs. 10,000.

[14] It is clear from the evidence of Mr. Bhasin that it was Mr. Dasani who signed the letter dated 14-7-1937. All that Mr. Bhasin says is that Mr. Dasani, gave himself out as the proprietor of the firm of respondent 2. Mr. Bhasin has no personal knowledge of the capacity in which Mr. Dasani was acting or purporting to act.

[15] On the other hand, two partners of the firm of respondent 2, Madhavdas and Kanayalal, have given evidence before me and both have said that Mr Dasani had nothing to do with their firm; he was merely a friend of Kanayalal. Certain partnership deeds have been produced before me and these plainly show that Mr. Dasani was never a partner in the firm of respondent 2.

[16] I am satisfied from the evidence of Madhavdas and Kanayalal that Dasani had no connection with the firm of respondent 2 and that Sunderdas was only a clerk employed at Cawnpore for the purpose of securing orders, which were in their turn subject to confirmation by respondent 2 at Karachi.

[17] The question arises, whether the so-called submission clause contained in the letter of 14-7-1937 is one which can bind respondent 2?

[18] Sub-s. (2) of S. 19, Partnership Act, says:

"In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—(a) submit a dispute relating to the business of the firm to arbitration . . . ."

[19] Now, so far as the three contracts which were made at Karachi in March and April 1937 are concerned, they contain a valid submission clause because the implied authority to refer the matter to arbitration is derived from the custom of trade in Karachi. But the submission clause contained in the letter dated 14-7-1937 signed by Mr. Sunderdas and Mr. Dasani and relied upon by respondent 1 is not a submission clause which has been subscribed to by a partner in the firm of respondent 2. It is a submission clause signed by one Sunderdas, a clerk in charge of the Cawnpore branch of respondent 2 and one Mr. Dasani a person wholly unconnected with respondent 2. It is clear from the evidence that neither Mr. Dasani nor Sunderdas had any authority from respondent 2 to refer any matters in dispute between respondents 1 and 2 to arbitration.

[20] Mr. Parmanand Thakurdas for respondent 1 has not led any evidence to show that Mr. Sunderdas or Mr. Dasani was a partner in the firm of respondent 2. The evidence led before me clearly shows that neither Mr. Sunderdas nor Mr. Dasani was a partner in the firm of respondent 2. Mr. Sunderdas and Mr. Dasani had no authority to refer any disputes between respondent 1 and respondent 2 to arbitration.

[21] Mr. Parmanand contends that while it is true that authority of Sunderdas and Mr. Dasani to refer disputes between respondents 1 and 2 to arbitration has not been proved, nevertheless respondent 2 has ratified the act of Sunderdas and Mr. Dasani as certain letters written by Mulchand an employee of respondent 2 would appear to indicate. On the evidence before me it is impossible to hold that all the three partners have ratified the so-called submission contained in the letter dated 14-7-1937.

[22] Section 196, Contract Act, deals with the subject of ratification; and it is plain that the person who can ratify is the person on whose behalf the act is done. In this case, the persons who could ratify the unauthorised act of Sunderdas and Mr. Dasani were the three partners constituting the firm of respondent 2. I can find nothing in the evidence to justify the conclusion that all the partners in the firm of respondent 2 have ratified the act of Mr. Sunderdas and Mr. Dasani.

[23] Mr. Parmanand for respondent 1 has argued from the letters written by Mulchand and the account filed by respondent 1 that at any rate the arrangement as regards payment for the goods has been assented to and given effect to by respondent 2. This arrangement refers to the payments of Rs. 10,000 by respondent 1 as a guarantee of good faith on their part before respondent 2 agreed to despatch the goods to Calcutta. I am inclined to accept the position that respondent 2 knew about the arrangement as regards the manner in which the goods were to be paid for and assented to it. But I am not satisfied that all the partners in respondent 2 firm had knowledge of the submission clause as contained in the letter dated 14-7-1937 and had assented to it. Indeed, the correspondence shows that respondent 2 called upon Mr. Bhasin to send them a certified copy of the letter dated 14-7-1937; Mr. Bhasin however replied that the letter was not in his possession. It is true that from one of the letters written by Mulchand at Karachi, it would appear that Mulchand knew that Mr. Bhasin was acting as an arbitrator. But Mulchand's knowledge cannot be called ratification by all the partners in the firm of respondent 2. Far from there being any ratification on their part, respondent 2, engaged Messrs. Suganlal & Co., to protest against the arbitration proceedings before Mr. Bhasin.

[24] Mr. Parmanand has next contended that assuming, there was no ratification by all the partners of respondent 2 of the unauthorised act of Mr. Sunderdas and Mr. Dasani, there is evidence to show that Kanayalal, one of the partners, at any rate, had ratified the unauthorised act of Sunderdas and Mr. Dasani. Mr. Parmanand has drawn my attention to the evidence of Madhavdas, a partner in the firm of respondent 2, where Madhavdas has stated that in 1937-38 Kanayalal was in Karachi. It is true Kanayalal has stated in his evidence that he left Karachi in the end of August 1937. But Mr. Parmanand is justified in relying upon the admission of Madhavdas that Kanayalal was in Karachi in 1937-38. Madhavdas has also admitted that letters written by Mulchand to respondent 1 or Mr. Bhasin must have been written under instructions from Mr. Kanayalal who was then in Karachi. I am inclined to hold upon this evidence that Kanayalal knew of the arrangement referred to in para. 1 of the letter written on 14-7-1937, as also the submission clause contained in the same letter. Upon this evidence Mr. Parmanand contends that assuming respondent 2 as a firm is not bound by the submission clause, Kanayalal must be held bound by reason of his having ratified the unauthorised act of Mr. Sunderdas and Mr. Dasani.

[25] The difficulty in accepting Mr. Parmanand's contention for the purpose of holding Kanayalal liable under the award is that the award has been made by Mr. Bhasin against the firm of respondent 2 and not against any individual member of the firm. The reference in this case was under the Arbitration Act of 1899, and the procedure to be followed on the making of an award under the Arbitration Act of 1899 is laid down in S. 11 and the following sections. After an award has been filed in Court under S. 11, unless the Court remits it under S. 13, or sets it aside under S. 14 of the Act of 1899, it is enforceable as if it were a decree of the Court. It is to be observed that in the Arbitration Act of 1899, there is no provision analogous to S. 15, Arbitration Act of 1940, where power is given to a Court to modify or correct an award. Under the Arbitration Act of 1899 the powers of Court are limited to remitting the award, setting it aside or enforcing it as if it were a decree. The award in this case being against the firm of respondent 2, it is to be enforced as a decree against respondent 2 as a firm if it is not set aside. If it is set aside, the question of enforcing the award as a decree does not arise. There is no provision, as far as I can see, in the Arbitration Act of 1899 which enables a Court to enforce the award as a decree against an individual member of the firm when the award is made against the firm as a whole.

[26] Mr. Parmanand has drawn my attention to Lindley on "Partnership," Edn. 10, at p. 183, where it is stated that "the partner actually referring the dispute is, however, himself bound by the award," and the authority cited is (1677) 2 Mod. 227.[1] On referring to the case itself, I find it was a case where an action was brought on the case for non-performance of an award. The defendant in that case had, on behalf of himself and his partner, referred all differences and controversies between the plaintiff and them to arbitrators, *and promised to perform their award*; the award was that all suits which are prosecuted by the plaintiff against the defendant shall cease, and that he shall pay the plaintiff a certain sum of money. For non-payment, action was brought upon this special

declaration, to which the defendant demurred. The Court held that

"the defendant may undertake for his partner, and having engaged for him, and promised that he should perform the award on his part (notwithstanding the partner is not bound so to do), yet if he refuses, it is a breach of the defendant's promise."

The action in (1677) 2 Mod. 227[1] was based upon the breach of the defendant's undertaking. This is made clear in Vol. II of the English and Empire Digest at p. 328, where in para. 118, referring to the case in (1677) 2 Mod. 227=86 E. R. 1041,[1] it is stated:

"If one of two partners sign an arbitration bond 'for himself and partner', when the partner is not a party to the arbitration, the non-signing partner is not bound to perform the award, but his failure to do so is a breach of the signing partner's promise."

(1677) 2 Mod. 227[1] is therefore not an authority for the proposition that, where an award has been passed against a firm, which was not a party to a reference to arbitration, the ratifying partner can be held liable personally, although the award is set aside against the firm.

[27] Mr. Parmanand has also relied upon the case in A. I. R. 1932 Bom. 516,[2] but this case has no application to the facts before me. In the Bombay case no objections to the award were filed. A decree was passed in terms of the award, and under the provisions of O. 21, R. 50, Civil P. C., the liability of partners not served in the suit was to be determined by the executing Court. In the present case, as I am setting aside the award on the ground that the submission to arbitration was unauthorised and that there has been no ratification of the unauthorised submission by all the partners of the firm, the award based upon such a reference cannot be enforced as a decree against one of the partners who has ratified the unauthorised submission.

[28] I would accordingly set aside the award and order that it be struck off the file. Respondent 2 will get costs of their objections from respondent 1.

S.C. *Award set aside.*

A. I. R. (35) 1948 Sind 83 *[C. N. 23.]*

O'SULLIVAN AND THADANI JJ.

Ghumanmal Lokumal and others—Plaintiffs—Appellants v. *Faiz Muhammad Haji Khan and others—Defendants—Respondents.*

First Appeal No. 5 of 1942, Decided on 12-5-1947, from decision of 1st Class Sub-Judge, Shikarpur, D/- 29-11-1941.

Mahomedan law — Cosharers — Alienation by one cosharer of part of property — Suit by vendee for adjusting equities between himself and his vendor in regard to property not alienated to him — Maintainability.

Where a Muslim cosharer alienates a part only, of the property held in co-ownership without authority of his other cosharer, the vendee is not entitled to adjustment of equities in respect of other property held in co-ownership which has not been alienated to him by his vendor. [Para 9]

The question of adjustment of equities between the vendor and vendee upon a suit by a Muslim cosharer for partition of the entire property held in co-ownership might properly arise but a vendee cannot compel him to sue for a general partition, for the purpose of adjusting equities between the cosharer vendor and himself, much less can he institute a suit for the sole purpose of adjusting equities between himself and his Muslim cosharer vendor in regard to property which has not been alienated to him: *Case law discussed.* [Paras 12, 13]

Cases referred:—

1. ('22) 16 S. L. R. 133 : 9 A. I. R. 1922 Sind 41 : 79 I. C. 841 (F.B.), Wazir v. Dwarkomal.
2. ('07) 1 S. L. R. 133, Dhanumal v. Mt. Kaim Khatun.
3. ('99) 23 Bom. 188, Abdul Kadar v. Bapubhai.
4. ('15) 28 I. C. 895 : 3 A. I. R. 1916 Mad. 248, Moideensa Rowthen v. Muhammad Kasim Rowthen.
5. Second Appeal No. 64 of 1942, D/- 20-3-1947, Relumal Kewalmal v. Huzur Bakhsh Pahilwankhan.
6. ('78) 3 Cal. 198 : 4 I. A. 247 : 3 Sar. 730 : 3 Suther 468 (P.C.), Deendyal Lall v. Jugdeep Narain Singh.
7. ('22) 45 Mad. 449 : 9 A. I. R. 1922 Mad. 112 : 68 I. C. 869, Subba Goundan v. Krishnamachari.
8. ('27) 50 Mad. 320 : 13 A. I. R. 1926 Mad. 774 : 96 I. C. 993, Kandasamy Udayan v. Velayutha Udayan.
9. ('39) 26 A. I. R. 1939 Bom. 40 : 179 I. C. 721, Gemalsingji Khumansingji v. Bai Fati.
10. ('39) I. L. R. (1939) Kar. 597 : 26 A. I. R. 1939 Sind 315 : 185 I. C. 11, Mangalmal Aganmal v. Haji Muhammad Usif.

Kimatrai Bhojraj — for Appellants.

Khanchand Gopaldas — for Respondents.

Thadani J. — This is an appeal from the decision of the learned First Class Subordinate Judge, Shikarpur, in Suit No. 57 of 1939, in which he dismissed the plaintiff-appellants' suit with costs. It appears that the appellants had purchased some agricultural property from one Bakhshokhan and Hajikhan, sons of one Nathokhan, by several deeds. The property shown in List A attached to the plaint was sold in its entirety to the appellants; as regards the property in List B, an undivided twelve annas share was sold to them. Bakhshokhan and Hajikhan had stated in the sale-deeds that the property sold to the appellants was their exclusive property.

[2] In 1930, heirs of Nathokhan filed Suit No. 78 of 1930 in the Subordinate Civil Court of Shikarpur in which they claimed the property included in Lists A and B in the present suit, as belonging to Nathokhan, and disputed the right of Bakhshokhan and Hajikhan to alienate their share in the property. The appellants were joined as defendants in that suit, and they raised a number of defences including limitation and adverse possession. Their main defence, however, was that a suit by the heirs of the deceased Nathokhan for a partial partition was incompetent and

that the entire property of the deceased Nathokhan should have been made available for a general partition. The trial Court on the authority of the Full Bench decision of the Court of the Judicial Commissioner of Sind in 16 S. L. R. 133[1] negatived the appellants' contention and found that the property involved in Suit No. 78/1930 was the property of the deceased Nathokhan, and that the shares of the plaintiffs in that suit could not be alienated by Hajikhan and Bakhshokhan. An appeal preferred against the judgment and decree passed in Suit No. 78/1930 was dismissed by this Court.

[3] The appellants in the present suit seek to have a general partition effected in the other properties of Nathokhan which were not alienated by Hajikhan and Bakhshokhan. Those properties are mentioned in Lists C, D and E, in the present suit. The respondents resisted the appellants' suit on the ground that they had no right to sue; that the suit was barred by the decree in Suit No. 78/1930; that so far as the property mentioned in Lists C, D and E is concerned, it has not been sold to the appellants by Bakhshokhan and Hajikhan; that the appellants are, therefore, not entitled to a declaration and partition as claimed by them.

[4] Upon the pleadings, the trial Court passed the following issues:

"(1) Have the plaintiffs a right to sue or not? (2) Is the suit not in proper form? (3) Is the suit barred by decree in Case No. 78 of 1930, of the First Class Subordinate Court, Shikarpur? (4) Are the plaintiffs estopped from bringing this suit? (5) Was the property shown in the plaint left by Bakhshokhan and Hajikhan? (6) Has any property been sold by Bakhshokhan and Hajikhan? (7) Are the facts stated in paras. 5, 6 and 7 of the plaint true? If so, what is the consequence? (8) Are the plaintiffs entitled to the declaration as prayed for in para. 8 of the plaint or to partition as prayed for in para. 9 of the plaint? (9) What should the decree be?

[5] The learned advocate for the appellants has challenged the findings of the trial Court on all the issues except Issue 6, in regard to which there is no dispute between the parties, as it is common ground that the property mentioned in Lists A and B only had been alienated by Bakhshokhan and Hajikhan to the appellants. But it is contended that the properties mentioned in Lists C, D and E which were not alienated by Hajikhan and Bakhshokhan, should be made available for a general partition so as to give effect to equities between the vendors Bakhshokhan and Hajikhan and the vendee-appellants, in view of the fact that in Suit No. 78/1930 the appellants' contention for general partition was negatived.

[6] Mr. Kimatrai concedes that his clients cannot obtain a partition decree in respect of the properties mentioned in Lists A and B, as they were the subject-matter of a partition in Suit No. 78/1930 and which resulted in a decree for partition. This position has been conceded in para. 15 (a) of the plaint. Paragraph 15 (a) of the plaint reads as follows:

"That the Court be pleased to declare that the decree in Suit No. 78 of 1930 in favour of the defendants (Nos. 18 to 40) will be sufficiently and adequately satisfied both in quantity and value, without touching the plaintiffs in their purchased property and disturbing them in any way as directed in that decree from the property shown in Schs. C, D and E and share of the defendants in Sch. E."

Both in the lower Court and before us, the relief claimed in para. 15 (a) of the plaint was given up. Mr. Kimatrai, however, relies upon cl. (b) of para. 15 of the plaint which reads as follows:

"That the Court be pleased to direct the partition of the entire property comprised in Schs. A to E in the manner and method prescribed above to prevent the possibility of the plaintiffs' property shown in Sch. A and their share in property in Sch. E, being touched in any way and to give such other relief as the justice and equity warrant and justify."

We cannot see how, when the relief claimed in cl. (a) of para. 15 has been abandoned, the relief contained in cl. (b) can be granted. The appellants seek to have partition effected not only of the properties mentioned in the Lists C, D and E, but also of the properties mentioned in Lists A and B. The relief claimed in cl. (b) of para. 15 is plainly dependant upon the relief claimed in cl. (a) of para. 15. If no declaration can be given with respect to properties mentioned in Lists A and B as conceded by the appellants' advocate, the question of directing a partition of the properties mentioned in Lists A and B in our opinion does not arise.

[8] Before the appellants can claim partition of the properties, described in Lists C, D and E they must prove that they are cosharers. But it is the case of the appellants that they have no share in these properties. If the appellants have no legal right to claim partition of the properties mentioned in Lists C, D and E, we fail to see how they can ask the Court to make them available for the purpose of giving effect to what the appellants call equities between themselves and their vendors Bakhshokhan and Hajikhan. We shall presently consider the cases which Mr. Kimatrai has cited before us in support of his contention.

[9] We are unable to agree with the generality of the proposition that even when no legal right exists in a vendee to claim partition from his vendor, a vendee can claim a partition of the properties belonging to his vendor and the vendor's cosharers by reason of the fact that a vendee's rights have been affected by a partition decreed upon a suit for partition instituted by the cosharers of the vendor in respect of that

property only which has been alienated by the vendor to the vendee without authorization of his cosharers. We take the view that where a Muslim cosharer alienates a part only of the property held in co-ownership without authority of his other cosharer, the vendee is not entitled to adjustment of equities in respect of other property held in co-ownership which has not been alienated to him by his vendor; and we think this is in conformity with the personal law of the Muslims relating to succession.

[10] Under the Muhammadan law, a Muslim cosharer is upon succession entitled to a specific share in every fraction of the estate, and applying the law to the facts before us, it is plain that in the properties mentioned in Lists C, D and E, the heirs of Nathokhan are cosharers with numbers mentioned therein. The heirs of Nathokhan have not claimed partition of the property in Lists C, D and E. If the appellants were to succeed in obtaining partition of the properties mentioned in Lists C, D and E on the equitable doctrine of adjustment of equities between themselves and their vendors Bakhshokhan and Hajikhan, the heirs of Nathokhan, would still retain their share in every fraction of the properties decreed in favour of the appellants. The result would be that the vendees' rights upon the adjustment claimed by them would be subject to the legal rights of the cosharers of their vendors, a situation entirely alien to property rights of Muslims.

[11] In 16 S. L. R. 133,[1] a Full Bench of the Court of the Judicial Commissioner of Sind, on the following question referred to it, namely:

"Whether a cosharer under the Muhammadan law suing to recover his share in a portion of his ancestral estate wrongfully alienated by another cosharer to a stranger, who is in possession, is required to seek for partition of the whole estate, and if not, whether a suit for partition of the portion alienated is competent."

answered the first part in the negative, and the second part in the affirmative. Kincaid J. C. in delivering the judgment of the Full Bench observed (page 135):

"The difficulty in deciding a question of this kind lies chiefly in the frequency with which English Judges have applied to suits between Mussalmans the rules that appertain to Hindu co-parcenaries."

It appears that in 1 S. L. R. 133,[2] Crouch A. J. C. a Judge of the Court of the Judicial Commissioner of Sind, had observed:

"We see no reason for holding that the position of a Muhammadan plaintiff who claims partial partition is any stronger than that of a Hindu plaintiff."

And in a Bombay case 23 Bom. 188,[3] Parsons J. had stated that in the Bombay Presidency a suit for partition of an inheritance by Mussalmans was hardly distinguishable from a partition suit by Hindus. The Full Bench of the Court of the Judicial Commissioner of Sind did not accept the view of Parsons J. or Crouch A. J. C. and confined the examination of those cases only in which joint Hindu families were not involved, and Kincaid J. C. referred to the case in 28 I. C. 895,[4] with approval.

[12] It may be conceded that the question of adjustment of equities between the vendor and vendee upon a suit by a Muslim cosharer for partition of the entire property held in co-ownership might properly arise, but we cannot accept the position that, while a Muslim cosharer elects to sue for partition of some of the properties only held in co-ownership, a vendee can compel him to sue for a general partition, for the purpose of adjusting equities between the cosharer-vendor and himself. If Mr. Kimatrai's contention were to prevail, it would put fetters upon what this Court in Second Appeal No. 64 of 1942,[5] has held to be an unfettered right of a Muslim cosharer to claim partition of some of the properties only held in co-ownership, while retaining his co-ownership in the remaining properties.

[13] If, then, a vendee cannot require a Muslim cosharer to sue for a general partition, much less can he institute a suit for the sole purpose of adjusting equities between himself and his Muslim cosharer-vendor in regard to property which has not been alienated to him, as is sought to be done in the case before us.

[14] The analogy of a case where a vendee-defendant in a suit for partition by a Hindu co-parcener in respect of some of the co-parcenary properties only has been relegated to a suit for the purpose of adjusting equities between the coparcener vendor and the vendee is quite inapplicable to the case of a Muslim cosharer-vendor. As was observed by Kennedy A. J. C. in 16 S. L. R. 133[1] at page 142:

". . . . In the case of Muhammadans who held the estate before division as tenants-in-common, there is sufficient authority for the proposition that *B* may ask for separate partition of the part of the estate improperly alienated. This seems to follow from the authorities quoted. A Muhammadan heir is not a coparcener. He has not merely a right to acquire by partition a share in a defined property which share is a unascertained till partition is effected, but a right to a defined and immediate share in each portion of the estate, and if any portion of the estate is, in any case, marked off and divided from the rest of the estate, he has a right to an immediate share in that portion."

[15] We think the Full Bench decision of the Court of the Judicial Commissioner of Sind in 16 S. L. R. 133,[1] is against the contention of the appellants that in a suit by a Muslim cosharer for partition against his cosharers and vendee relating to the property alienated by a cosharer, the vendee can claim a general partition of all the properties belonging to the Muslim cosharers so as to have the question of adjustment of

equities between himself and his Muslim co-sharer-vendors decided.

[16] Mr. Kimatrai for the appellants has relied upon a decision of their Lordships of the Privy Council in 3 Cal. 198,[6] and two other cases 45 Mad. 449[7] and 50 Mad. 320,[8] all of which were cases in which Hindu co-parcenary properties were involved.

[17] Mr. Kimatrai has relied upon certain observations of Rangnekar J. in A. I. R. 1939 Bom. 40,[9] but we do not think they have any application to the facts before us. The proposition that in effecting partition of joint property between cosharers and an alienee from one or some of them, equity requires that partition should be so effected as not to prejudice the latter, may for the purposes of this appeal be conceded. But as the learned trial Judge has observed, the question of equities as between the cosharer-vendors and the appellant vendees was considered in Suit No. 78/1930, and no further question of the adjustment of equities arises in the present suit, the more so as none of the properties mentioned in Lists C, D and E has been alienated to the appellants. Nor do we think the principle enunciated in I. L. R. (1939) Kar. 597,[10] governs the facts before us.

[18] We agree with the learned trial Judge that the suit as framed did not lie, the appellants having no right, title or interest in the properties described in Lists C, D and E, and that the decision in Suit No. 78/1930 operated as *res judicata* in so far as it related to properties mentioned in Lists A and B, and that as the appellants are not the alienees of any of the properties described in Lists C, D and E, they have no right to claim adjustment of equities arising out of the sale of properties mentioned in Lists A and B, having regard to the rights of Muslim cosharers in property held in co-ownership. In the result we dismiss the appeal with costs.

N.S.D. *Appeal dismissed.*

A. I. R. (35) 1948 Sind 86 *[C. N. 24.]*

O'SULLIVAN AND THADANI JJ.

Kartarsing—Applicant v. *Hassanand—Opponent.*

Civil Revn. Appln. No. 92 of 1946, Decided on 22nd April 1947.

(a) Interpretation of Statutes — Retrospective effect — Alteration of law during pending proceedings.

A statute cannot be interpreted as operating retrospectively in the absence of express provision to that effect and when the law is altered during the pendency of any action the rights of the parties must be determined in accordance with law as it stood when the action began. [Paras 9 and 11]

Annotation : ('44-Com.) C. P. C., Pre. N. 3 Pts. 1 and 16.

(b) Sind (Residential Premises) Control Order (1942), (as amended in 1946), Cls. 12 and 13—Proceedings commencing before amendment—Finality of order of Collector is not affected by subsequent amendment.

Where the proceedings had commenced prior to the amendment and under Cl. 12 of the Order as it stood then the order of the Collector was final, the subsequent amendment providing for revision to the Provincial Government could not in any way render that order inconclusive and since the amendment providing for revision was made subsequent to the commencement of the proceedings neither party was entitled to resort to revision against the order. [Para 15]

Cases referred :—

1. (1905) 1905 A. C. 369 : 74 L. J. P. C. 77 : 92 L. T. 738, Colonial Sugar Refining Co., Ltd. v. Irving.
2. ('27) 14 A. I. R. 1927 P. C. 97 : 54 Cal. 508 : 54 I. A. 152 : 101 I. C. 38 (P.C.), Keshoram Poddar v. Nundo Lal Mullick.
3. ('27) 14 A. I. R. 1927 P. C. 242 : 9 Lah. 284 : 54 I. A. 421 : 106 I. C. 156 (P. C.), Delhi Cloth and General Mills Co., Ltd. v. Income-tax Commr., Delhi.
4. ('08) 32 Bom. 337, Nana v. Sheku.
5. ('26) 13 A. I. R. 1926 Rang. 205 : 4 Rang. 221 : 97 I. C. 1025, Sakeena Bibi v. Stephens.

Madhavdas Bhagat — for Applicant.

Tikamdas Wadhumal — for Opponent.

O'Sullivan J.—This is an application under S. 32, Karachi Small Causes Court Act questioning the legality of an order made by the Chief Judge of the Small Causes Court, Karachi, under the Sind Rent Control (Residential Premises) Order, 1942.

[2] The facts are simple, but the point raised is of considerable interest. The opponent Hassanand Radhakrishin Batheja, a landlord, instituted proceedings in the Court of the Small Causes, Karachi, under S. 18, Karachi Small Causes Court Act to eject a tenant, Kartarsing, the applicant.

[3] Under cl. 10 of the Sind (Residential Premises) Control Order, 1942, which is in the nature of emergency legislation, no order for ejectment may be made unless, *inter alia*, a landlord has obtained a certificate from the Rent Controller in accordance with that section.

[4] On 30th April 1946, the opponent, applied to the Rent Controller for the necessary certificate and this was granted on 21st June 1946. Under cl. 12 of the Rent Control Order, as it stood on 30th April 1946, when the certificate was granted, an appeal lay to the Collector against the order of the Controller granting the certificate and the decision of the Collector was final.

[5] On 15th July 1946, the applicant filed an appeal under cl. 12 to the Collector. Before the Collector decided that appeal, the opponent on 24th August 1946 filed ejectment proceedings in

the Court of the Karachi Small Causes. On 9th September 1946, while the proceedings were pending, the Collector allowed the appeal and set aside the order of the Rent Controller.

[6] On 22nd August 1946, while the proceedings in the Karachi Small Causes Court were still pending, the Rent Control Order was amended by the introduction of a provision empowering the Provincial Government to modify, annul or reverse the order of the Collector. This was brought about by substituting for the original cl. 12 of the Rent Control Order, cls. 12, 13 and 14. Under the amendment, cl. 12 provided for appeal to the Collector and cl. 13, which reads as follows, provided for revision by the Provincial Government :

"The Provincial Government may call for and examine the record of any enquiry made or proceeding held by the Collector or the Controller, for the purpose of satisfying itself as to the legality or propriety of any decision or order made thereon, and as to the regularity of the proceedings. If in any case, it shall appear to the Provincial Government that any decision or order or proceeding so called for should be modified, annulled or reversed, it may pass such order thereon as it deems fit."

The new cl. 14 provided that orders under cls. 12 and 13 should be final to the extent laid down.

[7] The opponent thereupon made a revision application to the Provincial Government under the amended order and on 16th September 1946, Government set aside the order of the Collector and restored the order to the Rent Controller.

[8] On 1st November 1946, the learned Chief Judge, Karachi Small Causes Court, dismissed the objections of the applicant, and issued a writ for possession in favour of the landlord opponent, on the basis of the order of Government restoring the certificate of the Rent Controller.

[9] It is the contention of Mr. Madhawdas, who appears on behalf of the applicant and who has argued this matter with considerable ability, that the order of Government could not properly be taken into consideration in the ejectment proceedings. It is his contention that statutes cannot be interpreted as operating retrospectively in the absence of express provision to that effect, and that when the law is altered during the pendency of any action, the rights of the parties must be decided in accordance with the law as it existed when that action began.

[10] Therefore, according to Mr. Madhavdas, the Rent Controller, having been first approached on 30th April 1946 under the provisions of the then Rent Control Order as unamended and which clothed the decision of the Collector with finality, the order of the Collector must remain unaffected by the subsequent amendment providing for revision to the Provincial Government.

[11] We consider that Mr. Madhawdas' contentions are well founded. The principles to which he has referred are stated in the leading case of 1905 A. C. 369,[1] as follows :

"As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And, therefore, the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure ? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is maintained."

There was some discussion as to whether these principles were limited merely to something in the nature of judicial proceedings, but Mr. Madhawdas has referred us to a decision of the Privy Council, A. I. R. 1927 P. C. 97,[2] in which the facts are very close and which involve certain proceedings under the Calcutta Rent Act. In that case the appellant who was a tenant had taken certain action under the Act for the fixation of a reasonable rent. The rent was duly fixed by the Controller but the tenant being dissatisfied with the Controller's decision, filed an appeal to the President of the Improvement Committee, to whom, under the Act, an appeal lay. Owing to stress of business the appeal was undecided by the President for a considerable time, and during that period two subsequent enactments were passed which had the effect of terminating his powers. In view of these changes, the President, when he eventually heard the appeal, refused to dispose of it on the ground that his powers had then terminated. Against this decision a revision application was made to the Calcutta High Court and decided against the tenant. On appeal to the Privy Council, on the principles already enunciated above, their Lordships decided that the President of the Improvement Tribunal was bound to exercise his jurisdiction and remitted the proceedings to him for this purpose. They pointed out that the Act applied as at the time the parties begin to move under it, and that this was before the powers of the President were terminated.

[12] Another decision of the Privy Council which has afforded us guidance is A. I. R. 1927 P. C. 212.[3] In that case their Lordships were

considering the effect of a certain amendment to the Income-tax Act made in 1926, and their Lordships said on this point :

"But a further point remains. Is there under this section any appeal at all from an order of the High Court made before the Act of 1926 came into force ?

The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in 1905 A. C. 369,[1] where it is in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in absence of express enactment or necessary intendment. *Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders, which, when the statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to apply to orders final at the date when it came into force, it must be clearly so provided.* Their Lordships cannot find in the section even an indication to that effect."

[13] Two other cases throw some light upon this matter. We would refer in this connection to 32 Bom. 337.[4] Under the Mamlatdars' Courts Act of 1906, the Collector had been given a power of revision very similar to that provided for the Provincial Government under the Amended Sind Rent Control Order, and it was held by the Bombay High Court that in relation to pending proceedings commenced before the coming into operation of that Act, having regard to the words of the Bombay General Clauses Act, the Collector had no jurisdiction, and that to hold otherwise would be to affect the legal proceedings in respect of a right which had accrued under the old Mamlatdars' Courts Act of 1876.

[14] The other case is A. I. R. 1926 Rang. 205,[5] which relates to proceedings under the Rangoon Rent Act. In that case after referring to the observations of Lord Macnaghten in 1905 A. C. 369,[1] their Lordships said :

"It has been urged that this case is distinguishable from the present inasmuch as in that case it was sought to take away the vested right of the subject to appeal to the King in Council, while in the case before us a remedy by way of appeal is given and at the time it was given neither party could tell to whose advantage this remedy might accrue."

And the judgment went on to point out that there was no distinction in principle between the two cases.

[15] We cannot see there is any escape from the conclusion that recourse having been had by the opponent to the Rent Controller on 30th April 1946 under the provisions of the Sind Rent Control Order and such order providing finality for the decision of the Collector, the subsequent amendment providing for revision to the Provincial Government could not in any way render inconclusive the order of the Collector. In other words, neither party were entitled to resort to revision since the amendment providing for revision had been introduced subsequent to the time when the opponent began to move under the Rent Control Order.

[16] In 1905 A. C. 369,[1] it was emphasised that a clear distinction must be drawn between a matter of procedure only and a substantive right. There is no doubt that in this case the right to appeal to the Collector was a substantive right and as we have stated, the order of the Collector was, under the Control Order as unamended, final. Even if it be assumed for the purpose of argument that when the opponent resorted in the first instance on 30th April 1946 to the Controller for a certificate, it was a matter of procedure only, the principles set out above still apply, because on 15th July 1946 when the applicant was entitled to and did exercise his right of appeal which is a substantive right, the amendment had not come into force. This, as we have stated, came into force on 22nd August 1946.

[17] Mr. Tikamdas, who appears on behalf of the opponent, has been unable to convince us that the order of the learned Judge was correct. He commenced by suggesting that the order of the Collector was not a valid order because it had not been signed by him. In the first place the original document is not before us and this is not a matter which the opponent appears ever to have raised before the Small Causes Court, and in the second place in the very order upon which the opponent relies, that passed by the Local Government, the order reversed is referred to as the order of the Collector of Karachi.

[18] We do not therefore think that this is a point which we can go into in revision at all.

[19] In the result, we consider the applicant must succeed. We set aside the order of the learned Chief Judge of the Karachi Small Causes Court and allow costs throughout to the applicant.

G.B. *Petition allowed.*

A. I. R. (35) 1948 Sind 88 *[C. N. 25.]*

O'SULLIVAN AND THADANI JJ.

Abraham D. Danial — Applicant v. *Hassanand Radhakrishin Batheja—Opponent.*

Civil Revn. Appln. No. 93 of 1946, Decided on 25-4-1947.

Sind Residential Premises Control Order (1942), Cl. 12 (before amendment of 1946) — Rent Controller by one order granting two separate ejectment certificates against two tenants — Appeal by one tenant only—Effect on tenant not appealing.

Under the Sind Rent Control Order, separate premises come within the definition of a "house" and a separate certificate is required in respect of each of such

premises. Where the Rent Controller makes one order against two tenants but grants separate ejectment certificates in that order in respect of each of the premises there is a separate cause of action in respect of each of the premises and if one of the tenants appeals to the Collector and the Collector cancels the Controller's order it cannot be said that there is no certificate in existence in the landlord's favour even in regard to the premises occupied by the other tenant who has not appealed.
[Para 4]

Case referred :—
1. *Reported in* ('48) 35 A. I. R. 1948 Sind 86, Kartar Singh v. Hassanand.

L. L. Thacker — for Applicant.
Tikamdas Wadhumal — for Opponent.

O'Sullivan J. — This is a revision application connected with the Revision Appln. No. 92 of 1946,[1] dealt with and disposed of on the 22nd instant. The present applicant did not file an appeal to the Collector against the Rent Controller's order, but it is nevertheless contended on his behalf that he is entitled to succeed in the same way as the applicant in Revision Application No. 92 of 1946[1] on the ground that the Collector has cancelled the order in its entirety, and there is no certificate in existence in the opponent's favour even in regard to the premises occupied by him.

[2] In developing his argument, Mr. Thacker, who has no doubt given considerable thought to the points put forward, has pointed out that the Rent Controller made one consolidated order, Ex. 4, in the previous application (No. 92 of 1946),[1] and that in that order he referred to the present applicant and the applicant in Revision Application No. 92 of 1946,[1] as opponents 1 and 2, and further that the landlord had put forward a common ground for wanting both the premises in question, and that the landlord's application for a certificate was dealt with on that basis. Mr. Thacker further contended that the analogy of an appeal against a decree in a civil suit applies, and that although only one defendent may succeed in setting aside a decree, other defendants who have not appealed are entitled to take advantage of the appellate Court's order reversing the original decree.

[3] We have given this matter our consideration, and while having every sympathy with Mr. Thacker's client, who we have no doubt whatever has genuine and considerable difficulty in obtaining alternative premises, and while the landlord's grounds for wanting the premises do not appear *prima facie* very convincing, we cannot agree with Mr. Thacker's argument as to the analogy of civil proceedings.

[4] Under the Sind Rent Control Order, separate premises of this kind come within the definition of a "house" and a separate certificate is required in respect of each of such premises, and, therefore, in essence, there is a separate cause of action or a separate situation arises in respect of each separate set of premises. There is no one common cause of action as in the case of a suit. It is clear from the Rent Controller's Order that although the grounds given by the landlord for wanting the premises are the same in each case, he has nevertheless dealt with each case separately in his order, repeating each ground in each instance, and dealt with each case on a separate basis, and in the conclusion of his order he has granted separate certificates in respect of each of the premises. The final part of his order reads :

"I, therefore, certify that the request of the applicant is reasonable and *bona fide*, and accordingly grant the ejectment certificates applied for."

It is unfortunate that the applicant did not appeal, but since he did not, we cannot see that we would be justified in saying that there is no certificate in existence so far as the premises occupied by him are concerned. We must, therefore, disallow this revision application.

[5] In view of the difficulties of obtaining premises, we might have considered postponing this order for a reasonable time, but Mr. Tikamdas on behalf of the landlord has endeavoured to meet the situation by undertaking that no action will be taken to eject the applicant for at least three months from this date, and this undertaking is accepted.

[6] The application is dismissed with no order as to costs.

D.H. *Application dismissed.*

A. I. R. (35) 1948 Sind 89 *[C. N. 26.]*

THADANI J.

In the matter of Muhammad Osman Sumro.

Judicial Misc. No. 187 of 1944, Decided on 1-5-1947.

(a) Bombay Local Fund Audit Act (25 [XXV] of 1930), S. 13 (a)—Application under, to Chief Court —Maintainability — Sind Courts Act (7 [VII] of 1926), Ss. 8 and 22.

If S. 8 and S. 22 (1) and (2) of Sind Courts Act, are read together it is manifest that the Chief Court of Sind is not a District Court. Hence the Chief Court of Sind has no jurisdiction to entertain an application under S. 13 (a), Bombay Local Fund Audit Act, 1930.
[Paras 2, 6 and 17]

(b) Civil P. C. (1908), S. 2 (4) — District Court — Chief Court of Sind.

The Chief Court of Sind is not a District Court within the meaning of S. 2 (4), Civil P. C. : 14 A. I. R. 1927 Cal. 290, *Rel. on.* [Paras 11 and 15]

Annotation : ('44-Com.) Civil P. C., S. 2 (4), N. 2.

(c) Sind Courts Act (7 [VII] of 1926), S. 9—Judge of Chief Court of Sind sitting singly is not subordinate to Chief Court.

Section 9 refers to the subordination of subordinate Courts (if any) in the civil district of Karachi, to the Chief Court. A Judge of the Chief Court of Sind sitting singly is not subordinate to the Chief Court and the right of appeal is not governed by S. 9, but S. 14, Sind Courts Act. [Para 9]

Cases referred :—

1. ('46) I.L.R.(1946)Kar. 164 : 33 A.I.R. 1946 Sind 86: 221 I.C. 646, Elias Dadla Khan v. Pir Mahfooz Shah.
2. ('27) 14 A. I. R. 1927 Cal. 290 : 100 I. C. 331, Hyat Mahomed v. Shaikh Mannu.
3. ('98) 26 Cal. 133, Fakar-ud-din v. G. L. Garth.

Khanchand Gopaldas — for Applicant.

Balkrishna H. Lulla, Asst. Government Pleader — for the Crown.

Order. — This is an application by one Muhammad Usman Sumro under S. 13 (a), Bombay Audit Act, 1930, arising out of a surcharge made against him by the Revenue Commissioner-in-Sind in the sum of Rs. 484 in the matter of the construction of a road between Gujo Shah Hoosein—Khaiki and Ghulamullah.

[2] A preliminary objection has been taken by Mr. Lulla, for the Province of Sind, as to the jurisdiction of this Court to entertain the application. In my opinion the preliminary objection must prevail, as this Court is not a District Court for the purpose of an application under the Bombay Audit Act of 1930.

[3] Section 3, Sind Courts Act, 7 [VII] of 1926, lays down:

"On and from the commencement of this Act (Sind Courts Act, 1926), there shall be established for Sind a Chief Court hereinafter referred to as 'the Chief Court'."

Section 4 says:

"The Chief Court shall consist of a Chief Judge and other Judges."

Under S. 8:

"The Chief Court shall be the highest civil Court of appeal and revision and the highest Court of criminal appeal and revision for Sind and the principal civil Court of original jurisdiction for the civil district of Karachi . . ."

[4] Section 14 of the same Act deals with appeals from orders and decrees passed by a single Judge of this Court in the exercise of his original civil jurisdiction.

[5] The subject "District Courts" is dealt with in S. 21 and succeeding sections. Section 21 reads thus:

"For the purposes of this Act the Governor in Council may by notification divide Sind into civil districts and fix the limits of such civil districts and determine the headquarters of each such district. . . ."

Section 22 provides:

"(1) There shall be in each civil district other than that of Karachi, a District Court and the Governor in Council shall appoint a District Judge to each such Court.

(2) The District Court shall be the Principal Court of original civil jurisdiction in the civil district."

[6] It is significant that in S. 22 (1) there is an express provision for establishing a District Court in all the districts in Sind, except the district of Karachi, and sub-s. (2) defines "District Court" as the "principal Court of original civil jurisdiction in the civil district." If S. 8 and subss. (1) and (2) of S. 22, Sind Courts Act, 1926, are read together, it is manifest that the Chief Court of Sind is not a District Court.

[7] I had occasion to deal with this aspect of the case in I. L. R. (1946) Kar. 164,[1] in a matter arising out of S. 19, Bombay Local Boards Act, 6 [VI] of 1923. It is true the question involved in that case was whether a Judge of this Court was a District Judge, but the reasons which I gave for taking the view that a Judge of this Court is not a District Judge, apply in my opinion to the facts of this case.

[8] Mr. Khanchand for the applicant contends that as there is a civil district of Karachi, and the Chief Court of Sind exercises original civil jurisdiction for the civil district of Karachi, it is a District Court within the meaning of S. 2 (4), Civil P. C. I am unable to agree with this contention because if this Court is a District Court for the purposes of the Civil Procedure Code, all appeals from decisions passed by a single Judge of this Court would lie to the High Court under the provisions of the Civil Procedure Code. But the right of appeal from an order or decree of a single Judge of this Court is not governed by the Civil Procedure Code; it is governed by S. 14, Sind Courts Act, 1926.

[9] Mr. Khanchand has contended that under S. 9, Sind Courts Act, each Judge of this Court sitting singly is a Court subordinate to the Chief Court. I am unable to agree with this contention. Section 9, in my opinion, refers to the subordination of subordinate Courts (if any) in the civil district of Karachi, to the Chief Court. A Judge of this Court sitting singly is not subordinate to the Chief Court, and the right of appeal is not governed by S. 9, but by S. 14, Sind Courts Act.

[10] In I. L. R. (1946) Kar. 164,[1] I took the view that sub-s. (1) of S. 22, Sind Courts Act, expressly excludes the civil district of Karachi and makes no provision for the appointment of a District Judge for the civil district of Karachi. When S. 8, Sind Courts Act, is read with S. 22 (2) of the same Act, it means that without being a District Court in terms of S. 22, the Chief Court of Sind shall also be the principal civil Court of original jurisdiction. It does not mean that because the Chief Court is the principal civil Court of original jurisdiction for the civil district of Karachi, it is a district Court within the meaning of S. 22.

[11] Mr. Khanchand rightly contends that in I.L.R. (1946) Kar. 164[1] the question of the interpretation of S. 2 (4), Civil P. C., did not arise and was not considered. I propose therefore, to consider the question now whether this Court is a "district Court" within the meaning of S. 2 (4), Civil P. C. In my opinion, it is not. Section 2, cl. (4), Civil P. C., says:

"District means the local limits of the jurisdiction of a principal civil Court of original jurisdiction (hereinafter called a 'District Court') and includes the local

limits of the ordinary original civil jurisdiction of a High Court."

[12] It is not disputed that this Court is a High Court. But Mr. Khanchand contends that as under S. 8, Sind Courts Act, 1926, the Chief Court of Sind is the Principal Civil Court of original jurisdiction for the civil district of Karachi, it is also a district Court within the meaning of S. 2 (4), Civil P. C. But, as I have pointed out before, if this Court is a district Court, when exercising its original civil jurisdiction, by reason of S. 2 (4), Civil P. C., the right of appeal would also be governed by the Code of Civil Procedure from a decision of a single Judge of this Court. In view of S. 14, Sind Courts Act, 1926, however, I do not think such an interpretation is permissible.

[13] In A. I. R. 1927 Cal. 290,[2] Rankin C. J. had occasion to consider the meaning of the word "District" in the Civil Procedure Code, with reference to the ordinary civil jurisdiction of a High Court. Rankin C. J. referring to the case in 26 Cal. 133,[3] observed:

"Speaking for myself and bearing in mind the terms also of S. 3, Civil P. C., I decline altogether to hold that a learned Judge of the original side is Court subordinate to the High Court. He is the High Court, and, in my judgment, we would be going contrary to authorities and upsetting well-settled principles if we entertained the present application."

[14] The observations of Rankin C. J. apply with equal force to the facts of this case.

[15] In my opinion, the Chief Court of Sind is not a district Court within the meaning of S. 2 (4), Civil P. C.

[16] Mr. Lulla for the Province of Sind has further contended that assuming for the sake of argument this Court is a district Court within the meaning of S. 2 (4), Civil P. C., the application filed in this case is not an application in respect of which this Court is exercising original civil jurisdiction. There is considerable force in Mr. Lulla's argument, but it is not necessary for the purpose of this application to give a decision on this question.

[17] Accordingly I hold that the application does not lie to this Court. It is, therefore, dismissed with costs.

D.S. *Application dismissed.*

A. I. R. (35) 1948 Sind 91 [C. N. 27.]

O'SULLIVAN AND THADANI JJ.

Sabaldas Janjimal and others—Plaintiffs — Appellants v. *Sobhokhan and others — Defendants—Respondents.*

First Appeal No. 16 of 1942, Decided on 12-5-1947, against decision of First Class Sub-Judge, Larkana, D/- 10-1-1942.

(a) Contract Act (1872), Ss. 2 (e) and 63 — Compromise reducing claim is not agreement but comes under S. 63.

Where *A* makes a proposal to *B*, that the latter should reduce his claim and *B* accepts the proposal and reduces his claim, such an acceptance is not an agreement within the meaning of cl. (e) of S. 2. The compromise falls properly within the terms of S. 63 which does not require any agreement: 15 A. I. R. 1928 P. C. 99 and 34 A. I. R. 1947 Mad. 414, *Rel. on*; 28 Bom. 66, *Not approved*. [Para 16]

Annotation: ('46-Man.) Contract Act, S. 2 (e), N. 1.

(b) Sind Encumbered Estates Act (20 [XX] of 1896), S. 19—Relinquishment of estate — Revival of claims—Nature of.

Assuming that upon relinquishment of an estate under S. 19, all claims are revived they are not always revived in their original character. Their revival is subject to the provisions of S. 63, Contract Act. [Para 20]

Cases referred:—

1. ('03) 28 Bom. 66, Abaji Sitaram v. Trimbak Municipality.
2. ('28) 55 I. A. 154 : 15 A. I. R. 1928 P. C. 99 : 9 Lah. 510 : 108 I. C. 678 (P. C.), Channamal Ram Nath v. Mool Chand Ram Bhagat.
3. ('47) 1947-1 M. L. J. 226 : 34 A. I. R. 1947 Mad. 414, Venkataswami Chetty v. Panchakshara Reddy.
4. ('35) 59 Bom. 180 : 22 A. I. R. 1935 P. C. 21 : 62 I. A. 23 : 153 I. C. 700 (P. C.), Pratapsing Mohlalbhai v. Keshavlal Harilal.
5. ('96) 20 Mad. 367, Rangayya Appa Rau v. Kameshwara Rau.
6. ('10) 8 I. C. 47 (Cal.), Sarat Chandra Sinha v. Nritya Gopal.
7. ('41) 28 A. I. R. 1941 Cal. 257 : 195 I. C. 151, Mohini Mohan v. Bir Bikram Kishore.

Keshowdas Dalpatrai—for Appellants.

Manghanmal Bhojraj — for Respondents.

Thadani J. — This is an appeal from the decision of the learned First Class Subordinate Judge of Larkana in Suit No. 33 of 1938 in which he dismissed the plaintiffs-appellants' suit with costs.

[2] On 3rd March 1938, one Mir Dad Muhammad Khan Burdi Lohar, ancestor of respondents 1 to 7 and one Mir Bakhsho Khan son of Mir Allankhan, respondent 8, executed a registered lease deed in favour of one Seth Janjimal and Sadorosing, ancestors of the appellants. The period of the lease was seven years from 1928-29 to 1934-35. Under the terms of the lease, the lessees had to get excavation work done and to make advances to cultivators and for takavi, and the sums so advanced were recoverable from the lessors, and in the event of the lessors interfering in any way with the land or its produce, they were to become liable to the lessees for all damages accruing to them and the damages were made a charge upon the leased land.

[3] It is the appellants' case that their ancestors, the lessees carried out all the terms of the lease; they spent a sum of Rs. 7954 on excavation work, and advanced a sum of Rs. 14,560-2-3 to cultivators, and a further sum of Rs. 10,293-15-3 to their lessors, Mir Dad Md. Khan and Mir Bakhsho Khan, and cultivated the Kharif crop of the year 1928-29; in January 1929, however, when the crop was ready to be gathered, the

lessors interfered with the leased land and forcibly took away most of the produce, and kept the possession of the leased land with themselves and the lessees were not permitted to enter upon the land.

[4] In April 1929 Mir Dad Md. Khan sought protection of the Manager, Sind Incumbered Estates, who took over possession of the leased land and retained possession of it till 13th November 1931, when he relinquished it under the provisions of S. 19, Sind Incumbered Estates Act and handed the possession of the land to the lessors.

[5] Seven years later, the appellants filed the present suit in December 1938 for accounts. In para. 15 of the plaint they stated that the cause of action arose on 15th November 1938 when a demand for accounts was made upon the respondents, on the termination of the lease in August 1935, and contended that the period of limitation was six years, having regard to the fact that the lease-deed and the mortgage deed were registered. In any case, they contended that as the protection of Mir Dad Md. Khan's estate lasted from 20th June 1929 to 13th November 1931, the period so taken up was to be excluded for the purposes of limitation as provided by the Sind Incumbered Estates Act.

[6] Respondent 2, Mir Allahrakhia Khan, in a very long written statement denied the appellants' claim and raised a number of technical defences. He denied the execution of the lease by his father Mir Dad Md. Khan and contended that even if the lease was signed by Mir Dad Md. Khan, it was without consideration. In any case, he alleged that the appellants' ancestors were guilty of the breach of the terms of the lease. He denied that the lessors had committed breach of the terms of the lease or had interfered in any way with the crop or had instigated the cultivators and obstructed the lessees. According to respondent 2, some disputes had arisen between the lessors and the lessees ; the lessees had committed frauds upon the lessors, and when Mir Dad Md. Khan applied for protection of the Manager, Sind Incumbered Estates, the land in suit was taken over by the Manager who, in due course, leased it to other persons.

[7] Upon the pleadings, Mr. Muhammad Bakhsh Memon, who was then the First Class Subordinate Judge of Larkana, framed the following issues :

1. Has this Court no jurisdiction to try this suit ?
2. Is the suit time-barred ?
3. Is the plaint not properly stamped ?
4. Can the suit not lie on the basis of the alleged lease deed ?
5. Have the plaintiffs no right to sue ?
6. Is there misjoinder of parties and causes of action ? If so, what order should be made ?
7. Is the suit not in the proper form ?
8. Was any lease deed executed by Mir Dad Md. Khan as alleged in para. 2 of the plaint ? If so, what are its terms ?
9. What is the consideration of the said lease ?
10. Did the parties act according to the terms of the said lease ?
11. Have the plaintiffs spent Rs. 7954 or anything as alleged by them in para. 4 of the plaint ?
12. Did the plaintiffs advance Rs. 10,294-15-3 or any amount to Mir Dad Muhammad ?
13. Did the plaintiffs cultivate the Kharif crop of the year 1928-29 ?
14. Did the late Mir Dad Muhammad take away the Kharif crop as alleged by the plaintiffs ?
15. Was any mortgage lease executed by Mir Dad Muhammad ? If so, what was its consideration ?
16. Is the mortgage bond separate from the lease in question ? If not, what is the consequence ?
17. Are the plaintiffs entitled to any damages and accounts ? If so, what ?
18. What should the decree be ?

[8] At the trial before Mr. Zaffarali A. Shaikh, in consequence of certain statements made by the advocates of the parties, the issues were recast and the parties went to trial on the following six issues only :

"1. Is the suit time-barred ?
2. Whether the suit is not in proper form ?
3. Whether compromise effected by the parties before the Manager with regard to the first crop is barred by limitation ?
4. Was the lease relinquished by Janjimal and Sadorosing as alleged in the written statement ? If so, what is the consequence ? Whether oral evidence can be led about this plea ?
5. To what damages, if any, are the plaintiffs entitled ?
6. What should the decree be ?"

[9] It appears that the advocates of the parties made a statement before the trial Judge that the question of the breach of terms of the lease did not arise, and Mr. Vishinsing for the plaintiffs stated that the compromise recorded by the Manager would appear to be binding on the parties; on issues 2 and 3 the findings of the trial Judge are against the appellants.

[10] Before us the appeal has been argued from different aspects of the two issues, but Mr. Keshowdas has failed to convince us that the decision of the trial Judge is wrong. Undoubtedly, the plaint in the suit has been very ingeniously framed, but we think the very ingenuity of it has failed in its purpose, as it is obvious that in the matter of advances made by the appellants to the cultivators and for takavi and money spent in excavation work, no question of accounting can ever arise between the appellants and the respondents. It is only in connexion with the alleged removal of the produce of the first year by the respondents that any question of accounting could possibly arise. Even as regards the value of the crop alleged to have been removed by the lessors, we think a suit for a specified amount should have been filed and not

a suit for accounts. Indeed, the value of the crop was, as far back as 14th December 1929, estimated by the lessees at Rs. 26,000 odd when they lodged their claim before the Manager, Sind Incumbered Estates.

[11] In their claim, which was registered as claim No. 208 of 1930, by the Manager, Sind Incumbered Estates, it was stated by the lessees that Mir Dad Md. Khan had an account with them, and upon that account a sum of Rupees 10,293-15-3 was due from Mir Dad Md. Khan upto 18th February 1929. In this account the lessees included a sum of Rs. 90 on account of excavation expenses and a further sum of Rupees 743-15-0 as balance due on the mortgage for Rs. 6000, and interest at the rate of Rs. 2 per mensem.

[12] Two other claims were also made on the same day, 14th December 1929. One of them was registered as Claim No. 207 of 1930 for a sum of Rs. 12,864-9-0 made up of the following items : (1) arising out of the mortgage Rs. 7285, (2) arising out of advances made to cultivators, Rupees 5579-9-0. The other claim was registered as claim No. 202 of 1930, in respect of the produce of the leased land valued at Rs. 26,973-8-0. In this claim the lessees stated :

"In this manner the plaintiffs' claim on account of produce of both kharif and rabi crops of year 1928-29 amounts to Rs. 26,973-8-0. The claim as regards the remaining period of lease is given up."

From the three claims to which we have referred, it is plain that the legal representatives of the lessees in the present suit were in a position to claim, and were, therefore, bound to claim a sum of Rs. 26,973-8-0 multiplied seven times, for it is reasonable to suppose that the value of the crop of each succeeding year was approximately the same as that of the crop of 1929. In any case, court-fee should have been paid by the appellants on at least Rs. 26,973-8-0, the ascertained value of the crop of 1928-29. We shall presently indicate how the appellants' claim for the years 1930-35 based upon the alleged rights arising out of the lease or mortgage is clearly misconceived.

[13] The learned trial Judge has rested his decision upon what he calls a compromise filed before the Manager, according to which the lessees claimed a sum of Rs. 15,000 as principal and Rs. 1000 as interest in satisfaction of all the three claims made by them. It is not disputed that prior to the compromise the relationship between the parties was that of a lessor and lessee and mortgagor and mortgagee. As regards the relationship of lessor and lessee, no question of accounting can arise. The question of accounting might arise between a mortgagor and mortgagee in certain cases but in this case, the lessees-cum-mortgagees had lodged a claim for an ascertained sum as far back as 1929. We think the learned Judge was then right in holding that the suit as framed did not lie.

[14] Mr. Keshowdas for the appellants contends that as the alleged compromise was made at a time when the Manager, Sind Incumbered Estates had assumed protection, the debtor Mir Dad Md. Khan was not competent to enter into a contract involving him in pecuniary liability, and that the alleged compromise was a contract involving him in a pecuniary liability. On the facts of this case, we are unable to take the view that the alleged compromise was the result of an agreement as defined in S. 2, Contract Act.

[15] It is true the learned Judge has stated at p. 131 of the paper book, Ex. 137, that the parties have compromised for a sum of Rs. 15,000 as principal and Rs. 1000 as interest, but we think the correct interpretation of the statement is that the lessees instead of adhering to their original claims Nos. 202, 207 and 208, remitted them in part and limited them to Rs. 16,000 only within the meaning of S. 63, Contract Act.

[16] A "promise" is defined in cl. (b) of S. 2, Contract Act, thus :

"When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.'

"Promise" as defined in cl. (b) of S. 2 is something quite different to an agreement as defined in cl. (e) of S. 2, Contract Act. The statement of the lessees reducing their claim to Rs. 16,000 was made, we think, in pursuance of a proposal made by the lessors to the lessees to reduce their claims and the lessees accepting the proposal reduced their claim to Rs 16,000. Such an acceptance is not an agreement within the meaning of cl. (e) of S. 2, Contract Act. Every agreement must involve consideration, and if it is the case of the estate-owner that the alleged compromise was an agreement within the meaning of S. 2, Contract Act, he must allege and prove consideration. None has been alleged by the estate-owner. We think the alleged compromise falls properly within the terms of S. 63, Contract Act, which does not require any agreement.

[17] Apparently Mr. Keshowdas based his contention upon a decision of the Bombay High Court in 28 Bom. 66,[1] in which it is stated that a dispensation or remission under S. 63, Contract Act, involves a promise as defined by S. 2 (b), or what is the same thing, an agreement within S. 2 (e) of the Act. But this view of the Bombay High Court has not been approved of by their Lordships of the Privy Council in 55 I. A. 151[2] at p. 160, where their Lordships observed :

"The language of the section (S. 63, Contract Act) does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines."

Sir Maurice Gwyer, retired Chief Justice of India and Editor of the Commentary on Indian Contract Act by Pollock & Mulla, Edn. 7 (1944) at p. 338 has stated :

"Thus the words of the section are construed according to their natural meaning, and a promisee can discharge the promise not only without consideration but without a new agreement. The learned authors repeated part of their original protest in the previous edition of this work, though they themselves admitted that it was no longer necessary. There is nothing in the words of the section (they said) about promise, proposal, or acceptance, and it was difficult to see why any such matter should be imported, except on the assumption that the intention was to alter the English law of accord and satisfaction. But if consideration is no longer required, why should agreement be required ? It is hoped that Indian Courts have at last shaken off the unfortunate and erroneous presumption that a codifying Act is to be read as saving every existing rule, however peculiar, which it does not repeal in literal terms."

[18] In (1947) 1 M. L. J. 226,[3] the facts were these : An agreement between the parties to two promissory notes provided :

"The balance due is Rs. 5309-2-11, out of which the amount excused out of grace is Rs. 3809 2-11, the balance of Rs. 1500 shall be paid by 30th June 1942, and the two bonds executed and delivered on 15th May 1941, shall be taken back after getting the endorsement of payment made thereon."

It was held,

"the language clearly indicates that to the extent to which there was a remission out of grace, it was a remission in præsenti and under S. 63, Contract Act, there could be remission in part as well. The failure to follow up the remission by payment of the balance does not invalidate the remission and make the whole amount payable. The remission was valid even though it was not supported by consideration by reason of S. 63, Contract Act."

[19] Mr. Keshowdas, however, contends that as the estate of Mir Dad Md. Khan was relinquished under S. 19, Sind Incumbered Estates Act, the debts and liabilities which were barred by S. 14 of the Act were revived in their original character. We have heard long arguments upon the interpretation of S. 19 (d) with reference to S. 14, Sind Incumbered Estates Act. It was first contended by Mr. Keshowdas that where claims are lodged in pursuance of S. 12, they are revived but where no claims are lodged, they are discharged for all purposes and on all occasions as provided by S. 14. Later, Mr. Keshowdas contended that where the estate is relinquished under S. 19 of the Act, all claims, whether made or not, are revived in their original character.

[20] For the purposes of this appeal, we will assume that upon relinquishment of an estate under S. 19, all claims are revived, but we are not prepared to assume that they are always revived in their original character. Their revival is subject to the provisions of S. 63, Contract Act. In the case before us, not only did the lessees reduce their claim to Rs. 16,000, but they gave up all their claims arising out of the lease in respect of the years 1930-35. We cannot see, then, how a suit for accounts by the legal representatives of the lessees was competent.

[21] When Mr. Keshowdas was faced with the difficulty arising out of the statement made by his clients reducing their claim to Rs. 16,000 which would bar a suit after the expiry of three years from the date of the cause of action, he contended that assuming the provisions of S. 63, Contract Act, applied, the lessees had not abandoned their charge upon the property created in terms of the lease and the charge would entitle them to file a suit within twelve years of the date of cause of action under Art. 132, Limitation Act.

[22] Mr. Keshowdas' argument is that as the lease provides that in case the lessors entered upon the land or interfered with the batai or caused obstruction in any way and the lessees were deprived of their benefit under the lease, the lessors had made themselves liable to pay all damages and costs, and the claim in damages was to be a charge upon the leased property. The lessees are, therefore, in his submission entitled to invoke the aid of Art. 132, Limitation Act.

[23] We invited Mr. Keshowdas to refer us to facts which sought to prove that the lessors had entered upon the land or interfered with the lessees in any way. Mr. Keshowdas invited our attention to para. 5 of the plaint in which it is stated that the lessors forcibly took away most of the produce in January 1929. But when we examined this allegation, our attention was drawn to Ex. 87, a suit (No. 11 of 1929), filed by the lessees against the lessors for a declaration on 28th February 1929. In para. 6 of the plaint in Suit No. 11 of 1929, the lessees alleged that the defendants were threatening and attempting to interfere with the possession of the land and with its produce and were denying the plaintiffs' rights and were persuading the cultivators to obstruct the plaintiffs in taking away the produce. These averments made on 28th February 1929 clearly falsify the averments made in para. 5 of the plaint in the present suit that in January 1929 the lessors had forcibly removed the produce.

[24] There was yet another suit—suit No. 127 of 1928 — instituted in the First Class Subordinate Civil Court of Shikarpur by one Tarachand for possession and mesne profits against Mir Dad Md. Khan and the lessees, in which an application was made for the appointment of a Receiver. The lessee Janjimal filed an affidavit on 7th January 1929 in which he stated that he was in sole possession of the land in suit. Mir Dad Md. Khan also filed an answer on 21st February 1929 in which he stated that the land had been cultivated by Janjimal. It is clear from the

statement of Mir Dad Md. Khan that the land in suit was in the possession of the lessees at least upto the end of February 1929. Indeed, we think, by this time the lessors had decided to seek protection of the Manager, Sind Incumbered Estates, and the Manager was preparing to assume protection. It is significant that at no time did the lessees allege forcible possession by the lessors before the Manager. We are not prepared to accept the allegation of forcible possession by the lessors made by the legal representatives of the lessees for the first time in 1938 in the present suit. We think the lessees have failed to prove facts which would enable them to claim a charge upon the leased land.

[25] It is to be observed that the lessees, far from relying upon Art. 132, Limitation Act, had in para. 15 of their plaint relied upon Art. 120 only of the Limitation Act. We think the plaintiffs had misconceived the date upon which cause of action accrued to them. As we have observed, Claim No. 202 of 1930 was made on 14th December 1929. At p. 123 of the paper-book, the lessees have stated as follows :

"In this manner the plaintiffs' claim on account of produce of both kharif and rabi crops of year 1928-29 amounts to Rs. 26,973-8-0. The claim as regards the remaining period of lease is given up."

The date on which cause of action accrued to the lessees was 14th December 1929. Six years from 14th December 1929 would bring the lessees to 14th December 1935; add to this the period of two years five months and seven days, during which the estate was under protection, the suit should have been filed in the last week of May 1937. The present suit was, however, filed in 1938 when it was time-barred.

[26] It appears that the learned trial Judge took the view that the lease had been surrendered by the lessees, and Mr. Keshowdas contends that the surrender of a registered lease can only take place by a registered instrument. It is not necessary to deal with this point as we think the lessees had on 14th December 1929 remitted performance of the promise or promises made under the lease, and under S. 63, Contract Act, they cannot now enforce the rights under the lease and the question of the surrender of the lease by a registered instrument does not arise. In this view it is unnecessary to consider the cases in 59 Bom. 180,[4] 20 Mad. 367,[5] 8 I. C. 47 (Cal.)[6] and A. I. R. 1941 Cal. 257.[7]

[27] Our conclusion, then, is that a suit for accounts was misconceived, that a suit should have been filed for Rs. 16,000 within the period of limitation. Accordingly we affirm the decision of the trial Judge on all the issues upon which the parties went to trial, and particularly upon the two issues argued before us. In the result we dismiss the appeal with costs.

N.S.D. *Appeal dismissed.*

A. I. R. (35) 1948 Sind 95 *[C. N. 28.]*

DAVIS C. J. AND THADANI J.

Mathradas Girdharidas and others — *Appellants* v. *Khemchand Ramdas* — *Respondent.*

Second Appeal No. 60 of 1942, Decided on 21-2-1947, against judgment and decree of District Judge, Sukkur.

(a) Civil P. C. (1908), O. 21, R. 103 — Parties to suit — Person other than one obstructing delivery of possession, if can be joined as defendant — Multifariousness—Civil P. C. (1908), O. 1, R. 9.

Where a plaintiff brings a suit under O. 21, R. 103 to establish his claim for present possession of the property, the mere fact that that suit is occasioned by obstruction and that he is compelled by the particular facts of the case to bring a suit within a period of one year does not prevent his joining other parties as defendants, if such parties could have been joined in any suit for present possession brought by him apart from the provisions of O. 21, R. 103 : 22 A. I. R. 1935 Sind 129, *Rel. on.* [Para 6]

The decree-holder auction-purchaser brought a suit under O. 21, R. 103 against the mother of the judgment-debtor who obstructed the delivery of possession and also joined her sons in occupation of the property as defendants. The mother died pending the suit :

Held that the suit was not bad on the ground of multifariousness. [Para 6]

Held also that even if the suit had been bad on the ground of multifariousness, it merely meant that the plaintiff would have been asked to choose either one or other of the defendants as the party against whom he wished to proceed. As the mother was dead, there would be no choice of alternatives and he would have to bring a suit against her sons who were joined as defendants when at the beginning of the suit she was still living. [Para 7]

Annotation : ('44-Com.) C. P. C., O. 21, R. 103, N. 4a; O. 1, R. 9, N. 4.

(b) Civil P. C. (1908), O. 41, R. 1—A point brought forward in some vague way in argument and on which no issue was raised in the lower Court, cannot be allowed to be made the subject of argument in appeal. [Para 8]

Annotation : ('44-Com.) C. P. C., O. 41, R. 1, N. 12.

Case referred :—

1. ('35) 22 A.I.R. 1935 Sind 129 : 156 I. C. 702, Naraindas Idanmal v. Pevandbai Gokaldas.

Fatehchand Assudamal — for Appellants.

Kimatrai Bhojraj — for Respondent.

Davis C. J. — This is an appeal against a judgment of the learned District Judge of Sukkur, in which he dismissed an appeal argued before him, chiefly on the ground that it was not proper for the plaintiff to join as defendants not only one Tulsibai, the wife of Seth Radhakishendas but defendants 2, 3, 4, 5 and 6, who were her sons.

[2] The suit arose out of the fact that the plaintiff entered into business with defendant 2 and defendant 2 mortgaged his property to the plaintiff for payment of his business debts. A

suit was filed; a mortgage decree was passed and in execution of the mortgage decree the property was sold and purchased by the plaintiff himself, but when the plaintiff tried to take possession, he was obstructed by Tulsibai, the mother of defendant 2 and he then filed an application under O. 21, R. 97, Civil P. C., for the removal of the obstruction; that application was, however, dismissed. The plaintiff was then obliged to bring a suit as required by O. 21, R. 103, Civil P. C., alleging that Tulsibai had no right to the property, and alleging also that her sons, defendants 2, 3, 4, 5 and 6 had no right to occupy the property in prejudice to his rights. It does appear that the only point merely pressed before the Subordinate Court was that the plaint was insufficiently stamped. The learned District Judge in appeal differed from the learned Subordinate Judge, who held that the plaint was sufficiently stamped, the learned District Judge holding that the plaint was not sufficiently stamped and directing the plaintiff to pay an ad valorem court-fee before he could recover possession. The question of valuation was not pressed before us; but what was pressed was the point that the suit was bad on the ground of multifariousness and it may be said that this point was covered by part 2 of issue 1: "Is the plaint insufficiently stamped and cannot the suit lie in the form in which it is brought?"

[3] Now, on this point it was argued on behalf of the appellant before us that a suit brought under O. 21, R. 103, Civil P. C., is a suit brought to remove an obstruction and can be brought only against a person responsible for the obstruction, in this case Tulsibai.

[4] But when one reads through O. 21, R. 103, Civil P. C., one does not find that it is a suit brought in terms of removal of obstruction at all; it is as follows:

"Any party not being a judgment-debtor against whom an order is made under R. 98, R. 99 or R. 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive."

and we read this rule as really meaning that the aggrieved party is referred to a civil suit in order to establish his right to the present possession of property, whether it be based upon title or otherwise. We cannot see anything in that order which prevents him, when he brings a suit for title, as under the terms of the order he must do, from bringing the suit not only against the one person who obstructs him in his claim to possession of the house but against any other persons in occupation of the house, and who would obstruct his claim to possession likewise.

[5] There is a ruling of the Sind Judicial Commissioner's Court reported in A. I. R. 1935 Sind 129,[1] in which it was laid down that:

"O. 21, R. 103, Civil P. C., does not purport to lay down what may or may not be included in a suit filed for the purpose indicated therein, or what persons may be impleaded as parties to such a suit. The object of this rule is not far to seek. On the one hand the rule is intended to deprive the claimant of his remedy by way of an appeal or application for revision to a higher Court, and on the other to declare that the adverse order shall be conclusive against the claimant, subject however, to the result of any suit which he may file to establish his claim to the 'present possession of the property' which is the subject-matter of the order passed against him."

[6] It would appear to us that when the plaintiff brings a suit to establish his claim for present possession of the property, the mere fact that that suit is occasioned by obstruction and that he is compelled by the particular facts of the case to bring a suit within a period of one year does not prevent his joining other parties as defendants, if such parties could have been joined in any suit for present possession brought by him apart from the provisions of O. 21, R. 103, Civil P. C. In this particular case if we exclude from our consideration the fact that the suit is, as it were provoked by an obstruction brought against a decree-holder and if we regard the suit as a suit brought by the plaintiff claiming possession of the property in suit then it would appear that the suit would not be bad on the ground of multifariousness, and we see no reason to hold that it is bad merely because of the occasion which leads the plaintiff to seek the assistance of the Court.

[7] We might also add that as Tulsibai is now dead, if the suit had been bad on the ground of multifariousness, it merely means that the plaintiff would have been asked to choose either one or other of the defendants as the party against whom he wished to proceed. As Tulsibai is now dead there would be no choice of alternatives and he would have to bring a suit against the sons of Tulsibai, who were joined as defendants, when at the beginning of the suit she was still living.

[8] The learned advocate for the appellant wished to argue the question of set off, the right of defendant 2 to charge against the plaintiff certain business expenses due from the plaintiff to himself. There is no issue raised on this question at all. It seems to have been merely a point brought forward in some vague way in argument. We see no reason to allow it to be made the subject of argument in appeal.

[9] We therefore confirm the judgment of the power appellate Court and dismiss the appeal with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (35) 1948 Sind 97 *[C. N. 29.]*

O'SULLIVAN AND THADANI JJ.

Newandram Vishindas — *Appellant* v. *Emperor.*

Criminal Appeal No. 29 of 1947, Decided on 5-5-1947, against conviction and sentence by Sessions Judge, Nawabshah, D/- 23-12-1946.

(a) Criminal P. C. (1898), S. 482—Cognizance of offence under S. 480 whether essential.

A Court cannot act under S. 482 when cognizance has not been taken of the offence described in S. 480 before it has risen for the day. If cognizance is not taken in accordance with S. 480 and if the Court still wishes to take proceedings it can do under S. 476 but not under S. 482: 23 A. I. R. 1936 All. 762, *Dissent.*

[Paras 9, 11]

Annotation :— ('46-Com.) Cr. P. C., S. 482, N. 1.

(b) Penal Code (1860), S. 228—Judicial proceedings — Insult in private interview with District Magistrate.

The accused who was an M. L. A. sought a private interview with a District Magistrate. The accused had in his hand a written complaint about a person whose wife has been enticed away. At the interview the District Magistrate asked the accused whether he was a pleader and on his replying in the negative told him not to assume the role of a pleader. The District Magistrate then sent for the complainant who was standing outside. At this stage the accused got up, flung the complaint at the District Magistrate and went away uttering the words 'phool, phool'. The accused was prosecuted for an offence under S. 228:

Held that the insult was given at a private interview which did not become a stage of judicial proceedings by reason of the expression of mere intention to examine the complainant by the District Magistrate. The accused had therefore committed no offence under S. 228.

[Para 17]

(c) Criminal P. C. (1898), S. 552—Powers of District Magistrate.

Section 552 does not authorise a District Magistrate to issue notice to persons accused of unlawful detention to produce the detained woman. [Para 18]

Annotation :—('46-Com.) Cr. P. C., S. 552, N. 3.

Cases referred :—

1. ('36) 23 A.I.R. 1936 All. 762 : 165 I. C. 693, Emperor v. Malkhan Singh.
2. ('08) 35 Cal. 161, Bipin Chandra Pal v. Emperor.
3. ('40) 41 Cr. L. J. 766 : 27 A. I. R. 1940 Lah. 233 : I. L. R. (1941) Lah. 145 : 189 I. C. 628, Emperor v. Ram Lal.

Nihchaldas C. Vazirani — for Appellant.

Fatehchand Assudomal, Advocate General — for the Crown.

Thadani J.—The appellant Newandram son of Vishindas has been convicted by the learned Sessions Judge of Nawabshah under S. 228, Penal Code, and sentenced to imprisonment till the rising of the Court and to pay a fine of Rs. 200, or in default to undergo simple imprisonment for one month.

[2] On 17th August 1946, shortly before noon, the appellant, a member of the Sind Legislative Assembly, one R B. Hotchand, a zamindar of Nawabshah, and Mr. Tilokchand, Editor "Hind Samachar", Nawabshah, sought an interview with Mr. Masud, District Magistrate of Nawabshah. Mr. Masud was then sitting in the verandah of his office. The appellant and his two companions announced themselves and Mr. Masud promptly sent for them. The appellant's interview was connected with an alleged enticement of Mt. Gangi wife of one Mengho, by two Pathans Gulmahomed and Laloo. The appellant told Mr. Masud the object of his visit, and when he had nearly finished narrating the facts, Mr. Masud asked him whether he was a pleader representing Mengho in a criminal case. The appellant said: "No, but I am a representative of the people, and I have come to plead for a man of my constituency," whereupon Mr. Masud told him: "As a representative of the people you can bring to my notice complaints of a general character affecting the general public, but you cannot assume the roll of a pleader in criminal cases such as this." Mr. Masud then asked the appellant where the complainant was, and expressed his desire to examine him. The appellant informed Mr. Masud that Mengho was standing outside. Mr. Masud rang the bell and asked his Naik Haji Wario to call Mengho. When Mengho came, Mr. Masud asked him if he was the complainant. The appellant then is said to have got up from his chair, to use the words of the learned Sessions Judge, "with a thump on the ground", and flinging the application at Mr. Masud with a jerk of his arm, said "If you do not recognize me as a representative of the people, I do not want to speak to you." Saying so, he walked out, and his two companions R. B. Hotchand and Tilokchand followed him. As the appellant walked out, Mr. Masud told him: "Do not come to me again." The appellant then paused, looked back and muttered something which appeared to Mr. Masud to indicate that he was going to say something more offensive. Mr. Masud asked him to go away. The appellant then went out muttering something which Mr. Masud did not understand, but Mr. Masud's Naik Haji Vario told him that the appellant had muttered "phool, phool" (fool, fool).

(3) After the appellant and his companions had gone away, it is the prosecution case that Mr. Masud examined Mengho orally and gave him a date of hearing, and directed a notice to issue to the Pathans Laloo and his brother Gul Muhammad to produce the woman.

[4] The 17th August 1946 was a Saturday. The following day, the 18th August, the appellant received a notice from Mr. Masud to appear before him which he did on the evening of the same day. According to Mr. Masud he took down his statement, and on the same day he filed a complaint against the appellant in the Court of the Resident Magistrate at Nawabshah under S. 228, Penal Code. The appellant then

applied to this Court for a transfer of the complaint to any other district than Nawabshah, and this Court ordered the case to be committed to the Court of Session at Nawabshah.

[5] We propose to dispose of this appeal on two points of law, which arise out of the proceedings taken by the learned District Magistrate, Nawabshah, and which we think are fatal to the success of the prosecution.

[6] It appears that when the appellant appeared before the learned District Magistrate on 18-8-1946 the latter recorded the appellant's statement made in answer to a question put by him in these terms:

"Q. — You, on 17th August 1946, committed an offence under s. 228, I. P. C. by intentionally offering an insult and causing interruption to this Court while it was holding its judicial function. The statement of facts is read out to you. What have you to say in your defence ?"

"A. — I have heard the statement of facts, but I say they are not correct, and I have not committed any offence. This is all that I have to say at present."

Mr. Masud then passed the following order on the same day:

"Cognizance of the offence was taken. The accused has committed an offence under S. 228, I. P. C. He offers no apology. His statement has been taken.

The accused is directed to stand his trial before the Resident Magistrate, Nawabshah. He is ordered to enter into personal recognizance bond in the amount of Rs. 1,000/- to appear before the Resident Magistrate Nawabshah, on the 24th of August."

From this order it is clear that the learned District Magistrate purported to take action pursuant to S. 482, Criminal P. C, read with S. 480, Criminal P. C, which says: [After quoting Ss. 480 and 482 the judgment proceeded:]

[7] The learned Advocate-General contends that an action taken under S. 482, Criminal P. C. is independent of S. 480, Criminal P. C., and in support of his contention he has relied upon A.I.R. 1936 ALL. 762,[1] and 35 Cal. 161.[2] We shall presently deal with these cases. For the present we would content ourselves with analysing Ss. 480 to 482 Criminal P. C.

[8] Section 482, Criminal P. C., is employed by a Court only when offences mentioned in S. 480 are committed in its view or presence and it is of the opinion that imprisonment as a substantive punishment should be awarded or a fine exceeding Rs. 200 should be imposed upon the accused person, or when for any other reason the Court is of the opinion that the case should not be disposed of under S. 480. The words "disposed of" in S. 480 are very significant. We think they presuppose that cognizance has been taken under S. 480, Criminal P. C. of one of the offences therein specified.

[9] The question, therefore, arises whether a Court can act under S. 482, Cri. P. C., when cognizance has not been taken of the offence described in S. 480 before it has risen for the day. We think the answer to this question must be in the negative. Section 482, Criminal P. C. refers among other things to the "recording of the facts constituting the offence and the statement of the case as hereinbefore provided", and S. 481, Criminal P. C., says :—

" In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender. . . . . "

It is significant that S. 482, Criminal P. C., does not embody the provisions of S. 481 in their entirety. It leaves out the words "as well as the finding and sentence" of sub-section (1) of S. 481, Criminal P. C., and the whole of sub-s. (2). The reason for the omission of the words "as well as the finding and the sentence", is, we think, to be found in the difference in the use of the two sections. Whereas under S. 480 the Court has to record the finding and sentence, under S. 482, the Court, after it has taken cognizance under S. 480, does not try the case itself, but forwards it to a Magistrate having jurisdiction to try it. This aspect of the case has been considered in 41 Cr. L. J. 766[3] where Blacker J. observed:—

"Now the words 'the Court is. . . . of opinion that the case should not be disposed of under S. 480', show clearly that the decision to act under this section (S. 482) must be taken at a time when action under S. 480 is still possible, i. e., on the same day before the rising of the Court....An examination of the language of S. 482 shows to me quite unmistakably that the procedure therein described is only to be adopted in a case where the Court has already taken cognizance under S. 480, Criminal P.C. . . . .Again the reasons for which a Court may act under S. 482 will in many, if not in most cases be such as it cannot find to exist unless it has already held some inquiry into the matter. An apparently serious contempt may be greatly mitigated by the humble and repentant attitude of the offender when called upon to explain. Conversely a less serious complaint may be aggravated by a defiant and insolent attitude. Lastly, in the thrid ground for which the Court may decide to adopt this procedure, the words used are not 'dealt with' or any similar phrase, but 'disposed of'. These words suggest that, just as in the two preceding grounds, it is the final result of the case which is being envisaged, and that therefore what the Court is considering is not whether it shall start to take cognizance itself, but whether having taken cognizance, it shall leave the final action to some other Court. But itself, this circumstance might not be of any essential importance, but it does tend to show that the Legislature was choosing its language carefully and that, therefore, the use of the word 'accused' above was deliberate."

It is true, Bennet J. in A. I. R. 1936 ALL. 762,[1] has taken a view of S. 482, Criminal P. C., which cannot be reconciled with the view of Blacker J. With respect, if Bennet J. intended to say that S. 482 could be employed without taking cognizance of the offence referred to in S. 480, Criminal P. C., before the Court rises for the day, we cannot agree. The view of Bennet J., if accepted, would render S. 476, Criminal P. C., in

relation to an offence under S. 228, I. P. C., entirely superfluous. We do not think the Legislature could have intended to provide two alternative remedies in respect of an offence committed under S. 228, I. P. C. in addition to the one under S. 480, Criminal P. C.

[10] We are unable to accept the submission of the learned Advocate-General that where cognizance of an offence mentioned in S. 480, Criminal P. C., is not taken by a Court before it rises for the day, it is still open to it to act either under S. 482, Criminal P. C. or S. 476, Criminal P. C., for the obvious reason that when proceedings are taken under S. 476, Criminal P. C., a Court makes a complaint to another Court having jurisdiction, and the Court to which the complaint is made then proceeds to deal with it, not dispose of it, under Chapter XVI of the Code of Criminal Procedure. But when a case is forwarded to a Magistrate under the provisions of S. 482, Criminal P. C., there is no question of the application of Chapter XVI, Criminal P. C., because the case is sent to a Court for trial, and the procedure to be followed in such a case is the procedure contained in Chapters XX or XXI, Criminal P. C.

[11] We wish to make it plain that we do not accept the view that a Court in whose view an offence mentioned in S. 480, Criminal P. C. is committed, is bound to forward the case to a Magistrate on the same day on which the offence was committed, under the provisions of S. 482, Criminal P. C. All that we wish to say is that the cognizance of the offence must have been taken on the same day before the Court rises if resort is had to S. 482, Criminal P. C. If cognizance has not been taken in accordance with S. 480, Criminal P. C., and if the Court still wishes to take proceedings, it can do so under the provisions of S. 476, Criminal P. C., but not under S. 482, Criminal P. C.

[12] We think the case in 35 Cal 161,[2] does not assist the Crown in any way. From the facts stated in the judgment of Rampini, J. it appears that a witness who was subsequently an accused person, had declined to take an oath or to answer questions put to him on a certain date, and the Court on the same day required him to execute a bond for personal recognizance to appear again. By this action the Court undoubtedly took cognizance of the offence on the same day.

[13] The facts of the case before us, do not justify the conclusion that the learned District Magistrate of Nawabshah took cognizance of the alleged offence on 17th August 1946. The order of the learned District Magistrate dated 18th August, forwarding the case to the Resident Magistrate, Nawabshah, for trial, contains the words "cognizance of the offence was taken." The order does not say that cognizance was taken on the 17th. The learned District Magistrate while giving evidence at the trial said he could not remember the time when he wrote Ex. 15. Exhibit 15 is an order dated 17-8-1946, summoning the appellant to appear on the next day. But we are not satisfied that the learned District Magistrate passed the order contained in Ex. 15 before he rose for the day. The learned District Magistrate nowhere says in Ex. 15 that he took cognizance of the offence.

[14] The failure of the learned District Magistrate to take cognizance of the alleged offence on 17th August, is, we think, fatal to his subsequent action under the provisions of S. 482, Criminal P. C. Indeed, the Advocate-General realised the significance of this failure and contended that the action taken by the learned District Magistrate was one under the provisions of S. 476, Criminal P. C. But when it was pointed out to the learned Advocate-General that in Ex. 22, dated 18th August 1946, the District Magistrate says that "cognizance of the offence was taken", he abandoned the contention and justified the action of the District Magistrate under the provisions of S. 482, Criminal P. C. We have already stated that we are unable to accept the interpretation of the learned Advocate-General of S. 482, Criminal P. C.

[15] The taking of cognizance in accordance with the provisions of S. 480, Criminal P. C., is we think, a condition precedent to the employment of S. 482, Criminal P. C., and as the condition precedent has not been satisfied in this case; the forwarding of the case by the learned District Magistrate to the Resident Magistrate, Nawabshah. for trial was, in our opinion, contrary to law, and a trial had upon a case so forwarded was without jurisdiction, notwithstanding the fact that this Court committed the case for trial to the Court of Session.

[16] There is yet another aspect of the case upon which, we think, the appeal must be allowed. We are not satisfied that the alleged offence under S. 228, I. P. C., was committed in any stage of a judicial proceeding. Section 228, I. P. C., reads:

"Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment."

(After discussing the evidence of District Magistrate the judgment proceeds:)

[17] The learned Advocate-General concedes that the interview given by Mr. Masud to the appellant was a private interview, but he contends that the private interview became a stage of judicial proceeding when Mr. Masud decided to call Mengho in order to take his statement. We are

unable to regard, what was undoubtedly a private interview, as a stage in a judicial proceeding merely because in consequence of the private interview Mr. Masud expressed his intention to examine the person on whose behalf the interview was sought. The utmost that can be said is that Mr. Masud intended or prepared himself to examine the person on whose behalf the interview was sought. His intention or preparation to examine Mengho had not yet ripened into any stage of judicial proceeding. It is common ground that the alleged insult was offered by the appellant before Mengho was examined.

[18] The learned District Magistrate's evidence on the question of Mengho's examination is somewhat obscure. It is conceded by the learned Advocate-General that there is no recorded statement of Mengho. The learned District Magistrate says in his evidence that he questioned Mengho orally. We were unable to see the object or the necessity of examining Mengho at all when it was clear from the petition that Mengho did not desire to have any judicial proceedings taken against the two pathans. The learned Advocate-General has however enlightened us on this point by saying that the learned District Magistrate wished to examine Mengho in order to pass an order under the provisions of S. 552, Criminal P. C. But S. 552, Criminal P. C., says:

"Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman; or of a female child under the age of sixteen years for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance of such order, using such force as may be necessary."

Mengho had not alleged any abduction. Moreover the learned District Magistrate had not passed any order for the immediate restoration of Mt. Gangi to Mengho, or taken any other action authorised by S. 552, Cr. P. C. Section 552 does not authorise a District Magistrate to issue notice to persons accused of unlawful detention to produce the detained woman. There is nothing in writing to show that Mengho was ever examined on oath by the District Magistrate on 17th August. Assuming Mengho was orally questioned by the District Magistrate, it is an admitted position that the appellant had left long before the District Magistrate orally examined him.

[19] On a careful examination of the case, we are not satisfied that the alleged insult was offered to the learned District Magistrate while he was sitting in any stage of a judicial proceeding.

[20] We therefore set aside the conviction and sentence and acquit the appellant. The fine, if paid, will be refunded to him.

G. B. *Appeal allowed.*

**** A. I. R. (35) 1948 Sind 100** *[C. N. 30.]*

FULL BENCH

TYABJI C. J., THADANI AND CONSTANTINE JJ.

Mahomed Mehdi and another—Plaintiffs v. *Governor-General-in-Council and another—Defendants.*

Suits Nos. 210 and 486 of 1946, Decided on 22-10-1947, Reference by of Constantine J., D/- 19-5-1947.

*** * (a) Civil P. C. (1908), O. 11, R. 12— Order for discovery can be made against Crown : ILR (1946) Kar. 416 : 34 AIR 1947 Sind 154, OVERRULED.**

(Per *Tyabji C. J., and Constantine J.)* : — **In the matter of the procedure relating to discovery the law applicable to the Crown, when a party to a suit in India, is the same as that applicable between subject and subject and is governed by O. 11, R. 12. The Crown in India cannot claim the prerogative of being exempt from the liability to make discovery. Hence, an order for discovery can be made against the Crown : I. L. R. (1946) Kar. 416 : 34 A. I. R. 1947 Sind 154,** *OVERRULED.*

[Paras 12 & 16]

(Per *Thadani J. concurring.)* : — **The prerogative right of the Crown in India, in the matter of discovery, procedure in regard to which is regulated by O. 11, Civil P. C., has been taken away by reason of S. 276, Government of India Act, 1935, in suits instituted under the provisions of S. 79, Civil P. C., provided the subject-matter of the suit is one in respect of which the East India Company could have been sued as a body corporate. If, however, the subject-matter of the suit is not one in respect of which the East India Company could have been sued, the Crown in India, at any rate up to 15-8-1947, could claim the prerogative right in the matter of discovery. Such a plea can properly be taken upon notice issued to the Crown on an application made under the provisions of O. 11, R. 12, Civil P. C., and before the Court can compel the Crown to make discovery, it would have to decide whether the subject-matter of the suit is one in respect of which the East India Company could have been sued.**

[Paras 17 & 18]

Annotation :— ('44-Com.) Civil P. C., O. 11, Rr. 12 & 13, N 17.

(b) Government of India Act (1935), S. 212—Decision of Privy Council whether on appeal from Indian Courts or not is binding on Indian Courts. (Per *Tyabji C. J.)*

It cannot be said that S. 212, Government of India Act, makes a decision of the Privy Council binding on the Indian Courts only when the decision was made on an appeal from India. There is no such limitation in the section, and all tribunals from which appeals lie to the Privy Council must necessarily be bound as subordinate Courts by all decisions of the Privy Council, as the decisions of a Sperior Court. **[Para 4]**

(c) Precedents — Decision of House of Lords is not binding on Indian Courts. (Per *Tyabji C. J.)*

Strictly speaking, a decision of the House of Lords cannot be said to be binding on any Indian Court, though there can be no question about the House of Lords being the supreme tribunal to settle English Law and about all Courts, which are bound to follow the English Law, being bound by the decisions of the House of Lords. **[Para 4]**

(d) Corporation — Corporation can sue and be sued like any subject — Corporation can obtain discovery and can be compelled to make discovery —Civil P. C. (1908), O. 11, R. 12.

(Obiter) **A corporation can sue and be sued like any subject, and the procedure applicable to corporations when parties to a suit is the same as that applicable to**

other parties (with of course the modifications necessitated by the fact of a corporation being a corporation). A corporation can obtain discovery and inspection from the other party, and can be compelled to make discovery and give inspection. Unlike the Crown, corporation can be sued in contracts and in tort, and can even be indicted and fined for criminal offences. It is of course true that apart from matters relating to the ordinary rules of procedure applicable to all parties to a suit, it is open to a corporation to show that it was suing or being sued as the representative or agent of the Crown, and to ask the Court to take into consideration and give effect to such prerogative rights as it could claim as an agent of the Crown. [Paras 8 & 9]

Annotation :— ('44-Com.) Civil P. C., O. 11, Rr. 12 & 13 N. 16.

Cases referred—

1. ('46) I. L. R. (1946) Kar. 416 : 34 A. I. R. 1947 Sind 154, Sunderdas Vishendas v. Governor-General-in-Council.
2. (1931) 1931 A. C. 704 : 100 L. J. P. C. 183 : 145 L. T. 408, Robinson v. State of South Australia (No. 2.)
3. (1942) 1942-1 All. E. R. 587 : 1942 A. C. 624 : 111 L. J. K. B. 406 : 166 L. T. 366, Duncan v. Cammell Laird & Co.
4. (1927) 1927 A. C. 515: 96 L. J. P. C. 84 : 137 L. T. 1, Robinson v. National Trust Co. Ltd.
5. ('25) 52 I. A. 398 : 12 A. I. R. 1925 P. C. 272 : 47 All. 883 : 28 O. C. 352 : 91 I. C. 370 (P. C.), Mata Prasad v. Nageshar Sahai.
6. ('15) 38 Mad. 941 : 2 A. I. R. 1915 Mad. 833 : 20 I. C. 546, Kariadan Kumar v. British India Steam Navigation Co. Ltd.
7. ('09) 32 Mad. 95: 1 I. C. 977 (F.B.), Mahomed Ravuther v. British India Steam Navigation Co, Ltd.
8. ('46) 33 A.I.R. 1946 Lah. 116 : I. L. R. (1946) Lab. 692 : 227 I. C. 546 (F.B.), Firm Karam Narain Daulat Ram v. Volkart Bros.
9. (1897) 2 Q. B. 384 : 66 L. J. Q. B. 593 : 77 L. T. 203, Attorney-General v. New Castle, upon-Tyne Corporation.
10. (1874) 10 Q. B. 44, Thomas v. The Queen.
11. (1886) 31 Ch. D. 607 : 55 L. J. Ch. 488 : 54 L. T. 145 : 34 W R 375, In re Wood's Estate ; Ex parte Works and Public Buildings Commissioners.
12. (1901) 2 K. B. 781 : 70 L. J. K. B. 860 : 85 L. T. 96 : 50 W. R. 122, Graham & Sons v. Commrs. of Public Works & Buildings.
13. & 14. (1886) 17 Q. B. D. 658, Dixon v. Farrer.
15. (1920) 2 K. B. 233 : 89 L. J. K. B. 607 : 123 L. T. 334, Commrs. of Works and Public Buildings v. Portyprid Masonic Hall Co. Ltd.
16. (1915) 1 K B 45 : 84 L. J. K. B. 219 : 111 L. T. 630, Roper v. Public Works Commrs.
17. (1886) 18 Q. B. D. 43: 56 L. J. Q. B. 53 : 55 L. T. 578 : 35 W. R. 95, Dixon v. Farrer.
18. (1921) 3 K B. 1 : 90 L. J. K. B. 812 : 124 L. T. 727, In re Societe Les Affreteurs Reunis and Shipping Controller.
19. (1878) 37 L. T. 469, Kain v. Farrer.
20. (1836-37) 1 M. I. A. 175 (P.C.), Mayor of Lyone v. East India Co.
21. (1861-63) 9 M. I. A. 387 : 2 Moo. P. C. (N. S.) 22 : 1 Suther 515 : 2 Sar. 39 (P.C.), Advocate-General of Bengal v. Surnomoye Dossee.
22. (1861) 5 B. H. C. R. App. A., P. & O. S. N. Co. v. Secy. of State for India.
23. Brignett Rep. p. 120, Bank of Bengal v. East India Co.
24. ('13) 40 I. A. 48 : 40 Cal 391 : 18 I. C. 22 (P. C.), Secy. of State v. Moment J.
25. ('47) 34 A.I.R. 1947 P. C. 34: I. L. R. (1947) Kar. P. C. 60 : 73 I. A. 271 : 228 I. C. 117 (P,C.), Province of Bombay v. Municipal Corporation of the City of Bombay.
26. ('75-77) 1 Bom. 7, Ganpat Putaya v. Collector of Kanara.
27. ('06) 33 Cal. 1040, Gayanoda Bala Dassee v. Butto Kristo Bairagee.

A. P. Fonseca and S. H. Lulla —for Plaintiffs 1 and 2 respectively.

Choithram Dewanmal and E. V. Castellino — for Defendants 1 and 2 respectively.

Advocate-General of Sind —for the Crown.

Tyabji C. J. — We have before us two applications under O. 11, R. 12, Civil P. C., in each of which the plaintiff seeks an order for discovery on oath against the defendant, one in Suit No. 210 of 1946 against the Governor-General-in-Council, in respect of a claim against the North Western Railway, and the other in Suit No. 486 of 1946 against the Province of Sind, in respect of a claim against the Provincial Government. These applications were rejected by the Registrar (O. S.) on the ground that no such order as was prayed could be made against the Crown, and the decision of O'Sullivan J., in I. L. R. (1946) Kar. 416,[1] was relied upon. The plaintiffs being dissatisfied with the orders, had the matters brought before the Judge, Constantine J., and questioned the correctness of the decision of O'Sullivan J. Having regard to the very great importance of the matter, Constantine J., made a reference under R. 10 of the Rules of this Court, and the matter is now before us.

[2] In I. L. R. (1946) Kar. 416,[1] O'Sullivan J., had three applications against the Crown before him, two under O. 11, R. 12, Civil P. C., for discovery on oath, and the third under O. 11, R. 19 (2) for inspection, after discovery had been made. He considered that the same broad question was involved in all the three applications, viz., whether the Crown in India had the same prerogative as regards the procedure applicable to discovery and inspection as it had in England. O'Sullivan J., decided that it had. He rejected the contention that the statutory law in India had by necessary implication deprived the Crown of the prerogative claimed. He therefore held, first, that no order could be made compelling the Crown to make discovery and that it was not within the province of the Court to require the Crown to state any special ground of objection or to enquire into the reasons why the Crown objected. Secondly with regard to the third application before him, which raised a question of the procedure to be followed under O. 11, R. 19 (2) on the Crown objecting to produce certain documents for inspection, O'Sullivan J., considered that there was a conflict between the

decision of the Privy Council in (1931) A. C. 704,[2] and the decision of the House of Lords in (1942) 1 ALL. E. R. 587[3] as to whether the privilege claimed included the right to refuse to produce the documents for the inspection of the Court. With regard to this, O'Sullivan J., said:

"With very great respect to these most eminent tribunals, it appears to me that the decision of the House of Lords is to be preferred on the question under consideration. The Privy Council has itself laid down in (1927) A. C. 515,[4] that a decision of the House of Lords is the highest authority binding on the Courts and Dominions, and may, therefore, be preferred on a question of common law to an earlier decision of the Judicial Committee itself. This case has been referred to in Bentwich's Privy Council Practice at p. 238.

The point, however, is as to whether S. 212, Government of India Act, binds me to follow the decision of the Privy Council in the Australian case; and to my opinion it does not. I am of the view that S. 212 must be construed as referring only to judgments of the Privy Council in Indian appeals. The Sovereign has retained the prerogative of being the supreme tribunal of justice in the Empire and the ultimate right of appeal from all parts of the Empire is therefore to the King in Council. The Judicial Committee of the Privy Council is an Imperial body representing the Empire and the right of appeal to it has been defined and regulated in the case of the Dominions, colonies, dependancies and possessions by various statutes, Letters Patent and Orders in Council. Laws are not uniform throughout the Empire and the Privy Council decides appeals in accordance with the laws in force at the places from which they come. It seems to follow that the decision of this supreme tribunal on an appeal from one part of the Empire regulates as such appeal would be by a particular statute, charter or order in Council, and decided in accordance with a particular set of laws, is not and cannot be binding on the Courts in another part of the Empire."

[3] It was contended before us that O'Sullivan J. was in error on both these matters, and that the Privy Council decision is applicable, and therefore binding upon the Courts in India on all the matters it deals with.

[4] We are, however, only concerned with the first matter dealt with by O'Sullivan J. as the two applications before us are both applications under O. 11, R. 12, and not with any questions that might arise on an application under O. 11 R. 19 (2). The broad question before us is whether in the matter of the procedure relating to discovery and inspection the law applicable to the Crown, when a party to a suit in India, is the same as that applicable to any other party, or whether the Crown in India still retains the prerogative, which it has in England, by virtue of which no order can be made against it compelling it to make discovery or give inspection. There is no question here about the applicability of the Privy Council decision referred to above as that was a decision in a case from Australia where admittedly the prerogative, here in question, did not exist and the state was bound like any subject to make discovery and give inspection. I am unable however to agree with the view of O'Sullivan J., cited above, that S. 212, Government of India Act, makes a decision of the Privy Council binding on the Indian Courts only when the decision was made on an appeal from India. There is no such limitation in the section, and all tribunals from which appeals lie to the Privy Council must, I think, necessarily be bound as subordinate Courts by all decisions of the Privy Council, as the decisions of a Superior Court. In 52 I. A. 398,[5] their Lordships stated:

"their Lordships think it desirable to point out that it is not open to the Courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular cases."

In 38 Mad. 941[6] Sadasiva Ayyar J. said:

"It seems to me that this decision of the Privy Council pronounced on the 31st March 1909 (about 3½ months after the pronouncement of the Full Bench decision in 32 Mad. 95,[7] on 15th December 1908) clearly overrules the decision in the latter case, unless we are to accede to the ingenious argument of Mr. Sheshagiri Ayyar that we are not bound by the decision of the Privy Council unless it was given in a case which went up on appeal from an Indian tribunal. (The appeal case of 1909 was an appeal from the decision of the Supreme Court of the Straits Settlements.) I am wholly unable to hold that the binding nature of a decision of the Privy Council depends on the locality of the tribunal which pronounced the decision from which the appeal was preferred to the Privy Council, any more than the binding nature of a decision of this Madras High Court upon a Madras District Court depends on the question whether the High Court's decision was pronounced in an appeal preferred in a case which arose in that particular district",

and Tyabji J. also expressed the same view. In the Lahore Full Bench case, A. I. R. 1946 Lah. 116,[8] Harries C. J. held that in a case of conflict, a decision of the Privy Council was binding whereas a decision of the House of Lords was not (*cf.* p. 123). Strictly speaking, a decision of the House of Lords cannot be said to be "binding" on any Indian Court, though there can be no question about the House of Lords being "the supreme tribunal to settle English Law" and about all Courts, which are bound to follow the English Law, being bound by the decisions of the House of Lords, as was pointed out by the Privy Council in 1927 A. C. 515[4] at p. 519. The question, to what extent the Privy Council decision was applicable, is another matter.

[5] It is necessary first to turn for a moment to the law in England. As Viscount Simon, L. C. stated in (1942) 1 ALL. E. R. 587:[3]

"When the Crown (which for this purpose must be taken to include a Government department, or a minister of the Crown in his official capacity) is a party to a suit, it cannot be required to give discovery of documents at all. No special ground of objection is needed."

Viscount Simon then referred to the well-known observation made by Rigby L. J. in (1897) 2 Q. B. 384,[9] the truth of which has never been open to question:

"....the law is that the Crown is entitled to full discovery and that the subject as against the Crown is not. That is a prerogative of the Crown, part of the Law of England, and we must administer it as we find it....Now I know that there has always been the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in a position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded."

[6] I wish particularly to emphasise here that this particular prerogative, with which we are concerned, can only be claimed when the Crown is a party to a suit. A glance at the history of the law will show that this prerogative has been carefully preserved and kept intact by legislation in England. There was a time when no suit could be instituted against the Crown at all. Even after the Crown could be sued by a petition of right, suits by and against the Crown (informations and petitions of rights) had to be instituted in special forms which were essentially different from those of other suits (actions) between subject and subject, and the procedure and practice applicable to Crown suits (Crown practice) has always been different. In a suit by the Crown, (information or information and bill) the informant acting on behalf of the Crown gives the Court to understand and be informed of the facts alleged and prays for such relief as the Crown desires. Under the Petitions of Rights Act of 1860 the suit had to be in the form of a petition made by a suppliant addressed to Her Majesty The Queen which had to be

"left with the Secretary of State for the Home Department, in order that the same may be submitted to Her Majesty for Her Majesty's gracious consideration and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done."

Her Majesty could grant or refuse her fiat at her pleasure. It was not the absolute duty of the Attorney-General to advise the grant of the fiat in every case, although, where the petition disclosed a reasonable and probable ground of claim and a real cause of action, the fiat in practice was invariably granted. The fiat could be granted to the whole or part of the petition, and the petition could not be set down for trial until the fiat was granted. (Halsbury's Laws of England, Vol. IX, para. 1180, p. 694). The rules of the Supreme Court framed under the Judicature Acts only apply to Crown suits, in so far as the rules have been specifically made applicable to such suits; and apart from such specific application, the procedure applicable is governed by the Crown Suits Act, the Exchequer Rules, and the traditional procedure of the King's Remembrancer's Department. (Halsbury's Laws of England, Vol. IX, paras. 1162 and 1184). All the prerogative rights of the Crown have to be regarded as existing except in so far as they have been specifically taken away by statutes. The only Orders of the Rules of the Supreme Court made applicable to Crown suits under the Supreme Court of Judicature (Consolidation) Act, 1925, are those mentioned in O. 68, R. 2 of the R. S. C., which do not include O. 31, which deals with discovery and inspection.

[7] Section 7, Petition of Rights Act of 1860 provided:

"So far as the same may be applicable....the laws and statutes in force as to pleading....and the practice and course of procedure of the said Courts of law and equity respectively for the time being in reference to such suits and personal actions, shall....be applicable and apply and extend to such petition of right....."

and it was urged in (1874) 10 Q. B. 44,[10] that this section extended to petitions of right all the statutes relating to pleadings, evidence, hearing and trial and the means of procuring and taking evidence, and, as discovery was included in this, it was argued that a suppliant could obtain discovery in a petition of right. Section 50, Common Law Procedure Act of 1854 was as follows:

"Upon the application of either party to any cause or civil proceeding in any of the superior Courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or Judge to order that the party against whom such application is made, or if such party is a body corporate, shall answer an affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made the Court or Judge may make such further order thereon as shall be just."

Cockburn C. J. discharging the rule stated:

"If it had been intended to extend S. 50, Common Law Procedure Act, 1854, as to discovery of documents, to the case of petitions or right, there would have been inserted some enactment saying an officer should answer, as in the case of bodies corporate."

Technically the Queen could not be sued in her own Court, and having regard to the nature of a petition of right, it was legally and technically impossible to order Her Majesty the Queen to make an answer on affidavit. No one else could in law be compelled to make such an answer. Discovery could only be ordered against a party, and not against the Queen or anyone who was a stranger to the cause: *cf.* Halsbury's Laws of England, vol. X, para. 420, p. 347.

[8] Before leaving the subject of the law in England, the relevant law with regard to corporation requires to be noticed. A corporation

can sue and be sued, like any subject, and the procedure applicable to corporations when parties to a suit is the same as that applicable to other parties (with of course the modifications necessitated by the fact of a corporation being a corporation). A corporation can obtain discovery and inspection from the other party, and can be compelled to make discovery and give inspection. Unlike the Crown, corporation can be sued in contracts and in tort, and can even be indicted and fined for criminal offences: *cf.* Halsbury's Laws of England, Vol. VIII, Ss. 4, 5 and 6, paras. 159-179. Even where a corporation is incorported for public purposes, by a public Act, it cannot claim to be in the same position as the Crown. In (1886) 31 Ch. D 607,[11] Lindley L. J. stated:

". . . . no authority has been cited to show that this particular corporation, incorported by the Act of 1855 for certain public purposes, is to be treated as the Crown, and there is no ground for holding that a corporation specially incorporated in this way is in the same position as regards costs as the Crown."

and the corporation was ordered to pay the costs. In (1901) 2 K. B. 781,[12] Phillimore J. pointed out that even when a public corporation could probably be described as "a nominal defendant sued as representing one of the departments of the State," using his description as Lindley L. J., did in (1886) 17 Q. B. D. 658,[13-14] the mere fact of its incorporation conferred upon it "the privilege of suing and the liability to be sued," like subjects. No case has been cited before us, except one of the E. I. Coy. which will be referred to later, in which any corporation has even put forward the claim that it was entitled to the prerogative, which the Crown could claim, of being exempt from the liability to make discovery and give inspection, and it appears to me to be beyond question that the fact that corporations, unlike the Crown, can sue and be sued in the same manner as other subjects, in suits to which the ordinary procedure applies, necessarily subjects them to the ordinary rules of procedure, and makes it impossible for them to put forward any such claim.

[9] It is of course true that apart from matters relating to the ordinary rules of procedure applicable to all parties to a suit, it is open to a corporation to show that it was suing or being sued as the representative or agent of the Crown, and to ask the Court to take into consideration and give effect to such prerogative rights as it could claim as an agent of the Crown. As Phillimore J., said, in (1901) 2 K. B. 781[12] in such a case,

"The procedure amounts to obtaining a decision in the nature of a decision upon a hypothesis, namely if the person sued were a subject, what would be the decision of the Court on the case brought against him? The principle which is found in the Merchant Shipping Act is a useful one to consider; it shews that the Crown is the real entity pursued, although through the medium of a subject, and the privileges which the Crown has as to the mode of trial apply to such cases. In (1886) 17 Q.B.D. 658,[13-14] the Secretary of the Board of Trade was sued for the act of his subordinate in detaining a ship supposed to be unseaworthy. The Attorney-General of the day claimed, and successfully maintained his claim, to treat the action as a suit against the Crown, and to exercise the prerogative right of the Crown to lay the venue in whatever country it pleased."

[10] In (1920) 2 K. B. 233[15] Banks L. J., stated:

"The defendants plead the Statute of Limitations. To that the plaintiffs answer that they are suing as the representatives of the Crown to recover this money, and that the Statute of Limitations does not apply as against the Crown. Two cases have been referred to, (1901) 2 K. B. 781,[12] and (1915) 1 K. B. 45,[16] both of which make it clear that if a body, whether incorporated or not, is in fact acting in any particular matter as agents of the Crown, they are to be treated in law as such agents, and from that it follows that the Statute of Limitations does not apply to them. In this case I have no hestitation in coming to the conclusion that the plaintiffs are merely acting in their capacity as agents of the Crown in endeavouring to recover this money, although they possess a statutory right to bring the action in their own name. In (1886) 18 Q. B. D. 43,[17] Lindley L. J., dealing with a case where the Secretary of the Board of Trade was being sued, said (2) that the defendant was a nominal defendant sued as representing one of the departments of the State. Here the position is transposed; the plaintiffs are nominal plaintiffs suing as representing one of the departments of the State."

It must be noticed that the prerogative rights which may be so claimed do not in any manner affect the fact that in any suit to which the corporation is a party, the procedure applicable, as regards discovery and inspection and other matters, is the same as in any suit (action) between subject and subject. In (1921) 3 K. B. 1,[18] Greer J., stated:

"I want to add one word about (1878) 37 L. T. 469,[19] upon which great reliance was placed by counsel for the claimants, in order to point out that that was not from any point of view a proceeding between the Crown and the subject. It was a proceeding between a party and the Secretary to the Board of Trade as representing the Board of Trade. It was not contended and could not have been contended that the liability of the Secretary or of the Board was a liability of the Crown. It was an action for the purpose of determining the liability of the Secretary of the Board for wrongful acts and trespasses committed by inspectors acting on behalf of the Board, and in no circumstances could a claim of that kind be made against the Crown. Therefore in that case, so far as the Court deals with discovery at all, it deals with the matter on the assumption that it is deciding a case between parties who are both subjects of the Crown, and not a case in which one of the parties is the Crown itself."

Order 31, R. S. C., applies in all suits by or against corporations. It is only in Crown suits, informations and petitions of right, to which O. 31 does not apply, that the Crown's prerogative in the matter of discovery and inspection may still be claimed.

[11] I will next turn to the position in India. The East India Company was incorporated by

its Charter in 1600. For a long time thereafter, and even after the battle of Plassey, it remained a purely trading corporation, without any sovereign rights. In 1 M. I. A. 175[20] at p. 272, Lord Brougham speaking of the situation of Calcutta stated :

"The district on which Calcutta is built was obtained by purchase from the Nabob of Bengal, the Emperor of Hindostan's Lieutenant, at the very end of the seventeenth century. The Company had been struggling for nearly a hundred years to obtain a footing in Bengal, and till 1696, they never had more than a Factory here and there, as the French Danes and Dutch also had. Till 1678, their whole object was to obtain the power of trading, and it was only then that they secured it by a Firman from the Emperor, from that year till 1696, they in vain applied to the native Government for leave to fortify their Factory on the Hooghly, and it was only then that they made a fortification, acting upon a kind of half consent, given in an equivocal answer of the Nabab. Encouraged by the protection which they were thus enabled to afford the natives, many of them built houses, as well as the English subjects; and when the Nabob, on this account, was about to send a Kazi, or Judge, to administer justice to those natives, the Company's servants bribed him to abstain from this proceeding. Some years afterwards the Company obtained a grant of more land and villages from the Emperor, with renewed permission to fortify their Factories during all this period tribute was paid to the Emperor, or his Officer, the Nabob; first, for leave to trade, afterwards as Zamindars, under the Emperor; and in 1757, the year memorable for the battle of Plassey, the treaty with Jaffier Ally, indemnifying them for their losses, ceding the French possessions, and securing their rights, and binding them to pay their revenues like other 'Zamindars.' Eight years later, they likewise received from the native Government a grant of the Dewanny or receivership of Bengal, Behar, and Orissa; and of their subsequent progress in power it is unnecessary to speak; enough has been said to show, that the settlement of the Company in Bengal was effected by leave of a regularly established Government in possession of the country, invested with the rights of sovereignty, and exercising its powers; that by permission of that Government, Calcutta was founded and the Factory fortified, in a district purchased from the owners of the soil by permission of that Government, and held under it by the Company as subjects owing obedience, as tenants rendering rent, and even as officers exercising, by delegation, a part of its administrative authority. At what precise time, and by what steps, they exchanged the character of subjects for that of sovereign, or rather, acquired by themselves, or with the help of the Crown, and for the Crown, the rights of sovereignty, cannot be ascertained. The sovereignty has long since been vested in the Crown, and though it was at first recognized in terms by the Legislature in 1813; the Statute 53, Geo. III. c. 155, S. 95 is declaratory and refers to the sovereignty as 'undoubted,' and as residing in the Crown; but it is equally certain, that for a long period of time after the first acquisition, no such rights were claimed, nor any acts of sovereignty exercised; and that during all that time no English authority existed there, which could affect the land or bind any but English subjects. The Company and its servants were then in the situation of the Smyrna or the Lisbon Factories at the present time."

The Courts established by the Company by virtue of the powers conferred by the Charter of 1726 were Courts established in factories in foreign territory where all except the English servants of the Company were foreign subjects: 9 M. I. A. 387.[21] Even after it was recognized, in 1813, that the Company exercised sovereign powers within its territories, subject to the suzerainty of the Crown of England, it continued to sue and be sued as a subject, as a corporation. No prerogative could be claimed by it, in suits to which it was a party, and it was subject to the same liabilities as individuals in contracts as well as in torts. In the Indian Courts, trials were held in accordance with the Muhammadan Law of Procedure up to Regulation VI of 1832. Sir Barnes Peacock C. J. stated in 5 B. H. C. R. App. A 1[22] :

"In determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force. We concur entirely in the opinion expressed by the Chief Justice Grey in Brignell, Rep., p., 120,[23] which was cited in the argument, that the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them sovereigns."

"We are further of opinion that the East India Company were not sovereigns; and, therefore, could not claim all the exemptions of a sovereign; and that they were not the public servants of Government, and, therefore, did not fall under the principle of the cases with regard to the liabilities of such persons; but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of Government, and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

At pages 13 and 14 of the same case, Sir Barnes Peacock refers to a case, which is of particular interest here, in which an order of discovery was made against the East India Company. The plaintiffs in that case intended to make a claim against the Company in respect of an alleged breach of a contract of lease for 10 years of the right to supply the inhabitants of Madras with tobacco, and filed a bill for a commission and discovery. While overruling the demurrer by the Company, Lord Kenyon, the Master of the Rolls, said:

"I admit that no suit will lie in this Court against a sovereign power for anything done in that capacity, but I do not think the East India Company is within the rule. They have rights as a sovereign power; they have also duties as individuals. If they enter into bonds in India, the sums secured may be recovered here; so in this case as a private company they have entered into a private contract, to which they must be liable. Here is a prima facie ground of action; the Company has

put other persons in the way of doing the plaintiffs an injury;"

It is therefore clear that the East India Company could not claim to be exempt from the liability of being ordered to make discovery and give inspection, by virtue of its character as a Company possessing sovereign rights.

[12] The question then is, has the prerogative in question been assumed and exercised by the Crown in India, after it took over the Government of India in 1858, or has the prerogative been taken away by the statutory law applicable to India? The two enactments which we have specially to consider are the Government of India Act of 1858, and the Civil Procedure Code, Act 8 of 1859. With regard to the effect of the Act of 1858, Sir Barnes Peacock stated in 5 B. H. C. R. App. A 1:[22].

"The question as to the liability of the Secretary of State in Council to be sued depends upon the Act 21st and 22nd Vict., c. 106, for the better Government of India, and turns principally upon the construction of the 65th section. The main object of that section was to transfer to Her Majesty the possession and government of the British territories in India, which were then vested in the East India Company in trust for the Crown, but it does not appear to have been the intention of the Legislature to alter the nature or extent of liabilities with which the revenue of India should be chargeable; and accordingly we find it expressly enacted by the 42nd section that 'the dividends on the capital stock of the said Company secured by the Act of the 3rd & 4th William IV., c. 85, until the redemption thereof, and all the bond, debenture, and other debt, of the said Company in Great Britain, and all the territorial debt, and all other debts of the said Company, and all sums of money, costs, charges and expenses, which, if this Act had not been passed, would after the time appointed for the commencement thereof, have been payable by the said Company out of the revenues of India, in respect or by any reason of any treaties, covenants, contracts, grants or liabilities then existing, and all expenses, debts and liabilities which after the commencement of this Act shall be lawfully contracted and incurred on account of the Government of India and all payments under this Act, shall be charged and chargeable upon the revenues of India alone, as the same would have been if this Act had not been passed, and such expenses, debts, liabilities and payments as last aforesaid had been expenses, debts and liabilities lawfully contracted and incurred by the said Company; and such revenues shall not be applied to any other purpose whatsoever; and all other monies vested in, or arising or accruing from, property or rights vested in Her Majesty under this Act, or to be received or disposed of by the Council under this Act, shall be applied in aid of such revenues. But as the Queen could not be sued, as the East India Company could have been, in her own Court, it was necessary to provide for the mode of enforcing such liabilities; and therefore, after providing by S. 64, 'that all Acts and provisions then in force, by charter or otherwise, concerning India, should, subject to the provisions of the Act continue in force, and be construed as referring to the Secretary of State in Council in the place of the said Company, and the Court of Directors and Court of Proprietors thereof,' it was enacted by S. 65 that 'the Secretary of State in Council should and might sue and be sued as a Body corporate, and that all persons might have and take the same remedies and proceedings, legal and equitable against the Secretary of State in Council as they could have done against the East India Company, and that the property and effects thereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, should be subject and liable to the same judgments and executions as they would, while vested in the Company, have been liable to, in respect of debts and liabilities lawfully contracted and incurred by the said Company'."

The following sections of the Code of 1859 require to be particularly noticed:

"*17.* The recognised agents of parties by whom such applications and appearances may be made are:

* * *

3rdly. Persons being ex officio or otherwise authorised to act for Government in respect of any suit or judicial proceeding.

* * *

26. The plaint shall be distinctly written in the language in ordinary use in proceedings before the Court, and shall contain the following particulars:

1. The name, description, and place of abode of the plaintiff.

2. The name, description, and place of abode of the defendant, so far as they can be ascertained.

* * *

6. In all suits by or against the Government, or one of its officers in his official capacity, or any corporation, or any Company authorized to sue and be sued in the name of an officer or trustees 'the words, 'the Government', or 'the collector of' or otherwise, as the case may be, or the name of Corporation, or the name or names of the officer or trustees of the Company, shall be inserted in Nos. 1 and 2, instead of the name and description of the plaintiff or defendant, but in all other cases it shall be necessary to specify the names of all the parties.

* * *

Of suits against Government and Public Officers.

67. If the suit be against the Government, the summons shall be served on the Government Pleader. The Court, in fixing the day for the Government to answer the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channels, and for the issue of instructions to the Government Pleader to appear and answer on behalf of the Government, and may extend the time at its discretion on the application of the Government Pleader. The Court may also, if it think proper, direct the attendance of a person who may be able to answer all material questions relating to the suit.

68. If the suit be against an officer of the Government for an act which the plaintiff alleges to have been done by such officer in his official capacity, the summons shall be served upon such officer in the manner hereinbefore provided.

69. If the officer, on receiving the summons, shall consider it proper to make a reference to Government before answering to the plaint, he may move the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channels; and the Court upon such motion may extend the time for so long as shall appear to it to be requisite.

70. If the Government shall undertake the defence of the suit, the Government Pleader shall be furnished with authority to appear and answer to the plaint; and upon motion made by him, the Court shall order a note to that effect to be entered in the register.

71. If such motion shall not be made by the Government Pleader on or before the day fixed in the notice for the defendant to appear and answer to the plaint, the case shall proceed as in a suit between private parties, except that the defendant shall not be liable to arrest before judgment.

72. If in any such suit the Court shall require the personal appearance of the defendant, and the defendant shall satisfy the Court that he cannot absent himself from his duty without injury to the public service, the Court shall exempt him from such appearance; but he shall be liable to be examined in any way in which an absent witness may be examined.

* * *

Of the production of Documents.

128. The parties or their pleaders shall bring with them, and have in readiness at the first hearing of the suit, to be produced when called upon by the Court, all their documentary evidence of every description which may not already have been filed in Court, and all documents, writings, or other things which may have been specified in any notice which may have been served on them respectively within a reasonable time before the hearing of the suit, and no documentary evidence of any kind, which the parties or any of them may desire to produce, shall be received by the Court at any subsequent stage of the proceedings, unless good cause be shown to its satisfaction for the non-production thereof at the first hearing.

129. All exhibits produced by the parties shall be received and inspected by the Court; but it shall be competent to the Court, after inspection to reject any exhibit which it may consider irrelevant or otherwise inadmissible, recording the grounds of such rejection."

The words in S. 71, "the case shall proceed as in a suit between private parties" deserve particularly to be noticed. In 40 I. A. 48,[24] Lord Haldane speaks of "the substantial right of the subject to sue the Government in the civil Courts like any other defendant" conferred by the Act of 1858, and of "the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old East India Company." In 5 B. H. C. R. App. A. 1,[22] Sir Barnes Peacock pointed out that by the Act of 1858 the revenues of India were constituted a fund, entirely apart from the English Exchequer, and that an action against the Secretary of State in Council, sued as a Body Corporate, was the proper mode of getting at that fund. It is beyond question now that a Government department in India cannot claim the prerogative by virtue of which the Crown in England could not be sued either in contract or in tort. That is because the Secretary of State was made liable where the East India Company would have been liable. It seems to me to be equally clear that the Crown's prerogative, of exemption from the liability to make discovery and give inspection was also taken away. It is impossible to contend that the provisions of the Civil Procedure Code of 1859 did not apply to the Secretary of State, who was sued like any other defendant, or that the position of the Crown in India was similar to that in England, where O. 31 of the R. S. C. is still not applicable to Crown suits. The provisions enacting that the Secretary of State can sue and be sued as a Body Corporate and like any other subject, necessarily subject him to all the provisions of the Civil Procedure Code, including O. 11, and thereby make it impossible for the Crown in India to contend that the position of the Secretary of State was not "like any other defendant", or "different from that of the old East India Company." In my view Lord Haldane's words are conclusive on the matter before us.

[13] The position has not been materially altered by the successive amendments and alterations since made in the Code of Civil Procedure. After the Government of India Act of 1935, suits which still then were described as "suits by or against the Government or Public Officers in their official capacity," are described as "suits by or against the Crown or Public Officers in their official capacity," and S. 79 has been altered by the Government of India (Adaptation of Indian Laws) Order, 1937, so that the authority to be named has now to be the Governor-General in Council, or the Province, or the Secretary of State, according to the department concerned. The procedure in such suits by or against the Crown continues to be governed by the Code, and is the same as in a suit between subject and subject. The position in India is therefore the same as in Australia, where after the Commonwealth Judiciary Act 1930-1940, the procedure applicable to the State when a party to a suit is the same "as in a suit between subject and subject" and "the state is not only sued as defendant under the authority of statute but is in the suit bound to give discovery." (1931) A. C. 704.[2] The statute thus gives to the subject in India what in England is denied in law but in practice the Crown takes the utmost care to give.

[14] It is of course beyond question that the Crown's prerogatives remain in force except such of them as have been taken away by statute expressly or by necessary implication, and that there are several prerogative rights which the Crown still possesses in India. For instance, it is a prerogative of the Crown that no statute can be said to bind the Crown, unless the statute is made applicable to the Crown in express terms or by necessary implication: A. I. R. 1947 P. C. 34.[25] Another instance is that of Crown debts having precedence over other debts. Two cases were practically relied upon before us as showing that although the Civil Procedure Code was generally applicable to suits in which the Crown was a party, the provisions of the Code were to be regarded as inapplicable

to the Crown, as soon as a prerogative of the Crown was shown to be effected. But, in my view, it is impossible to accept this contention. In 1 Bom. 7,[26] the question was whether the Crown could claim that court-fees payable to the Crown in a pauper suit had precedence over the claims of the judgment-creditor. West J. in deciding the point stated :

"The decision of this case turns upon the construction of S. 309, Civil P. C. Its direction that the amount of fees, which would have been paid by the pauper plaintiff, shall, on decision of the suit, be recoverable by Government from any party ordered by the decree to pay the same in the same manner as costs of suit are recoverable, does not preclude the Crown or its representative from urging its prerogative and insisting upon its right to precedence. The circumstances of its being placed in the position of judgment-creditor does not reduce its rights of necessity to those of a private judgment-creditor in case of a contest as to prior satisfaction out of moneys realized in execution."

[15] In 33 Cal. 1040,[27] the plaintiff instituted a suit in *forma pauperis* against the defendant and obtained a decree. The decree directed that the property in suit should be conveyed to the plaintiff, and the taxing officer was to certify the amount of court-fees, that would have been payable by the plaintiff, had she not sued in *forma pauperis*, and to tax the plaintiff's other costs of suit. It was also ordered and decreed that the defendants should pay the amount of court-fees to be certified by the Government Solicitor, which should form a first charge on the property conveyed. Thereafter, the plaintiff applied for attachment of other premises belonging to the defendants and obtained an order for sale. The sale proceeds were ordered to be paid into Court, which amounted to Rs. 999-1-8. The plaintiff's attorney then without notice to the Government Solicitor or defendants made an application for payment to him of the amounts realized in execution from the defendants. The Government Solicitor then presented a petition asking that the amount of court-fees certified as due and payable by the defendant to the Government Solicitor in terms of the decree be paid in the first instance and in precedence to all claims. It was held that court-fees form a Crown debt and under ordinary circumstances the principle would apply that the Crown would be entitled to precedence in payment of this debt over all creditors; and that S. 411, Civil P. C. was an enabling section and though it indicated the manner in which Crown may proceed to realise the debt, it did not preclude the Crown or its representatives from urging its prerogative and insisting on its rights to precedence over all other creditors. The comment on this case in Mulla's Civil Procedure Code (1941 Edn, p. 1051) is as follows:

"It is to be observed that in the Calcutta case cited above, *C* was a creditor of *A* inasmuch as he was entitled to be paid his costs by *A*. But he was merely an ordinary creditor as distinguished from a secured creditor. It is also to be observed that court-fees form a Crown debt, and the Crown was to that extent a creditor of *A*. It has to be borne in mind that it is only when claims of the Crown and claims of ordinary creditors or 'common persons' (to use an old expression) concur or come into competition that the Crown is preferred. The Crown has no more right than a 'common person' to seize *X's* property and apply it in or towards discharge of a debt due from *Y*. It was so observed by Lord Macnaghten in a case in which the Privy Council held that where a money decree is obtained by a pauper in a suit by him against *Y*, and *Y* is directed by the decree to pay the court-fees, the Government are not entitled to realize the court-fees by a sale of *Y's* property previously mortgaged by him to *X*, so as to defeat the right of *X*. All that could be sold by the Government in such a case is the equity of redemption of *Y* in the property."

These decisions were made not by disregarding the provisions of the Code but in accordance with them. The Calcutta decision is in accord with the provisions of the Code which are now contained in S. 73 (3) and O. 33, R. 10.

[16] I would, therefore, grant the two applications under O. 11, R. 12 before us. The two plaintiffs will have the costs of this application.

[17] **Thadani J.**—I concur but I would add a few words. I think the prerogative right of the Crown in India, in the matter of discovery, procedure in regard to which is regulated by O. 11, Civil P. C., has been taken away by reason of S. 276, Government of India Act, 1935, in suits instituted under the provisions of S. 79, Civil P. C., provided the subject matter of the suit is one in respect of which the East India Company could have been sued as a body corporate. If, however, the subject matter of the suit is not one in respect of which the East India Company could have been sued, I think the Crown in India, at any rate up to 15th August 1947, could claim the prerogative right in the matter of discovery. Strictly speaking the question of discovery when the plea to which I have referred is taken does not arise as the plea goes to the root of the Court's jurisdiction.

[18] The question then arises when can such a plea be taken. I think it can properly be taken upon notice issued to the Crown on an application made under the provisions of O. 11, R. 12, Civil P. C. and before the Court can compel the Crown to make discovery, it would have to decide whether the subject matter of the suit is one in respect of which the East India Company could have been sued.

[19] In the two cases referred to us, the learned Advocate General has not contended on behalf of the Crown that the subject-matter of the suits is one in respect of which the East India Company could not have been sued.

Constantine J.—I agree with the judgment of the Hon'ble the Chief Judge, and have nothing to add.

D.S. *Applications granted.*

A. I. R. (35) 1948 Sind 109 *[C. N. 31.]*

DAVIS C. J. AND O'SULLIVAN J.

Emperor v. *(1) Ak S/o Lalbaksh and (2) Mir Muhammad S/o Budho—Opponents.*

Criminal Ref. Nos. 247 and 248 of 1946, Decided on 10-1-1947, from order of Sessions Judge, Larkana.

Penal Code (1860), Ss. 171-D and 171-F—Personation in elections to Legislative Assembly—Proper punishment is rigorous imprisonment and not fine.

Personation in elections to the Legislative Assembly, i.e., recording votes in elections under false name is a serious offence and fine cannot be an adequate punishment. The proper punishment for this offence, even though it be a first, is rigorous imprisonment. [Para 4]

Fatehchand Assudomal, Advocate-General of Sind —for the Crown.

Pribhdas Wadhva and V. N. Gidvani—for Opponents (Nos. 1 & 2 respectively).

Davis C. J.—We have before us two really very serious cases relating to personation in elections to the Sind Legislative Assembly. But apparently the Magistrates who tried these two cases—in one case Mr. A. K. Ukeli, First Class Magistrate, Mehar, and in the other case Mr. Pandhiani, Resident Magistrate of Larkana—have failed completely to understand the necessity of purity in elections, if democratic Government is to function honestly and they have imposed in both cases entirely inadequate sentences of fine and we would make it clear to these Magistrates, and also to other Magistrates in the Province that these offences are so serious that in the ordinary way the only proper sentence to pass is one of rigorous imprisonment. Persons like the accused in these two cases, although they may be ignorant, will come to learn that if they do take slips from corrupt persons and record votes in elections under false names, they will go to prison, even if the names of their corrupt seducers are not known and they thus escape punishment.

[2] In one case, the accused is Mir Muhammad, and he has been convicted of an offence under S. 171-D read with S. 171-F, Penal Code, and sentenced to pay a fine of Rs. 30 only. This sentence, of course, is ludicrously inadequate. We do not propose to enhance the fine lest it be thought that we in any way consider a fine as an adequate or proper punishment for so serious an offence; in fact we do not. But in this case this Mir Muhammad has pleaded guilty, and although we think that we might well send him to prison for at least six months, he can scarcely be expected to have understood the serious nature of the offence, if as it is perfectly plain, the learned Magistrate appears quite unconecious of the serious nature of this offence; but both this almost illiterate hari and the learned Magistrate must learn. We have told this Mir Muhammad that if he commits a like offence again and it is proved against him then he will go to prison with rigorous imprisonment and we trust that should he come again before a Court and be convicted of an offence of this nature, he will come before a Magistrate with a greater sense of responsibility and a true realisation of the very serious nature of these offences, and that he will if convicted go to prison with rigorous imprisonment for some six months at least.

[3] The second case is one against a gentleman called Ak son of Lalbakhsh Bhutto. He has not like Mir Muhammad pleaded guilty, but given a false defence, presumably on advice as presumably it was on advice, and, we should imagine, as a result of corrupt consideration, that he used the false name of one Gullan son of Lakhidino instead of his own name Ak. son of Lalbakhsh. The evidence of one Radhakrishin Verandmal, a clerk in the Sessions Court of Larkana, calls for adverse comment. It is perfectly clear from his deposition that he is timid and untruthful and we do not think the employment of this particular clerk in the Court of Session, can add to its dignity or its efficiency. He pretends that he cannot recognise the accused Ak; his memory is good enough to enable him to say he thinks that it was a boy who produced the slip EX. 1 A on which a false name was written. But there can be no question of mistaken identity of this Ak. This Radhakrishin reported the matter to the presiding officer at once, gave him the slip, and this accused was then and there arrested. Mr. Kishinchand Shivdasani was then a Presiding Officer; the polling agent, one Ahmed Bakhsh, called his attention to the fact that this Ak was not the person in whose name he had demanded a polling paper. A slip which this Ak produced was shown at once to Kishinchand by Radhakrishin, and Kishinchand at once reported the matter to the police. Ghulam Abbas Kadir was the agent of Khan Bahadur Khuhro at Larkana-Madresah Polling Station for the East Larkana Muslim Constituency. He suspected both Ak and another; he followed them to the Polling Officer, and heard this Ak give his name as Gullan. Gullan Abbas Kadir told one Ahmedbakhsh, as agent of K. B. Khuhro that this Ak was giving a false name, and it was found on inquiry that this was so; so Ahmedbakhsh reported the matter to the presiding officer. Ahmedbakhsh also gives evidence and says that this Ak came to their booth, gave a slip to the Polling Officer, and Ahmedbakhsh then found that the name called out by

the Polling Officer on the slip was of one who was dead, and it was this Ak who was personating this dead man. The Sub Inspector of Police who was on duty at this Larkana-Madresah polling station took charge of Ak along with the polling slip and a written report of the presiding Officer.

[4] The defence of the accused is that he is innocent and did not personate—quite clearly a false defence; and for this most serious offence this accused has been fined Rs. 200, an entirely inadequate punishment. We do not propose to enhance the fine, as we have said before, because we do not wish to have it believed that we think under any circumstances for offences of so serious a nature, a fine can be an adequate punishment. But if the Resident Magistrate of Larkana is so unconscious of the serious nature of this offence, it is unlikely that this accused, a hari, was any more conscious of its serious nature. But this Ak has been told, and we hope he understands that we regard the proper punishment for this offence, even though it be a first, as rigorous imprisonment, and when once sentences of this nature are imposed for these offences it will soon get known among these ignorant persons, now possessed of this power and responbility of voting for members of the Legislative Assembly, from whose ranks His Excellency's Ministers are chosen, that offences of this nature would ordinarily be punished by rigorous imprisonment.

[5] We think we should draw the attention of the District Magistrate Larkana to the inadequate sentences passed upon the accused persons, these impersonators, and the desirability in the public interest that he should keep a close watch upon his criminal returns and do his best to see that these very serious offences are adequately dealt with by subordinate Magistrates and adequately punished, and if necessary reference for enhancement made to this Court. For reasons, however, we have given, we return these references.

D.S. *Order accordingly.*

A. I. R. (35) 1948 Sind 110 *[C. N. 32.]*

MEHER J.

Nihalmal Haryalmal — Appellant v. *Lachmibai w/o Seoomal — Respondent.*

Second Appeal No. 17 of 1943, Decided on 1-9-1947, against judgment of Dist. Judge, Hyderabad.

(a) Limitation Act (1908), Art. 182 (5) — Step-in-aid of execution — Application for execution to transferee Court by person before being brought on record as legal representative of deceased decree-holder is not step-in-aid of execution — Civil P. C. (1908), O. 21, R. 16.

A transferee of a decree must apply in execution to the Court which passed the decree though the decree may have been sent for execution to another Court. A Court to which a decree is transferred for execution is not the proper Court within the meaning of Art. 182, Cl. (5), Limitation Act. Hence an execution application to the transferee Court made by a person who had not been brought on record as the legal representative of the decree-holder, cannot be considered as a step-in-aid of execution. [Para 9]

Annotation: ('42-Com.) Lim. Act, Art. 182, N. 78; ('44-Com.) Civil P. C., O. 21, R. 16, N. 12.

(b) Precedents—Ruling of Court of Judicial Commissioner is not binding on Chief Court.

A ruling of the Court of Judicial Commissioner of Sind, though entitled to great weight, is not binding on the Chief Court of Sind. [Para 13]

(c) Limitation Act (1908), Art. 182 (5) — Step-in-aid of execution — Application by heir of deceased decree-holder merely to be brought on record as legal representative made to Court which passed decree is step-in-aid of execution.

A prayer to have the name of a legal representative or assignee entered in place of the decree-holder is implied in an application under O. 21, R. 16, for execution of a decree by such legal representative or assignee, and when the legal representative or assignee makes an application to have his name substituted for the decree-holder and to have intimation sent to the transferee Court, as a preliminary to, and to enable him to make an execution application to the transferee Court it cannot be said that such an application is in contravention of the law, much less can it be said to be not an application asking the Court to take a step-in aid of execution of the decree. The step of substituting the legal representative of the deceased judgment creditor is a step which must be treated as in accordance with the spirit as well as the letter of the law. Hence an application to the Court which passed decree by an heir of a deceased decree-holder to be brought on record as legal representative and without praying for execution is a step-in-aid of execution within meaning of Art. 182 (5) : *Case law referred.* [Paras 28 & 29]

Annotation: ('42-Com.) Lim. Act, Art. 182, N. 78.

Cases referred :—

1. ('93) 20 Cal. 755, Hafizurdin Chowdry v. Abdool Aziz.
2. ('09) 4 I. C. 118 (Cal.), Hari Badani Dasi v. Gobinda Chandra Das.
3. ('33) 20 A. I. R. 1933 Sind 341 : 27 S. L. R. 314 : 147 I. C. 470, Devraj Multani Sahai v. Fatehchand Ramchand.
4. ('41) 196 I. C. 1:28 A. I. R. 1941 Bom. 302: I. L. R. (1941) Bom. 596 (FB), Krishna Govind v. Moolchand Keshawchand.
5. ('46) I. L. R. (1946) Kar. 371:34 A. I. R. 1947 Sind 149, Hassomal Chatomal v. Balchand Shewaram.
6. ('33) 20 A. I. R. 1933 Rang 55 : 144 I. C. 310, C. Moidoo v. S. Mohamed.
7. ('07) 31 Mad. 234, Annamalai Mudaliar v. Ramier.
8. ('04) 14 M. L. J. 393, Ramachandra Aiyar v. Subramania Chettiar.
9. ('28) 50 All. 621 :15 A. I. R. 1928 All. 299:109 I. C. 412, Mohansing v. Jagat Sing.
10. ('07) 29 All. 301, Pitamsingh v. Totasingh.
11. ('38) 25 A. I. R. 1938 Nag. 191 : 174 I. C. 243, Tanba Yadorao v. Chandra Shankar.
12. ('27) 14 A. I. R. 1927 Nag. 308 : 24 N. L. R. 36: 103 I. C. 279, Ramchandra v. Uka.

13. ('33) 147 I. C. 470 : 20 A. I. R. 1933 Sind 341 : 27 S. L. R. 314, Devraj Multani v. Futehchand Ramchand.
14. ('36) 159 I. C. 807 : 22 A. I. R. 1935 Sind 26, Memoo Mahomed Ismail v. Md. Sidiq Pir Mahomed.

Keshewdas Dalpatrai—for Appellant.

Manghanmal Bhojraj — for Respondent.

Judgment. — This is an appeal against a judgment of the learned District Judge, Hyderabad, setting aside an order of the learned Sub-Judge, Tando Mahomed Khan, who had dismissed an execution application as time barred.

[2] The facts of the case out of which this appeal has arisen are as follows: Seoomal, the husband of the plaintiff-respondent had obtained a money decree against the defendant-appellant. On 27-8-1938, an execution application filed by Seoomal was disposed of. After that Seoomal died and on 7-4-1941, his widow, Lachmibai, who is the respondent in the appeal, filed an execution application in the Court of the Sub-Judge, Tando Mahomed Khan, to whom the decree had been transferred for execution. The learned Judge held that the legal representative should have first applied under O. 21, R. 16, Civil P. C. to the Court which passed the decree to have her name entered as the transferee by operation of law and he dismissed the execution application. On that very day, 27-8-1941, Lachmibai made an application to the Shahdadpur Court, which had originally passed the decree, praying that she be joined as the legal representative of deceased Seoomal. The Shahdadpur Court passed an order joining Lachmibai as the legal representative of Seoomal in the decree. On the strength of that order, an execution application was filed by Lachmibai on 20-12-1941, in the Court of the Sub-Judge, Tando Mahomed Khan. The learned Sub-Judge came to the conclusion that neither the execution application of 7th April 1941, nor the application dated 27th August 1941, made to the Shahdadpur Court could be considered as step in aid in execution and he dismissed the application as time barred.

[3] In appeal, the learned District Judge came to the conclusion that the application dated 27th August 1941, made to the Shahdadpur Court could not be considered as a step in aid in execution, but the execution application of 7th April 1941, made by Lachmibai to the Sub-Judge, Tando Mahomed Khan, before she was joined as the legal representative of Seoomal, was made to the proper Court within the meaning of Art. 182, Limitation Act, and could be considered as a step in aid of the execution; that the period of limitation of three years would run from that date and so the execution application filed on 20th December 1941, was in time. He accordingly ordered that the papers should be sent to the Sub-Judge to proceed with the execution in accordance with law.

[4] It has been urged in the appeal that the learned District Judge was in error in holding that the execution application of 7th April 1941, was made to the proper Court and was in accordance with law. The learned District Judge in his judgment observed that though this application was made by Lachmibai before she had applied to be joined as the legal representative of deceased Seoomal it was one in accordance with law. He relied on two reported cases. The first is one decided by the Calcutta High Court and reported in 20 Cal. 755.[1] In that case the facts were that the heirs of a deceased decree-holder made an application in execution. At the time of the application, the heirs had neither taken out a succession certificate nor had they applied for substitution of their names on the record. The Munsiff directed the applicants to obtain a certificate. On their failing to do so, he rejected the application for execution. The heirs then obtained a succession certificate and applied for execution. It was held that the first application made by the heirs before they had obtained a succession certificate was in accordance with law within the meaning of Art. 179, cl. (4), Limitation Act. The reasoning given in that case is that both the Civil Procedure Code and the Limitation Act were passed long before the succession certificate had been granted and, therefore whatever interpretation may be put on the word "application" as used in the Code of Civil Procedure and the Limitation Act, it could in no way depend upon the Succession Certificate Act.

[5] The other case relied upon by the learned District Judge is the case in 4 I. C. 118.[2] In that case it was held that an application for execution by the executors of the original decree-holder though probate had not then been obtained, if proper in form, was a step in aid of execution.

[6] On the anology of those rulings, the learned District Judge in the judgment under appeal came to the conclusion that the application made by Lachmibai before she was joined as a legal representative was still in accordance with law.

[7] It seems to me that the principles on which the two cases referred to by the learned Judge were decided have no application to the facts of this case. The Code of Civil Procedure does not require that the legal representatives must obtain a succession certificate or probate before taking out execution. But the Code makes provision for legal representatives to be brought on record and under S. 47, Civil P. C., where question arises as to whether any person is or is

not the representative of a party, such questions are to be determined by the Court.

[8] Under Art. 182, cl. (5), Limitation Act, time runs from the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order.

[9] Under O. 21, R. 16, Civil P. C., when the interest of decree-holder is transferred under operation of law the transferee has to apply for execution of the decree to the Court which passed it. It is, therefore, clear that a transferee of a decree must apply in execution to the Court which passed the decree though the decree may have been sent for execution to another Court. A Court to which a decree is transferred for execution is not the proper Court within the meaning of Art. 182, cl. (5), Limitation Act. I am, therefore, of opinion that the execution application of 7-4-1941, made by a person who has not been brought on record as the legal representative of the decree-holder, and which application was not made to the proper Court, could not be considered as step in aid of execution.

[10] Mr. Manghanmal, who appeared for the respondent, was not able to advance any arguments in support of the finding of the learned District Judge that the application dated 7-4-1941 was a step in aid of an execution. He has, however, supported the judgment of the learned District Judge on other grounds which were decided by the learned Judge against the respondent, and this he is entitled to do in view of the provisions of O. 41, R. 22, Civil P. C.

[11] He has urged that the learned District Judge was wrong in holding that the application made by the respondent to the Shahdadpur Court on 27-8-1941, could not be considered as a step in aid in execution. Now, if this application can properly be considered as a step in aid in execution, then it would save limitation, for the last execution application by the deceased Seoomal was disposed of on 27-8-1938.

[12] In coming to the conclusion that the application dated 27-8-1941, made to the Shahdadpur Court cannot properly be considered as a step-in-aid in execution, the learned District Judge relied on a case decided by the Court of the Judicial Commissioner of Sind, A. I. R. 1933 Sind 341,[3] in which it was held that an application by a transferee to be brought on the record without asking for execution of the decree was not an application in accordance with law, as it was not an application for execution of the decree. In that case Rupchand J. C. further expressed that it could not be said that such an application could be considered as a step in aid.

[13] Now, if this case is good law, then the application made by the respondents on 27-8-1941, cannot be considered as a step-in-aid in execution. The ruling of the Court of the Judicial Commissioner of Sind, though entitled to great weight, is not binding on this Court. With respect I am unable to agree with the view that such an application cannot be considered as an application in accordance with law or as a step-in-aid of a execution.

[14] In a case decided by the Full Bench of the Bombay High Court in 196 I. C. 1[4] it was held that it was no doubt open to an assignee of a decree to make two applications, one under R. 16 to get the assignment recognized and a further application giving particulars of the methods in which execution is prayed and that in a case where there are any complications or where the decree has been transferred for execution at the instance of a decree-holder to another Court, that may be a desirable course.

[15] In I. L. R. (1946) Kar. 371,[5] O'Sullivan J. expressed agreement with this Full Bench view and observed :

"It seems to me, in the light of the opinion, that the filing of the application to get the assignment recognized would clearly be a step-in-aid of execution."

[16] In A. I. R. 1933 Rang. 55,[6] it was held that although an application by an assignee to get his name substituted is not an application for execution, it is an application asking the Court to take a step-in-aid of execution.

[17] In that case Baguley J., observed :

"It seems to me from first principles also that, although this application was not an application for execution, it was an application asking the Court to take a step-in-aid of execution. Under O. 21, R. 16, no doubt the transferree might file an application for execution, but he could not get execution in any form until after the notice mentioned in the proviso had been issued and the Court had heard objection to execution if any. The application was made in the present case in effect merely to get rid of the clog which is to be found to the assignee's freedom of action in Pro. 1, R. 16, and if a person asks the Court to free him from an impediment which clogs his freedom of action in executing his decree, he must be regarded as asking the Court to take a step in aiding him to execute the decree. There is authority that the Courts must not take too strict a view of technicalities of this description."

[18] In 31 Mad. 234,[7] where the facts were that an application was made purporting to be under S. 232, Civil P. C., by the transferee of a decree, praying to be recognized as assignee plaintiff in the suit, and, stating that when so recognized, he would file an execution petition, i. e., when the Court passed an order as prayed for, and the defendant did not appeal against such order it was held that the application was a step-in-aid of execution, and an application in accordance with law within the meaning of Art. 179 (4) of Sch. II, Limitation Act.

[19] In that case the application was made to the Court which passed the decree but the

objection taken was that it was merely an application for substitution and not one for execution as required under S. 232 of the old Code of Civil Procedure (corresponding to O. 21, R. 16, Civil P.C.).

[20] The learned Judge answered the objection as follows :

"We are unable to agree with this conclusion. The petition, as appears from its terms, was intended as a step in aid of execution, as it sought the recognition by the Court of the petitioner's right to execute which recognition it was open to the Court to grant or withhold. The question then arises was it an application in accordance with law? It is, no doubt true, as pointed out by Sir Bhashyam Aiyangar in 14 M. L. J. 393,[8] that S. 232, Civil P. C., does not provide for an application in this form, but contemplates that the transferee should apply for execution of the decree without any preliminary of the kind, merely giving notice of the application to the transferor and the judgment-debtor. Consequently, when, instead of applying for execution, the appellant put in his application for recognition as transferee, the Court might have returned the petition to him for amendment as not in accordance with the section. Instead of doing this, the Court made the order prayed for and the defendant did not appeal against it as he might have done. Under these circumstances the application must be taken to have been in accordance with law."

It may be noted that in the case decided by the Court of the Judicial Commissioner of Sind, referred to above, Rupchand J. C. sought to distinguish this Madras case and did not dissent from it.

[21] In 50 ALL. 621,[9] it was held, following this Madras case, that an application for substitution of names is a step-in-aid of execution. That decision followed an earlier decision of the Allahabad High Court, 29 ALL. 301,[10] in which it was held that an application made by the transferee of a decree asking that his name might be substituted on the record for that of the original decree-holder and a further application asking for time to serve one of the judgment-debtors, whose address was not then known, with notice of the application for substitution were both applications made to the proper Court to take some step-in-aid of execution within the meaning of Art. 179 of Sch. 2, Limitation Act, 1877.

[22] In A. I. R. 1938 Nag. 191,[11] Puranik J. following an older decision of that Court reported in A. I. R. 1927 Nag. 308[12] held that an application for substitution of names in place of the original decree-holder is a step-in-aid of execution and saves limitation. That learned Judge went on to say :

"A. I. R. 1933 Sind 341[3] no doubt lays down that an application by a transferee to be brought on record without asking for execution of a decree is not an application in accordance with law, as it is not an application for execution of the decree. The view is not in accordance with the view taken in A. I. R. 1927 Nag. 308,[12] and on a plain reading of Art. 182, cl. (5) I respectfully dissent from the view taken in that case."

[23] I agree, with respect, with the views of the Bombay, Madras, Allahabad and Nagpur High Courts cited above.

[24] In K. J. Rustomji's Law of Limitation, at p. 1772, Edn. 5, that learned Commentator has made the following observation in a foot note :

"In Sind, however, it has been held that since under O. 21, R. 16, Civil P.C. a transferee decree-holder cannot apply merely for recognizing him as transferee, but can only apply to execute the decree, an application by the transferee decree-holder merely to be brought on record without a prayer for execution of the decree, is not a step in aid so as to save limitation. 147 I. C. 470;[13] 159 I. C. 807[14] (both being Sind decisions). But the soundness of this view is doubtful, as it is well settled that an application by the transferee decree-holder for substitution of names is a step in aid of execution."

[25] In the present case, the application filed by the respondent for bringing his name on record reads as follows :

"It is submitted on behalf of the plaintiff that the decree papers of the above suit have been transferred to Tando Mahomed Khan Court. However, plaintiff Seoomal has died on about 9-3-1941, and his legal heir and representative is his wife and survivor, Sh. Lachmibai. None else but she is the heir of the deceased. Hence it is prayed that the Hon'ble Court may be pleased to appoint her as legal representative of the deceased Seoomal and join her as such in the category of the plaintiff, and intimate the same to Tando Mahomed Khan Court."

[26] This application was not rejected by the Court as not in accordance with law, but granted and it was ordered : "Lachmibai to be joined as heir of the plaintiff."

[27] This enabled the respondent to proceed in execution against the appellant in the Tando Mahomed Khan Court to which the decree had already been transferred. How can it be said then that it was not a step-in-aid ? If the respondent had made the application to the Shahdadpur Court in the form of an execution application, then the column relating to "the mode in which the assistance of the Court is required" would have had to be left blank, as the respondent wanted execution within the limits of the Tando Mahomed Khan Court to which the decree had already been transferred.

[28] A prayer to have the name of a legal representative or assignee entered in place of the decree-holder is implied in an application under O. 21, R. 16, for execution of a decree by such legal representative or assignee, and when the legal representative or assignee makes an application to have his name substituted for the decree-holder and to have intimation sent to the transferee Court, as a preliminary to and to enable him to make an execution application to the transferee Court, it cannot be said that such an application is in contravention of the law, much less can it be said to be not an application

asking the Court to take a step-in-aid of execution of the decree. The step of substituting the legal representative of the deceased judgment-creditor is a step which must be treated as in accordance with the spirit as well as the letter of the law.

[29] For the foregoing reasons I have come to the conclusion that the application made by the respondent on 17-8-1941 may properly be considered as an application made to the proper Court in accordance with law, asking it to take some step in-aid of execution of the decree. I, therefore, hold, though on grounds different from those on which the learned District Judge has based his judgment, that the execution application dated 20-12 1941, was within time, and I dismiss this appeal with costs.

D.S. *Appeal dismissed.*

A. I. R. (35) 1948 Sind 114 *[C. N. 33.]*

DAVIS C. J. AND THADANI J.

Nandiram Fatechand v. *Emperor.*

Criminal Revn. Appln. No. 201 of 1946, Decided on 17-12-1946, from order of Addl. Sessions Judge, Nawabshah, D/-27-8-1946.

(a) Criminal P. C. (1898), S. 476—Section has no reference to jurisdiction of Court in regard to proceedings with reference to which the offence is committed—Failure of Magistrate to act in accordance with S. 191, Criminal P. C., in regard to certain criminal proceedings does not vitiate complaint filed by him under S. 476, as to offence committed in relation to such proceedings.

There is no reference in S. 476, Criminal P. C., to jurisdiction over the proceedings in relation to which the offence is alleged to have been committed. A complaint filed by the Court under S. 476, against persons who have committed offences referred to in S. 195 (1) Cl. (b) or (c) in regard to certain proceedings in the Court cannot fail because such proceedings have ultimately been held to be without jurisdiction. The failure of a District Magistrate to act in accordance with S. 191, Criminal P. C., in certain proceedings has nothing to do with the complaint filed by him under S. 476 as to offences alleged to have been committed in relation to such proceedings. [Paras 8 and 9]

Annotation :—('46-Com) Cr. P. C., S. 476 N. 3.

(b) Criminal P. C. (1898), S. 476—Inquiry is not obligatory. [Para 10]

Annotation:—('46-Com.) Cr P.C., S. 476, N. 7 Pt. 4.

(c) Government of India Act (1935), S. 270 — Question of sanction depends on facts of each case.

The question of sanction depends on the facts of each case. Where the allegation is that a police officer has instigated a person to file a false complaint of theft against an innocent person and upon such complaint being filed the police officer arrests and confines an innocent person, it cannot be said that he was acting or purporting to act in discharge of his duty and S. 270 of the Government of India Act has no application. [Para 11]

Case referred:—

1. ('38) 25 A. I. R. 1938 Lah. 19 : 173 I. C. 324, Mohamed Sadiq v. Emperor.

Kishinchand H. Nagrani—for Applicant.

Fatechand Assudomal, Advocate-General of Sind—for the Crown.

Thadani J.—This is a Criminal Revision Application against the order of the learned Additional Sessions Judge of Nawabshah, who refused to withdraw a complaint filed against one Nandiram son of Fatechand by the learned District Magistrate of Nawabshah, under the provisions of S. 476, Criminal P. C., for offences under Ss. 120-B, 211, 193 and 220, Penal Code.

[2] The complaint was filed under the following circumstances:

[3] The applicant Nandiram was until recently a Sub-Inspector of Police at Sakrand. One Ghazi Khan was a head-constable posted at the same police station. There were two cases Nos. 4 and 6 of 1946, pending investigation by Nandiram. On 19-4-1946, Nandiram received information alleged to be from a spy that one Nathimal was in possession of property suspected to be stolen property. As two cases Nos. 4 and 6 were still undetected, Nandiram ordered one Allahbaksh, a head-constable, to search the house of Nathimal. Nathimal's house was searched, and the police took possession of 2 farasis, 2 gunjis, a coat, a patharni (quilt) and some other articles. In due course, the complainant in Crime No. 6 of 1946, one Rewomal, came at the police station but he did not identify any of the property secured from the house of Nathirmal. The complainant in Crime No. 4 was one Parsram, a student in the Sakrand Agricultural College. The officer-in-charge of the Sakrand Farm was directed by Nandiram to ask Parsram to appear at the police station.

[4] On 1-5-1946 it was not Parsram who appeared at the police station but one Saindito Chawan and reported that a theft of his property had taken place at Sakrand some two and half months previously and desired to see the articles which had been secured from the house of Nathirmal. It is alleged that in the presence of mashirs Ismailshah and Muhammad Chawan, Saindito Chawan identified 2 farasis, 2 gunjis, a coat and a quilt, part of the property secured from the house of Nathirmal as belonging to him. A first information report was duly lodged by Saindito. Nathirmal was arrested on 2-5-1946. A seven days' remand was applied for by Nandiram but the Second Class Magistrate authorized detention in police custody for four days only.

[5] After Nathirmal's arrest, one Narainibai appeared before the District Magistrate of Nawabshah and made an application in which she alleged high-handedness on the part of the applicant Nandiram and prayed for the release of Nathirmal on bail. On 4-5-1946, it is alleged, the District Magistrate, Nawabshah, went to the police station and directed Nandiram to stop all investigation on the first information report of

the offence lodged by Saindito Chawan, and demanded that all papers connected with it be placed before him. It is the case of the applicant that after examining the papers, the District Magistrate asked the applicant to leave the room and proceeded to record the evidence of certain witnesses.

[6] Among the persons examined by the learned District Magistrate were Nathirmal, one Sanwaldas, Narainibai, Saindito, the first informant, the applicant, and the head constable, Ghazikhan. After recording their evidence, the learned District Magistrate directed Nathirmal to be released on bail, and on 11-5 1946 discharged Nathirmal under S. 253 (2), Criminal P. C., and directed an inquiry under S. 476, Criminal P. C., to be made by the Additional District Magistrate of Nawabshah. In due course, the Additional District Magistrate made his report to the District Magistrate who directed a complaint to be filed against the applicant and Gazikhan on 27-5-1946 before the Sub-Divisional Magistrate, Nawabshah, who took cognizance of it on 29-5-1946, and issued process against the applicant and Gazikhan. It is against this complaint that the revision application has been filed.

[7] It is contended as a matter of law that when a police investigation is pending in respect of a cognizable offence reported to the police, a District Magistrate has no jurisdiction to take cognizance of the offence alleged under S. 190 (1) (c), Criminal P. C.; that in any case the learned District Magistrate of Nawabshah committed an illegality in proceeding with the case against Nathirmal himself in disregard of the provisions of S. 191, Criminal P. C., which made it obligatory for him to inform Nathirmal that he had a right to be tried by another Magistrate, and that even though Nathirmal has been discharged by the learned District Magistrate, the proceedings held by him were without jurisdiction.

[8] In support of his contention, Mr. Nagrani has relied upon the case in A. I. R. 1938 Lah. 19.[1] That, however, was not a case where an accused person against whom proceedings were taken was discharged. While we appreciate the contention that where a person against whom an offence has been alleged and a Magistrate takes cognizance of the offence under S. 190 (1) (c) and is tried and convicted in disregard of the provisions of S. 191, Criminal P. C., the question of prejudice would necessarily arise, we cannot accept the position that where an accused person is discharged, prejudice still persists as a necessary consequence. But this aspect of the case, in our opinion, has nothing to do with the powers of a Magistrate to file a complaint in pursuance of S. 476, Criminal P. C., against persons who have, according to him, committed offences mentioned in S. 195 (1) (b) or (c), Criminal P. C. Assuming that the learned District Magistrate of Nawabshah acted without jurisdiction in the proceedings against Nathirmal, it would affect the case of Nathirmal only and would not affect the evidence of witnesses who were examined on oath in that case. Mr. Nagrani has not referred us to any authority for the proposition that where offences mentioned in S. 195 (1) (b) or (c), Criminal P. C., have been committed in proceedings in Court, and the proceedings against an accused person in the end have been held to be without jurisdiction, the proceedings taken against persons who have committed offences referred to in S. 195 (1) (b) or (c), Criminal P. C., are also vitiated. Section 476 (1), Criminal P. C., says:

"When any civil, revenue or criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in S. 195, sub-s. (1), cl. (b) or cl. (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate, or, if the alleged offence is non-bailable, may, if it thinks necessary so to do, send the accused in custody to such Magistrate and may bind over any person to appear and give evidence before such Magistrate."

It is to be remarked that S. 476 (1), Criminal P. C., does not say "when a civil, revenue or criminal Court *having jurisdiction* is . . ." There is no reference in S. 476, Criminal P. C., to jurisdiction, and we think for obvious reasons. The question of want of jurisdiction, for instance, may be decided by their Lordships of the Privy Council upon an application for leave to appeal to the Privy Council. Is it then to be supposed that all complaints filed against persons who have committed offences referred to in S. 195 (1), cl. (b) or (c) in the proceedings which have ultimately been held to be without jurisdiction so far as an accused person is concerned, must fail? We are not at present prepared to accept this view of the law.

[9] We are therefore of the opinion that the failure by the learned District Magistrate to act in accordance with S. 191, Criminal P. C., has nothing to do with the complaint filed by him under the provisions of S. 476, Criminal P. C. Nor on this view of the case do we think it necessary further to consider whether the learned District Magistrate exercised his powers under S. 190 (1) (b) or (c).

[10] Mr. Nagrani has questioned the right of the learned District Magistrate to delegate his

powers to the learned Additional District Magistrate to hold an inquiry under the provisions of S. 476, Criminal P. C. But it is obvious that an inquiry under S. 476, Criminal P. C., is not obligatory. When the law does not require a Magistrate to hold an inquiry in the first instance, and a Magistrate wrongly orders an inquiry to be made by another Magistrate, and upon his report files a complaint, the report so made can be disregarded for the purposes of a revision application under S. 439, Criminal P. C., and no interference would be called for on the ground that the Magistrate making the complaint had no power to delegate his powers to order an inquiry to be made by another Magistrate.

[11] Mr. Nagrani then took the point that sanction was required under S. 270, Government of India Act, for an offence punishable under S. 220, Penal Code. But the question of sanction depends upon the facts of each case. Where as, here, the allegation is that a police officer has instigated a person to file a false complaint of theft against an innocent person and upon such complaint being filed, the police officer arrests and confines an innocent person, it cannot be said that he is acting or purporting to act in the discharge of his duty. On the facts as alleged, we do not think that S. 270, Government of India Act, has any application. We dismiss the revision application accordingly.

G.B. *Revision dismissed.*

A. I. R. (35) 1948 Sind 116 *[C. N. 34.]*

DAVIS C. J. AND THADANI J.

Vensimal Tarachand—Applicant v. *Karachi District Local Board and others — Opponents.*

Civil Revn. Appln. No. 17 of 1947, Decided on 20-3-1947, from order of Sm. C. C., Chief Judge, Karachi D/- 13-2-1947.

(a) City of Karachi Municipal Act (17 (XVII) of 1933), S. 17— Karachi District Local Board if "ward" or "community" or "person" within S. 17.

The "ward concerned" in S. 17, means any of the eight wards mentioned at pp. 6 and 7, Karachi Manual of Election Rules. The Karachi District Local Board is not one of them. The word "community" in S. 17, means any of the communities mentioned at pp. 6 and 7, Karachi Manual of Election Rules, and refers to Hindus, Muhammadans, Europeans, Anglo Indians, Indian Christians, Parsis, Jews and Sikhs and not to a statutory body like the Karachi District Local Board. [Paras 9, 10]

The Karachi District Local Board is not a "ward" or "community" or "a person whose name is entered in the register of electors for the ward or community concerned" within the meaning of S. 17, and therefore the Judge of the Karachi Small Cause Court has no jurisdiction to entertain an application made by it under S. 17. [Para 14]

Even if the Karachi District Local Board were to be regarded as a "person" it is not a person "whose name is entered in the register of elections for the ward or community concerned" within S. 17. [Para 11]

(b) Civil P. C. (1908), S. 115—Persona designata —Orders of, if revisable—City of Karachi Municipal Act (17 of 1933), S. 17.

Where the Judge of the Karachi Small Cause Court as a persona designata under S. 17, City of Karachi Municipal Act, acts without jurisdiction he ceases to act as a persona designata and becomes a Court subordinate to the Chief Court under S. 115, Civil P. C. and the Chief Court has power to revise his order: 30 A I R 1913 Sind 233, *Rel. on.* [Para 17]

But the Chief Court will not interfere with the order when the error sought to be corrected has been rectified as the revisional powers will be exercised only in the interest of justice. 30 A. I. R. 1943 Sind 233, *Rel. on.* [Paras 20, 21]

Annotation.—('44-Com.) C. P. C., S. 115, N. 6, Pt. 2.

(c) City of Karachi Municipal Act (17 (XVII) of 1933), S. 9—Incapacity to act as Councillor before expiry of term within S. 10—What is—S. 15 if exhaustive—City of Karachi Municipal Act, Ss. 10 and 15.

The Karachi District Local Board elected one of its members *K* as a representative on the Karachi Municipal Corporation. *K*'s term as a Municipal Councillor was to expire on 1st May 1946 but by reason of a fresh election to the Karachi District Local Board *K* was unseated and ceased to be a member of the Board from 1st September 1945 and ceased to be a councillor of the Municipal Corporation also from that date. The Local Board thereupon on 5th October 1945 elected *V* one of its members as its representative to the Municipal Corporation vice *K*.

Held that S. 15 was not exhaustive of the cases in which a Councillor ceased to hold office as such. When *K* ceased to be a member of the Local Board in 1945 he became incapable of acting as a Municipal Councillor within the meaning of S. 10 and the new councillor *V* could only function till the expiry of *K*'s term on 1st May 1946. [Para 20]

Cases referred :

1. ('33) 35 Bom. L.R. 89 : 20 A. I. R. 1933 Bom. 105: 142 I. C. 378, Jagmohan Surajmal v. Venkatesh Gopal.
2. ('95) 21 Bom. 279, Balaji Sakharam v. Merwanji Nowroji.
3. ('26) 28 Bom. L. R. 519 : 13 A. I. R. 1926 Bom. 344 : 50 Bom. 357 : 94 I. C. 660, Gangadhar Bapurao v. Hubli Municipality.
4. ('44) 46 Bom. L.R. 371 : 31 A. I. R. 1944 Bom. 203: 214 I. C. 111, Hifzurraheman Ansarsaheb v. Hasansaheb.
5. ('45) 47 Bom. L. R. 851 : 33 A. I. R. 1946 Bom. 64: I. L. R. (1946) Bom. 143, Keshav Ramchandra v. Municipal Borough, Jalgaon.
6. ('43) I. L. R. (1943) Kar. 345: 30 A. I. R. 1943 Sind 233 : 210 I. C. 19, Pir Bakhsh Khan Muhammad Bakshh Khan v. Daryakhan Saindad.
7. ('24) 47 Mad. 369 : 11 A. I. R. 1924 Mad. 561 : 78 I. C. 98 (F. B.), Parthasarathi Naidu v. Koteswara Rao.
8. ('33) 11 Rang. 337 : 20 A. I. R. 1933 Rang. 185 : 144 I. C. 849 (F. B.), Maung Phye v. Yeo Win Su.
9. ('44) 31 A. I. R. 1944 Pat. 147 : 22 Pat. 577 : 214 I. C. 59, Abdul Razak v. Kuldip Narain.
10. ('41) 20 Pat. 373 : 28 A. I. R. 1941 Pat. 65 : 192 I.C. 217 (F. B.), Mt. Dirji v. Smt. Goalin.
11. (1910) 2 K B 165 : 79 L. J. K. B. 595 : 102 L. T. 578, The King v. Board of Education.

Khanchand Gopaldas—for Applicant.

Dingomal Narainsingh and Srikihindas H. Lulla —for Opponent 1 and 2 respectively.

Thadani J.—This is a revision application under S. 115, Civil P. C., by one Vensimal Tarachand against an order of Mr. Rahimbakhsh, Chief Judge of the Karachi Small Cause Court, dated 13th February 1947 made in the following circumstances: In pursuance of S. 8, cl. (g), City of Karachi Municipal Act, 17 of 1933, the District Local Board, Karachi, by its resolution dated 16th April 1940 elected K. B. Allabakhsh Gabole as its representative on the Karachi Municipal Corporation for a term of five years from 1st May 1940. Under S. 9, City of Karachi Municipal Act, K. B. Gabole's term was to expire at noon on 1st May 1945, but by reason of Sind Act 10 of 1945, K. B. Gabole's term was extended till 1st May 1946. In August 1945, a fresh election to the District Local Board, Karachi, took place, and K. B. Gabole was unseated and ceased to be a member of the District Local Board with effect from 1st September 1945, and under R. 4 of Chap. 3 of Sch. 1, Karachi Municipal Corporation Manual of Election Rules K. B. Gabole ceased to be a Councillor of the Karachi Municipal Corporation also from 1st September 1945.

[2] On 5th October 1945, the Kharachi District Local Board passed a resolution by a majority of votes to the effect that the applicant Vensimal Tarachand was elected as a representative of the Karachi District Local Board to the Municipal Corporation vice K. B. Allahbakhsh Khan Gabole. The resolution was forwarded by the Karachi District Local Board to the Chief Officer of the Karachi Municipal Corporation and from 5th October 1945, the applicant represented the Karachi District Local Board as a Councillor on the Municipal Corporation.

[3] The term of the Councillors of the Karachi Municipal Corporation came to an end on 1st May 1946, and under the City of Karachi Municipal Act, the Chief Officer was required to hold fresh elections and he fixed certain dates for the elections as prescribed by Rules. All the Ward Elections were fixed for 13th March 1946, and the elections of the representatives of the Chamber of Commerce, the Karachi Indian Merchants' Association, the Karachi Buyers' and Shippers' Chamber, the Muslim Chamber of Commerce and the registered Trade Unions were fixed for dates between 26th March 1946 and 1st April 1946. Nothing was done as regards the Karachi District Local Board, because it appears that by its resolution dated 5th October 1945, the Karachi District Local Board had elected the applicant to represent it on the Municipal Corporation for a period of three years from 5th October 1945.

[4] After 29-4-1946 some correspondence took place between the Karachi District Local Board and the Karachi Municipal Corporation. Mr. Bukhari, the President of the Karachi District Local Board drew the attention of the Chief Officer of the Karachi Municipal Corporation to what he thought was an illegality committed by the Chief Officer in declaring the applicant as an elected representative of the District Local Board on the Karachi Municipal Corporation. The president of the District Local Board pointed out to the Chief Officer of the Karachi Municipal Corporation that having regard to S. 9, City of Karachi Municipal Act, the applicant ceased to be a Councillor on 1-5-1946 and that he should have retired along with other Councillors on that date, and that notwithstanding the resolution of the Karachi District Local Board passed on 5-10-1945, the applicant could not take his seat as a Councillor on the Karachi Municipal Corporation. The President of the Karachi District Local Board also informed the Chief Officer of the Karachi Municipal Corporation that the Karachi District Local Board will proceed to elect a fresh representative on the Karachi Municipal Corporation for the new term of the Corporation at their special meeting to be held on 7-5-1946. The Chief Officer of the Municipal Corporation, however, took his stand upon the resolution of the Karachi District Local Board dated 5-10-1945, and informed the President of the Karachi District Local Board that the applicant would continue to sit as a Councillor.

[5] On 7-5-1946, the Karachi District Local Board elected Pir Mahfoozshah as their representative on the Karachi Municipal Corporation and the Karachi District Local Board authorised the President to institute proceedings to have the election of the applicant set aside. In pursuance of this authority the Karachi District Local Board through its Chief Officer filed an application under S. 17, City of Karachi Municipal Act, 17 [XVII] of 1933.

[6] When the petition came up for hearing before the learned Chief Judge of the Karachi Small Cause Court, acting as *persona designata* under S. 17, City of Karachi Municipal Act, it was contended before him that the application filed by the Karachi District Local Board was incompetent as the Karachi District Local Board was not one of the persons whose name appeared in the register of electors for the ward or community concerned. The learned Judge, however, did not accept the contention and held that the application was competent.

[7] Section 17 (1), City of Karachi Municipal Act, 1933, reads as follows:

"17. (1) If the order of the Chief Officer as to the validity of the nomination of any candidate for election as a councillor or as to the qualification of any person declared to be elected a councillor, is disputed, or if the validity of any election is questioned by reason of material irregularity in the election proceedings, bribery,

corruption, personation, treating, undue influence or any other thing materially affecting the result of the election any person whose name is entered in the register of electors for the ward or the community concerned may, at any time within ten days after the result of the election has been declared, apply to the Judge of the Karachi Small Cause Court for an adjudication in the matter. If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates who, although not declared elected were duly nominated for election to the seat in question and proceed against the candidate who has been declared to be elected."

[8] The learned Judge came to the conclusion that the application by the Karachi District Local Board was competent because it was a "community" within the meaning of S. 17, City of Karachi Municipal Act, notwithstanding the contention of the advocates who appeared before him that the word "community" in S. 17 refers to the communities mentioned in R. 3 of Chap. 1, Sch. 1 at pages 6 and 7 of the Karachi Municipal Corporation Manual of Election Rules. The learned Judge thought that there was no justification for putting such a restricted interpretation upon the word "community", for it was difficult to contemplate that the Legislature would fail to make a provision for challenging the election of the representative of the Karachi District Local Board to the Karachi Municipal Corporation. The learned Judge referred to the Oxford Dictionary for the meaning of the word "community", which described "community", as "A body of people organized into a political, municipal or social unity," and took the view that the word "community" must be understood in that sense, and that the District Local Board was therefore a community.

[9] We think the learned Judge was manifestly wrong in his interpretation of the word "community" in S. 17, City of Karachi Municipal Act. The word "community" in S. 17 refers to Hindus, Muhammadans, Europeans, Anglo Indians, Indian Christians, Parsis, Jews and Sikhs, and not to a statutory body like the Karachi District Local Board. For the purposes of elections to the Karachi Municipal Corporation, the City of Karachi is divided into a number of wards. The number of Hindu Councillors to be returned from ward I to the Municipal Corporation is 3; from ward II, 4; from ward III, 6; from ward IV, 6, from ward V, 3, from ward VI, 5; from ward VII, 2; from ward VIII, 1. The number of Muslim Councillors to be returned from ward I is 1; from ward II, 1; from ward III, 1; from ward IV, 2; from ward V, 12; from ward VI, 4; from ward VII, 2; from ward VIII, 2. Europeans, Anglo-Indians, Indian Christians, Parsis, Jews and Sikhs are not assigned any particular ward. They vote from all the wards together—Europeans returning 2; Anglo-Indians 1: Indian Christians 2; Parsis 3; Jews 1; and Sikhs 1. In column 1 at pages 6 and 7 of the Karachi Municipal Corporation Manual of Election Rules, Hindus, Muhammadans, Europeans, Anglo-Indians, Indian Christains, Parsis, Jews and Sikhs are described as a community. In cloumn 2 the wards are mentioned.

[10] We think the learned Judge gave undue importance to the word "or" between the words "ward" and "community" in S. 17, City of Karachi Municipal Act. The important words in S. 17 are : ". . , ... any person whose name is entered in the registers of electors for the ward or the community concerned . . . . . ." The "ward concerned" means one of the eight wards mentioned at pages 6 and 7 of the Manual of Election Rules, and the "community concerned" means any of the communities mentioned at pages 6 and 7 of the same Manual. The learned Judge fell into error in thinking that the Karachi District Local Board was a community within the meaning of S. 17, City of Karachi Municipal Act. The meaning of the word "community" in S. 17 must be gathered from the Act itself having regard to its purpose and scheme, and the learned Judge should not have adopted the meaning of the word community in the English Dictionary, with the object of giving effect to his doubts or apprehensions of his conception of hardship in which an aggrieved party might find himself.

[11] Under S. 17, City of Karachi Municipal Act any person whose name is entered in the register of electors for the ward or the community concerned may apply to the Judge of the Small Cause Court, Karachi, and it is conceded that even if a District Local Board were to be regarded as a person, the name of the Karachi District Local Board is not entered in the registers of electors for any of the wards I to VIII, or in the register of electors for any of the communities mentioned at pp. 6 and 7 of the Karachi Municipal Corporation Manual of Election Rules. We think the learned Judge, then, clearly assumed jurisdiction which he did not possess.

[12] Not only has the learned Judge assumed jurisdiction which he did not possess, but he has dealt with the arguments of the advocates who appeared on behalf of the applicant and the Karachi Municipal Corporation and criticised the conduct of the Chief Officer of the Karachi Municipal Corporation in a manner unbecoming even a *persona designata*.

[13] Commenting on the correspondence passed between the Chief Officer of the Karachi Municipal Corporation and the President of the District Local Board, Karachi, the learned Judge says :

"The perusal of this letter shows beyond any doubt the reckless disregard on the part of the executive head of the Corporation for the provisions of the Act and the rules framed thereunder."

The learned Judge should have remembered that the Municipal Corporation has its Legal Adviser, and it appears that the Chief Officer was acting upon the advice of the Legal Adviser of the Corporation. There was, therefore, no justification for the learned Judge to express himself in the way in which he has done. It is sufficient for us to observe that the learned Judge's adverse remarks concerning the Chief Officer of the Karachi Municipal Corporation are uncalled for and without justification.

[14] We have no doubt that the learned Judge was not justified in entertaining an application at the instance of the Karachi District Local Board, it being neither a ward nor a community nor a person whose name is entered in the register of electors for the ward or the community concerned. But this erroneous assumption of jurisdiction by the learned Judge does not dispose of the question as to whether we should exercise our extraordinary jurisdiction in revision on the facts of this case.

[15] Mr. Dingomal for the Karachi District Local Board has put his case for consideration from two points of view (1) that this Court has no power to revise any order of a *persona designata*, and (2) that, in any case, as the learned Judge has rectified an error which should not have been allowed to remain, we should decline to exercise our powers in revision. Mr. Dingomal has relied upon a number of decisions of the Bombay High Court in 35 Bom. L. R. 89,[1] 21 Bom. 279[2] and 28 Bom L. R. 519,[3] where the view taken was that a Judge acting under S. 15, Bombay City Municipalities Act (18 [XVIII] of 1925) was not a Court but a *persona designata*, and the High Court had, therefore, no jurisdiction to revise his order under S. 115, Civil P. C., 1908.

[16] In a later decision, however, of the Bombay High Court in 46 Bom. L. R. 371,[4] Macklin J., did not think that where a *persona designata* exceeded his jurisdiction, the High Court in revision was powerless to interfere. It is true, Chagla J., in 47 Bom. L. R. 851,[5] did not agree with the view of Macklin J., and preferred to follow the earlier decisions of the Bombay High Court to which we have referred.

[17] It is unnecessary to agree or disagree with the earlier decisions of the Bombay High Court or the view of Chagla J. We are bound by the decision of a Division Bench of this Court in I. L. R. (1943) Kar 345,[6] in which the view taken was that if a Judge as a *persona designata* exceeded the powers conferred on him by the section or acted outside it, he ceased to act as a *persona designata*, and became a Court subordinate to the High Court under S. 115, Civil P. C.

[18] A Full Bench of the Madras High Court in 47 Mad. 369,[7] have even taken a less restricted view. The learned Judges took the view that a District or Subordinate Judge, in deciding an election petition presented before him under the rules issued by the local Government under the Local Boards Act, 1920, was acting not merely as a *persona designata* but as a Court in the exercise of its ordinary jurisdiction extended for that purpose; consequently, the High Court was competent to exercise its powers of revision over decisions in election petitions.

[19] We do not think it is necessary to refer at length to other decisions of other High Courts, for instance, those reported in 11 Rang. 337,[8] A. I. R. 1944 Pat. 147,[9] 20 Pat. 373,[10] or to the decision reported in (1910) 2 K. B. 165,[11] remarks at pages 178 and 179, in view of the decision of this Court to which we have referred, and from which we are not inclined, for the present, at any rate, to differ.

[20] But while we think we have power under S. 115, Civil P. C., to revise an order passed by a Judge as a *persona designata* who acts without jurisdiction, we do not propose to interfere in the order passed by the learned Chief Judge of the Karachi Small Cause Court because we think a serious error which had been committed in permitting the applicant to continue as a Councillor on the Karachi Municipal Corporation after 1st May 1946 has now been rectified properly.

[21] Mr. Khanchand for the applicant has argued that S. 9, City of Karachi Municipal Act, has no application to the election of the applicant by the Karachi District Local Board, because, according to Mr. Khanchand, the vacancy created by the unseating of K. B. Gabole at an election of the Karachi District Local Board held in 1945 was not a casual vacancy within the meaning of S. 10, Municipal Act, so as to retire the applicant from the Municipal Corporation on 1st May 1946. In support of this argument, he has referred us to Ss. 14 and 15, Municipal Act, which deal with questions of disqualification and ceasing to hold office as a Councillor. Mr. Khanchand contends that it is not disputed that K. B. Gabole was never disqualified; he merely ceased to hold office within the meaning of S. 15 which lays down in what cases a Councillor will cease to hold office as such. But we do not think that S. 15 is exhaustive. Section 10 refers to non-acceptance of office by a person elected to be a Councillor, death, resignation, disqualification of a Councillor or his becoming incapable of acting previous to

the expiry of his term of office. Where a Councillor becomes incapable of acting before the expiry of his term, the new Councillor acting in his place must retire in accordance with S. 9. Obviously, K. B. Gabole was incapable of acting as a Councillor after he ceased to be a member of the Karachi District Local Board in 1945, and when the applicant was elected to represent the Karachi District Local Board on the Corporation on account of the incapacity of K. B. Gabole to act as a Councillor, by reason of his ceasing to be a member of the Karachi District Local Board, the applicant could only function till 1st May 1946. The Division Bench of this Court in I.L.R. (1943) Kar. 345,[6] has dealt with this aspect of the case in different circumstances where the *persona designata* had acted without jurisdiction, but had passed an order which the interests of justice required should be upheld. The Division Bench declined to interfere on the ground that the revisional powers of a High Court have to be exercised only in the interests of justice. We think the interests of justice in the case before us do not require our interference in this case, because a manifest error has now been rectified. We therefore dismiss the revision application but make no order as to costs.

G.N. *Application dismissed.*

A. I. R. (35) 1948 Sind 120 *[C. N. 35.]*

TYABJI C. J. AND O'SULLIVAN J.

Tayaballi Abdulhussain Mandviwala — Applicant v. *The Commissioner of Income-tax, Bombay, Sind and Baluchistan, Bombay — Respondent.*

Referred Case No. 98 of 1944, Decided on 10-2-1948.

(a) Income-tax Act (1922), S. 16 (1) (c), Proviso 1 —Trust—Provision for forfeiture of benefit under certain circumstances — Right reserved to settlor to cancel forfeiture — This does not amount to reservation of right to re-assume power over property — Proviso not applicable — Trust not revocable.

A trust deed provided that "if any of the beneficiaries during the continuance of this trust is adjudicated an insolvent he shall forfeit all interest in all the trust moneys, properties etc. and thereafter the entire trust property shall vest and be paid out to the other beneficiary or beneficiaries. Likewise, if the share or interest of any beneficiary in trust properties is attached and such attachment continues effective for a period of one month and be not removed or raised during one month then the right or interest of such beneficiary in all trust properties, shall stand forfeited and the share forfeited shall immediately vest in the other beneficiary or beneficiaries : Provided however that it shall be within my power and at my discretion as trustee during my lifetime to cancel forfeiture occasioned by attachment or by other process of Court and to declare such beneficiary eligible and entitled to his share under this trust deed in everything of the trust by a separate declaration deed made in writing and executed by me :"

Held, without deciding whether the clause was legal or illegal, that the trust was not a revocable settlement within the meaning of the first proviso to S. 16 (1) (c), Income-tax Act, so as to regard the income therefrom as the income of the settlor. The clause in the trust deed entitling the settlor to cancel the forfeiture under certain circumstances did not amount to a reservation of a right to re-assume power over the assets. [Para 10]

(b) Income-tax Act (1922), S. 66 (1)—New plea.

Point not taken before the Income tax authorities or the tribunal and not arising out of the reference and not falling under S. 66 (1) cannot be allowed to be raised during the hearing of the reference. [Para 10]

Cases referred : —

1. (1883) 21 Ch. D. 838 : 48 L. T. 577 : 30 W.R. 837, In re Machu.
2. (1888) 38 Ch. D. 176 : 57 L. J. Ch. 634 : 58 L. T. 581 : 36 W. R. 462, Dugdale v. Dugdale.

Fatechand—for Applicant.

Hakumatrai Eidnani—for Respondent.

Tyabji C. J. — This is a reference under S. 66 (1), Income-tax Act, made by the Income-tax Appellate Tribunal, and the main point in the case is, whether a trust deed executed on 24th March 1934 was a revocable settlement within the meaning of proviso 1 of S. 16 (1) (c), Income-tax (Amendment) Act, 1939.

[2] This deed, Ex. T-G, was executed by Tayabali A. Mandviwalla, who purported thereby to create a trust of certain properties for the benefit of his son, Ghulamali, and his grandsons, Yusuf Ali and Hakimuddin. The settlor, Tayabali, constituted himself as a trustee for the three beneficiaries from the date of the deed, and it was provided in the deed that thereafter the properties subject to the trust were to be managed by the trustee in a particular manner during the duration of the trust, and that the trust was to come to a termination on the death of the settlor or when the youngest of the beneficiaries attained majority, whichever event happened later. Clause 13 of the deed was as follows :

"That if any of the beneficiaries during the continuance of this Trust is adjudicated an insolvent he shall forfeit all interest in all the Trust moneys, properties, securities, fund, etc., and thereafter the entire trust property and everything appertaining and relating to Trust shall vest and be paid out to the other beneficiary or beneficiaries. Likewise if the share or interest of any beneficiary during the continuance of this trust in trust properties or any other trust moneys or funds or securities or other properties is attached or any process of Court taken out by any person by execution proceedings or otherwise for satisfaction of his claim or payment of money demand against such beneficiary and such attachment or process continues effective for a period of one month and be not removed or raised during one month then the right or interest of such beneficiary under this Trust in all Trust properties, funds, moneys, securities or other properties, etc, shall stand forfeited and the share so forfeited shall immediately vest in the other beneficiary or beneficiaries : Provided however that it shall be within my power and at my discretion as Trustee during my lifetime to cancel forfeiture occasioned by attachment or by other

process of Court and to declare such beneficiary eligible and entitled to his share under this Trust Deed in everything of the Trust by a separate Declaration Deed made in writing and executed by me."

[3] There was no dispute before this matter came up to this Court about the deed executed by Tayabali being a valid deed effecting a gift by way of a trust in favour of the three beneficiaries. It was contended on behalf of Tayabali that the income of the properties, which were the subject of this trust, had ceased to be his properties and should not be included as his properties in the assessments made for the years 1939-40 to 1942-43. The Tribunal ultimately decided against the assessee on this matter and para. 6 of the judgment of the Tribunal which deals with this matter is as follows :

"6. There is, however, one clause in the second trust deed dated 24th March 1934, that makes all the difference between the two and goes to support the department's view that that settlement is revocable. The Appellate Assistant Commissioner appears to have lost sight of this clause and it was brought to our notice by the Departmental Representative who based his case mainly upon it. That clause is to the effect that the beneficiary under the deed shall forfeit all interest in the trust properties and income on his being adjudicated an insolvent, and shall likewise do so if the trust property or income happens to be attached in execution of a decree against him. In such a case the deed directs that the interest so forfeited shall vest in the rest of the beneficiaries. The deed further provides that it shall be within the power of the appellant settlor to cancel the forfeiture, and declare by a deed that such a beneficiary shall continue to be entitled to the share. It is this particular provision on which the Departmental Representative has relied. Now, the clause read as a whole will go to show that the forfeiture comes into force immediately on the insolvency of the beneficiary, or on the attachment of the property in execution of a decree if the attachment is not raised within one month. In such a case the interest immediately vests in the remaining beneficiaries. But if a settlor has power to make a restitution to the beneficiary who has thus lost his interest by means of a deed made for the purpose it means that he has equally a power to make such a disposition which he cannot do unless he has reassumed control over the assets, This particular provision therefore brings the settlement of 24-3 1934, within the ambit of a revocable settlement, under S. 16 (1) (c), Income-tax Act."

[4] At the instance of the assessee, the Tribunal has made a reference to this Court under S. 66 (1) and the question referred is as follows:

"Whether, in the circumstances of the case and upon a true construction of cl. 13 of the deed of trust dated 24-3-1934, it was rightly held that the trust in question was a revocable settlement within the meaning of proviso 1 to S. 16 (1) (c), Income-tax (Amendment) Act, 1939, so as to regard the income therefrom as the income of the assessee?"

[5] The text of cl. (c) of S. 16 (1), Income-tax Act, is as follows :

"All income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the Indian Income-tax (Amendment) Act, 1939, from assets remaining the property of the settlor or disponer shall be deemed to be income of the settlor or disponer, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor:"

Then follow the three provisos. There is no question that with regard to the properties which were the subject of the trust, all the assets had ceased to be the properties of the settlor under the terms of the deed, and the only question in this case was, whether the transfer of the assets, effected by the settlement was or was not a revocable transfer.

[6] Proviso 1 to cl. (c) of S. 16 (1) is in these terms:

"Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the settlor, disponer or transferor, or in any way gives the settlor, disponer or transferor a right to re-assume power directly or indirectly over the income or assets."

[7] The question before us, therefore, is whether cl. 13 of the deed contains a proviso "for the re-transfer directly or indirectly of the income or assets to the settlor" or, any provision which in any way gave to the settlor "a right to reassume power directly or indirectly over the income or the assets."

[8] The decision of the Tribunal has been set out above. The point relied upon by the Tribunal was, that under cl. 13 under certain circumstances, a beneficiary was to forfeit his rights under the deed, but the settlor had reserved to himself a power to cancel the forfeiture, if he so chose. The Tribunal argued:

"But if a settlor has power to make a restitution to the beneficiary who has thus lost his interest by means of a deed made for the purpose it means that he has equally a power to make such a disposition which he cannot do unless he has reassumed control over the assets."

[9] We find it quite impossible to accept this argument. As cl. 13 is worded, the effect of it would be that under certain contingencies the beneficiary was to lose his interest under the settlement, and that interest was thereupon immediately to vest in the other beneficiary or beneficiaries. It is argued before us on behalf of the assessee that such a clause was illegal and of no effect, as the interests of the beneficiaries vested in the beneficiaries from the moment when the deed was executed, under the terms of the deed, and any such clause, by which the beneficiaries, after their beneficial interests had vested in them, were to be deprived of the benefits which had accrued to them after their beneficial interests had vested in them, was inoperative in law. Mr. Fatehchand cited (1883) 21 Ch. D. 838[1] and (1888) 38 Ch. D. 176,[2] in support of his argument. Section 10 (12?), T. P. Act was also referred to. Mr. Hakumatrai, on the other hand, argued that the terms of the deed were such that the entire deed was invalid according to the

Mahomedan law, as he argued, under the terms of the deed the beneficiaries were not to receive any benefit at all until the youngest of the beneficiaries had attained majority. Mr. Hakumatrai contended that the deed created a trust under which the beneficial interests of the beneficiaries were only to vest at a future date, after certain events had taken place.

[10] We do not think that we can allow Mr. Hakumatrai to argue that the deed in question was an invalid one because it is clear that no such point was taken before the Income-tax authorities or the Tribunal, and the matter does not arise out of the reference before us and does not fall within the perview of S. 66 (1). We also consider it unnecessary to discuss the point, whether these clauses were or were not illegal. It is sufficient to say that, no matter what view one takes with regard to the legality or effect of the clauses in question, it is impossible to say that cl. 13 of the deed contains any provision the effect of which was to reserve to the settlor a right to reassume power over the assets at any time. It appears to us therefore that the question referred must be answered in the negative, that is to say, the settlement in question was not revocable within the meaning of proviso 1 to S 16 (1) (c), Income-tax Act. We answer this reference accordingly, and we order that the assessee have the costs of this application.

R. G. D. *Reference answered.*

A. I. R (35) 1948 Sind 122 *[C. N. 36.]*

TYABJI C. J. AND O'SULLIVAN J.

Makhan Khan S/o Nawazali—Appellant v. *Emperor.*

Confirmation Case No. 37 and Criminal Appeal No. 197 of 1947, Decided on 3-2-1948.

(a) Evidence Act (1872), S. 33—Proviso—"Adverse party" is party which does not call the witness – Party calling him does not become "adverse" merely because witness favours the other side or becomes hostile.

The expression "the adverse party" is used in S. 33 to distinguish that party from "the party who calls" the witness, and the distinction has nothing whatever to do with the nature of the evidence given by the witness. A party calling a witness does not become "the adverse party" because the witness gives evidence which favours the opposite party or is hostile to the party calling the witness; and the expression "the adverse party" in the proviso can only refer to the party which was the adverse party at the time when the deposition was recorded in the first proceedings. [Para 10]

Annotation:—('46-Man) Evidence Act, S. 33, N. 11.

(b) Evidence Act (1872), S. 167—Illegal rejection of evidence—Conviction cannot be set aside if its admission would not have varied the decision.

In order to entitle the accused to get the conviction set aside on the ground of illegal rejection of evidence, the accused has to show that the admission of the evidence would have varied the decision of the Court. Where the case against the accused is clear and the admission of the rejected evidence would not have varied the decision, the conviction cannot be set aside on the ground of such rejection. [Paras 11 & 12]

Annotation:—('46 Man) Evidence Act, S. 167, N. 3.

E. V. Castellino—for Appellant.

Fatechand Assudomal, Advocate-General—for the Crown.

Tyabji C. J.—The appellant, Makhan Khan son of Nawazali, has been convicted of murder by a Judge of this Court, Agha J., in accordance with a unanimous verdict by the jury and sentenced to death. He has appealed, and the case is also before us for confirmation of the death sentence.

[2] The appellant has been convicted of the murder of one Bashir Ahmed. On the night of 27th November 1946, at about 10 p. m, the deceased, Bashir Ahmed, was going on a much frequented public street, the Lidbitter Road The appellant came from the opposite direction and stabbed the deceased. One Sahibdino, a tailor, who was following the deceased, was about ten paces behind him, when he saw the appellant coming from the opposite direction and stabbing the deceased. He was one of several persons there, who thereafter ran in pursuit of the appellant, who ran to and sat in a gharry which happened to be standing a short distance away. The gharry was immediately surrounded by people and a police constable, Mukhtiar Singh, who was on duty at the time and saw the appellant with a knife in hand pursued by several men, immediately came up and arrested the appellant, and secured the knife which was blood-stained. The appellant was then taken to the spot where Bashir Ahmed had fallen down, and the injured man immediately stated that it was appellant who had stabbed him. Another police constable, Ghulam Rasool, who though not on duty happened to be there, also saw the entire occurrence. Tirath, son of Sugnomal was the owner of a pan-biri shop which was near the scene of the crime. His attention was attracted by the cries on the street, and on turning to that direction he saw the injured man lying on the ground, and the appellant running from there to the gharry where he was arrested. There were also other persons there, including one Daulatkhan, who saw the occurrence and came up and told the police constable that it was the appellant who had stabbed the deceased.

[3] The deceased was immediately sent off to the hospital and the appellant and the witnesses were taken to the Police Station. Head Constable Mukhtiar Singh made a report at the Police Station within a few minutes of the occurrence in the course of which he stated:

"I was on duty at Napier Road from 8 p. m. to 2 a. m. At about 10 p. m. when I came to the junction of Na-

pier Road and Lidbitter Road, I saw the present accused with an open knife in his hand running towards a garri standing nearby. I heard cries of "khoon, khoon". I caught hold of the accused who gave his name as Makhan Khan and also secured the open knife which was in his hand. It was stained with blood

Doulatkhan, Abu Yakoob and others came and told me that the present accused had stabbed one Bashir Ahmed, a Punjabi young boy who was lying in the pool of blood. I took the accused to the injured who stated and pointed that the accused Makhankhan had stabbed him due to previous enmity.

In the meantime H. C. Karim and H C. Rahmatkhan came there. The injured was then sent to Civil Hospital with H. C. Karim, and I have brought the accused Makhan Khan and produced the blood stained knife taken possession of from the accused.

There are blood marks on his coat and right hand palm of the accused."

[4] It has already been mentioned that the deceased told Head Constable Mukhtiar Sing and the others who came up, when the appellant was taken to the place where the deceased was lying, that the appellant had stabbed him. A statement of the deceased was recorded by Sub-Inspector Muhammad Sharif at the Civil Hospital on the same night, and another statement of the deceased was recorded by the Additional City Magistrate, Mr. Mir Muhammad, the next morning. In both these statements the deceased stated very clearly that the appellant had stabbed him because of enmity on account of certain quarrels which had taken place between the deceased and the appellant. The blood stained knife, which was secured from the hands of the appellant, and the coat which the appellant was wearing at the time of the incident which appeared to be blood-stained, were sent to the Chemical Analyser, who found human blood on both articles.

[5] The medical evidence shows that the deceased had an incised wound $2\frac{1}{2}'' \times 1''$, deep to the abdominal cavity, as a result of which the omentum and colon protruded from the left side of the abdomen. The deceased died as a result of this injury on 29th November at 4.30 P. M. There was no question in the case about the death of the deceased having been caused by this stab-wound.

[6] The appellant did not make any statement before the Committing Magistrate beyond saying that he would say what he had to say in the Sessions Court. In the Sessions Court he stated:

"Mukhtiarsing secured me at 10-30 P. M. where the quarrel had taken place. He said I had committed this murder. The injured Md. Bashir was my neighbour. I lived in the compound and he lived outside it in the land. There was no dispute between me and him. I did not stab him."

He denied that the knife and the coat secured by the police belonged to him.

[7] This was a case tried by a Jury who unanimously found the appellant guilty. There is no suggestion made by the learned [illegible] who appears before us on behalf of the appellant, that there was any misdirection in the learned Judge's charge to the Jury. There cannot be any question about the evidence in the case abundantly supporting the charge against the appellant. There was only one point which Mr. Castellino, the learned advocate for the appellant, pressed before us. He argued that the learned Judge had erroneously disallowed an application made on behalf of the defence for bringing on the record, under S. 33, Evidence Act, the evidence given by Doulatkhan a witness examined in the Court of the Committing Magistrate who could not be examined in the Sessions Court as he was untraceable and whose whereabouts were not known. It was argued that the appellant was gravely prejudiced as a result of this error, and the conviction of the appellant ought not, therefore, to be upheld.

[8] Now, Doulatkhan, who had been examined on behalf of the Crown before the Committing Magistrate, had stated in his evidence as follows:

"I know Bashir since $2\frac{1}{2}$ years. He was working with me at Malir. About 3 months back at 9 10 P M, I was going along the Napier Road, Bashir was going ahead of me. When I came to the corner Bashir said that he was stabbed. I did not know the accused. I saw him only when he was pulled down from the ghariy by Mukhtiar Sing He had a knife in his hand. I did not see the accused stabbing Bashir. Some people were saying that a Makrani had stabbed him; but I did not see him being stabbed. Bashir fell down on the footpath. Accused was brought to the scene by Mukhtiar Sing. Bashir at that time could not speak. The accused was then taken to foujdari. We took Bashir to the hospital. Bashir said nothing about the cause of fight. After leaving Bashir in the hospital I went to call his father. Some police constables came there besides Mukhtiar Sing."

[9] After proving through the evidence of the Sub-Inspector investigating the case, that the whereabouts of Doulatkhan were not known and that he was untraceable, the Assistant Public Prosecutor stated in the Sessions Court that he did not wish to bring the evidence of the witness on the record under S. 33, Evidence Act. Mr. Chandnani the advocate who appeared on behalf of the appellant, then made an application that the evidence of Doulatkhan be brought on the record "either as a prosecution witness or as a defence witness" The Assistant Public Prosecutor, however, objected to this, on the ground that he regarded Doulatkhan as a hostile witness:—" as a witness who had not spoken the truth," and argued that as he had not had the right and opportunity to cross-examine the witness as a hostile witness, the evidence could not be admitted. The learned Judge in his order upheld the objection. He also stated in the order that he had considered the question of taking

the evidence on record as that of a court witness, but was of the opinion that this could not be done unless both the Crown and the accused had had the right and opportunity to cross-examine the witness.

[10] We are clearly of the view that the order made by the learned Judge was not correct. The terms of S. 33, Evidence Act are very clear with regard to the question now before us. The relevant words in the section are:

"Provided . . . . , that the adverse party in the first proceedings had the right and opportunity to cross-examine."

This is one of the conditions which have to be fulfilled before the evidence given by a witness in a judicial proceeding can become relevant and be admitted in the subsequent proceeding. "The first proceeding" in this case was the enquiry before the committing Magistrate. As Doulatkhan was examined as a prosecution witness, the adverse party in the proceeding clearly was the appellant. Apart from the fact that there is nothing in the recorded deposition to show that the evidence of Doulatkhan was regarded as hostile evidence in the Magistrate's Court, a reference to Ss. 137, 138 and 154, Evidence Act, will make it clear that the expression "the adverse party" is used to distinguish that party from "the party who calls" the witness, and the distinction has nothing whatever to do with the nature of the evidence given by the witness. A party calling a witness does not become "the adverse party" because the witness gives evidence which favours the adverse party or is hostile to the party calling the witness, and the expression "the adverse party" in the proviso can only refer to the party which was the adverse party at the time when the deposition was recorded in the first proceeding. There can be no doubt that the appellant had the right to cross-examine the witness, a question depending upon the legal character of the first proceeding. There is also no question about the appellant having in fact had the opportunity to cross-examine the witness, a matter of recorded fact. The conditions required by this proviso were thus completely fulfilled, and the recorded evidence of Doulatkhan became relevant for proving the truth of the facts stated therein, by reason of the terms of S. 33, as there was no question here about the other conditions required by the section having been fulfilled. It was therefore open to the prosecution or the defence or the Court to bring this relevant evidence on the record. We, therefore, think that the evidence of Doulatkhan ought, under the circumstances to have been brought on the record under S. 33, by the prosecution as Doulatkhan had been examined as a prosecution witness in the Magistrate's Court. The defence and the Court were also entitled, if they so chose, to have the evidence brought on the record like any other relevant evidence.

[11] We have, therefore, to see whether the erroneous rejection of this evidence by the learned Judge furnishes any ground for ordering a new trial or reversing the conviction. In view of the terms of S. 167, Evidence Act, it is necessary for Mr. Castellino to show us that the rejection of this evidence was likely to affect the decision of the case. If we are satisfied that even if the evidence had been admitted, it ought not to have varied the decision of the Court, the rejection cannot be made a ground for interfering with the decision.

[12] The deposition of Doulatkhan has been set out above. We cannot see how the admission of this evidence could have helped the appellant. It is, on the other hand, clear that this evidence even as it stands largely, if not entirely, supports the rest of the prosecution evidence. It would appear that the only criticism which the prosecution had to offer regarding this evidence was that Doulatkhan had not spoken the truth when he denied having actually seen the appellant stabbing the deceased, and heard the deceased implicating the appellant. We consider it to be beyond any question that even if the rejected evidence had been received, it ought not to have led the Court to arrive at a different decision.

[13] This is a very clear case, and there is no reason for interfering either with the conviction or the sentence passed. We accordingly dismiss this appeal and confirm the sentence of death passed on the appellant.

R.G.D. *Conviction & sentence confirmed.*

A. I. R. (35) 1948 Sind 124 *[C. N. 37.]*

TYABJI C. J. AND MEHER J.

Sardar Mahammad Hussain Khan and another — Appellants v. *Rasoolbux and others —Respondents.*

First Appeal No. 30 of 1942, Decided on 12-8-1947, against the order of First Class Sub-Judge, Sukkur.

(a) Civil P. C. (1908), O. 20, R. 12—Appeal—Order holding application under O. 20, R. 12 incompetent in view of appellate decree directing mesne profits to be ascertained in execution — Order not appealable — Civil P. C. (1908), Ss. 2 (2) and 105.

An order under O. 20, R. 12 is not now appealable. Where an enquiry is directed to ascertain mesne profits, a final decree has to be passed and the appeal lies against such a decree. [Para 4]

Where the appellate Court while decreeing a suit for possession directed the mesne profits to be ascertained in execution proceedings:

Held, that the order of the lower Court that no application under O. 20, R. 12 lay in view of the direction of the appellate Court was not a decree within the

meaning of S. 2 (2) but was an interlocutory order and no appeal lay from it. [Para 5]

Annotation : — (44-Com.) C. P. C., O. 20 R. 12 N. 15 Pt. 1; S. 105 N. 7 Pt. 1.

(b) Civil P. C. (1908), S. 151—Order passed without jurisdiction — Court has inherent power to set aside such order.

A Court has inherent power to set aside its own order which is null and void. In such a case the Court does not substitute one decision on the merits for another but merely finds and records that what had been done was without jurisdiction. No Court is compelled to proceed with any proceeding after finding that the proceeding was without jurisdiction and the fact that many steps had been taken in the proceeding before the Court found that it had no jurisdiction, is no ground for persisting in continuing the proceeding : 32 S. L. R. 215, *Rel. on.* [Para 8]

Annotation : — (44-Com.) C. P. C., S. 151 Note 6 Pt. 2.

(c) Civil P. C. (1908), O. 20, R. 12—Decree directing mesne profits to be ascertained in execution—Direction not nullity — Court cannot entertain application under R. 12.

Where the Sind Judicial Commissioner's Court, while decreeing the suit for possession in appeal, ordered that the mesne profits be determined in execution proceedings and the decree was confirmed by the Privy Council:

Held, that whether the direction in the appellate decree was or was not right the lower Court could not question it and was right in holding that it had no jurisdiction to entertain an application under O. 20, R. 12, under the circumstances: 42 C. W. N. 748, *Rel. on.* [Para 12]

Annotation : —(44-Com.) C. P. C, O. 20 R. 12 Note 4 Pt. 5.

Cases referred :—

1. ('38) 42 C. W. N. 748, Commr. of the Port of Calcutta v. Probladrai.
2. ('38) 32 S. L. R. 215, Dholandas v. Sadhumal.

Tikamdas Bassarmal — for Appellants.

Fatehchand Assudomal — for Respondents.

Meher J.—The facts out of which this appeal arises are as follows: The plaintiff appellant filed this suit for possession of a certain land in Deh New Sukkur against the Secretary of State for India defendant 1 and K. B. Pirbakhsh defendant 2. The District Court which tried the suit dismissed it. In appeal the Court of the Judicial Commissioner of Sind decreed the suit for possession, on 18-1-1931, and as regards mesne profits, ordered :

"We order that the compensation payable to defendant 2 for improvements to be ascertained as on this date, and also the mesne profits payable to the plaintiff from the date of dispossession to the date on which he is put into possession, both being ascertained in the manner stated above, be determined in execution proceedings."

An appeal was made to the Privy Council which was dismissed. As regards mesne profits, their Lordships of the Privy Council observed in the judgment :

"As regards the compensation payable to the defendant for improvements, and as regards the mesne profits payable to the plaintiff, no objection was stated before their Lordships to the manner in which these matters are dealt with in the judgment of the Judicial Commissioner's Court, which will accordingly stand."

[2] Instead of acting in accordance with the very clear and definite directions given in the order, and making an application for determination of mesne profits in execution, the appellant made an application under O. 20, R. 12, Civil P. C, in the course of which it was stated :

"Though the Appellate Court while making an order to the above effect in the judgment has made a mention that the mesne profits may be determined in execution proceedings, but under the law such enquiries are not to be made in execution proceedings, but an application is to be made in the suit. Hence this application is being presented."

[3] The learned Sub-Judge, Mr. Shankersing, granted this application and appointed a Commissioner to determine mesne profits. After the Commissioner had made his report, the matter came up, on 9-2-1942, before Mr. Shankersing's successor, Mr. Bhavnani. After considering the decision in 42 C. W. N. 748,[1] Mr. Bhavnani came to the conclusion that the direction that mesne profits should be determined in execution proceedings was binding upon the Court, and that the application under O. 20, R. 12, Civil P. C, was therefore one which the Court had no jurisdiction to entertain. He found the order previously passed by Mr. Shankersing to be without jurisdiction, set it aside, and dismissed the application under O. 20, R. 12, Civil P. C. It is against this order that the appellant has come in appeal.

[4] A preliminary objection has been urged by Mr. Fatehchand for the respondent that no appeal lies against this order. Under the Code of 1882, the amount of mesne profits was determined in execution proceedings, and the decision determining mesne profits was appealable as a decree. An order under O. 20, R. 12, Civil P. C., is not now appealable. Where an enquiry is directed to ascertain mesne profits, a final decree has to be passed, and the appeal lies against such a decree. A party aggrieved by the determination of mesne profits can prefer an appeal from any decree finally determining the mesne profits.

[5] In this case, however, there was a decree, passed on appeal by the Court of the Judicial Commissioner of Sind, for the determination of mesne profits in the manner directed. The order passed by the lower Court, refusing to act in a manner not permitted by the decree and insisting upon the directions in the decree being carried out, could not be construed as an order finally determining mesne profits. The order that no application lay under O. 20, R. 12, Civil P. C., because the direction in the decree passed by the Appellate Court, that mesne profits be determined in execution proceedings, had to be followed, was not a decree within the meaning of S. 2 (2), Civil P. C. It was only an interlocutory order. The order did not preclude the appellant from obtaining an order for the determination of

mesne profits in accordance with the decree passed. It would therefore appear that no appeal lies from the order.

[6] As, however, the merits of the order have been argued at some length, we propose to make a few remarks on the matter.

[7] The points taken by Mr. Tikamdas are (1) that the Sub-Judge erred in setting aside his predecessor's order, and (2) that the direction in the decree with regard to mesne profits was void

[8] As regards the first point, it has been pointed out in Mulla's Code of Civil Procedure, Edn. 11, at p. 480, that a Court can recall and cancel its own invalid orders under its inherent powers. There is also a Sind case reported in 32 S. L. R. 215,[2] in which it was held that a Court has inherent power to set aside its own order which is null and void. In such a case the Court does not substitute one decision on the merits for another, but merely finds and records that what had been done was without jurisdiction. No Court is compelled to proceed with any proceeding after finding that the proceeding was without jurisdiction, and the fact that many steps had been taken in the proceeding, before the Court found that it had no jurisdiction, is no ground for persisting in continuing the proceeding.

[9] We now come to the next point. Mr. Tikamdas has argued that the direction of the Appellate Court, that mesne profits be determined in execution proceedings, was not permissible under the Civil Procedure Code, and was invalid. We are unable to accept this argument. We might refer to the case in 42 C. W. N. 748,[1] where there was a decree directing that mesne profits be determined in execution proceedings; it was held that the direction was not invalid, and that the executing Court should in such a case make a report to the Court which passed the decree, which would then pass final decree under O. 20, R. 12, Civil P. C. In that case, Derbyshire C. J., observed :

"There is nothing in O. 20, R. 12. Civil P. C., forbidding the suit Court which passed its first decree to direct that the inquiry in respect of the mesne profits from the institution of the suit to recovery of possession shall be ascertained by the executing Court. It is probable that where the executing Court has to come into existence, to obtain possession, that Court is in a position to know better than any other tribunal, the date at which the possession was obtained, and so it is in a position to ascertain the amount payable in respect of mesne profits from the institution of suit to delivery of possession. It appears to me that there is nothing improper or wrong in law in the suit Court directing that such an inquiry shall be made by the executing Court, and there is much to be said in favour of it from the point of view of convenience. When the executing Court has ascertained the amount of the mesne profits, it is not for that executing Court to make a decree in respect of them, but it is for the executing Court to report the amount of the mesne profits that it has so assessed, to the suit Court, and then it is for the suit Court to pass that in the words of sub s. (2) of O. 20 R. 12, 'a final decree in respect of rent or mesne profits in accordance with the result of such inquiry.' This final decree can then be transmitted to the executing Court for execution. I see no ground whatever for the view taken by the learned Judge that directing the enquiry as to mesne profits from the institution of suit to delivery of possession, to be made in execution, makes the decree invalid. It may be that in accordance with custom that has sprung up, based upon opinion expressed with regard to the effect of the change brought about by O. 20, R. 12, it has been, and is, unusual to direct the inquiry to be made in execution. It may well be that the Courts will avoid this direction; but where, as in this case, such a direction does appear, I am unable to see that it is invalid or without jurisdiction."

[10] Mukherjea J. did not agree with the view of Derbyshire C. J., and considered that it was not proper to direct that mesne profits should be determined in execution proceedings, and stated :

"The direction regarding mesne profits is only a preliminary decree and it would be against the whole scheme of the present Civil Procedure Code to suppose that there could be an executing Court to carry out the directions of the preliminary decree before the final decree was passed . . . . . It is a direction, in my opinion, which is not proper and is manifestly contradictory to the express provisions of the Code."

[11] He, however, agreed that where such a direction was made, it was not a nullity.

[12] In the present case the decree in question was confirmed by the Privy Council which in its judgment pointed out that no objection had been taken to the manner in which that Court had dealt with mesne profits, and that the judgment of that Court on these matters would stand. But whether the decision of the appellate Court was or was not right, it was not, in any case open to the lower Court to question the appellate decree. Its plain duty was to carry out its directions. The Sub-Judge, Mr. Bhavnani, was therefore right in holding that the application under O. 20, R. 12, Civil P. C., was under the circumstances one which he could not proceed upon.

[13] It was pressed before us that the invalidation of the proceedings before the Commissioner would result in quite unnecessary waste of time, that it made very little difference whether the Commissioner took accounts under the orders of the executing Court on an application in execution, or of the Court hearing the suit, on an application under O 20, R. 12, Civil P. C., particularly when the same Judge presided in the Court in each case. But this unfortunate result is clearly due to the parties adopting a misconceived course. If a proper application, in order and in time, can and should be made, it should be possible for the parties and the Court to put to good purpose what has already been done. But whe-

ther that is or is not possible cannot affect the legal position.

[14] The appeal is dismissed with costs.

D.H. *Appeal dismissed.*

A. I. R (35) 1948 Sind 127 *[C. N. 38.]*

THADANI AND CONSTANTINE JJ.

Mt. Saran Bai—*Appellant* v. *Abdul Rashid s/o Abdul Satar and others*—*Respondents.*

First Appeal No. 23 of 1943, Decided on 16 10-1947, from decision of 1st Class Sub-Judge, Sukkur, D/- 22-10-1942.

(a) Limitation Act (1908), Art. 127 — *H* a Kutchi Memon dying leaving behind two sons *A* and *B*—*A* disinherited under *H*'s will and *B* remaining in exclusive possession of *H*'s property since *H*'s death—Suit by *A*'s widow for partition and possession after 12 years of *H*'s death held barred by Art. 127.

H a Kutchi Memon died in 1909 leaving behind him two sons *A* and *B*. Prior to his death *H* had disinherited *A* under a will, and since the death of *H*, *B* remained in exclusive possession of the property of the deceased. At no time did *B* treat *A* as a co-sharer in the property left by *H*. *A* died subsequently and his widow sued *B* in 1939 for partition and possession of half share in the property left by *H*:

Held, that the suit was barred by limitation under Art. 127. Since *H*'s death *B* having remained in adverse possession for more than 12 years the title if any of *A* to the property was extinguished. [Para 11]

Annotation : ('42-Com.) Lim. Act, Art. 127, N 4 and 17.

(b) Evidence Act (1872), S. 90 — Will, 30 years old and produced from proper custody— Presumption is that it is genuine and duly executed.

In the case of a will which is more than 30 years old and produced from proper custody a presumption arises under S. 90 that the will was a genuine document and validly executed. The presumption must also extend to the due execution of the will: 34 A. I. R. 1947 P. C. 15, *Foll.* [Para 12]

Annotation : ('46 Man.) Evidence Act, S 90, N 8.

(c) Hindu law — Applicability—Kutchi Memons — Law of survivorship and acquisition of interest in ancestral property by birth not applicable.

A Kutchi Memon governed by the Hindu law in matters of succession and inheritance is not governed by the law of survivorship or acquisition of interest in the ancestral property by birth, as in the case of a Hindu joint family joint in food, worship and estate: 1 A. I. R. 1914 Bom. 17; 2 A. I. R. 1915 Bom. 151 and 29 S. L. R. 366, *Rel. on.* [Para 13]

(d) Hindu law — Maintenance — Widowed daughter-in-law — Son dying after lifetime of his father without leaving any property — His widow is not entitled to maintenance out of property left by her father in-law.

Under the Hindu law the condition precedent attaching to the moral liability of a father-in-law to maintain his daughter in-law is the predecease of his married son. Hence where a son who has no share in the property of his father dies after the lifetime of his father without leaving any property, his widow is not entitled to maintenance out of the property left by her father-in-law. The reason is that there being no moral liability on the father in-law it cannot be transmitted as a legal liability to his heirs and legal representatives.

[Paras 15 and 16]

Cases referred:—

1. ('14) 16 Bom. L. R. 224 : 1 A. I. R. 1914 Bom. 127. 23 I. C. 565, Mangal Das v. Abdul Razak.
2. ('46) 1946 2 M. L. J. 453 : 34 A. I. R. 1947 P. C. 15 : I. L. R. (1946) Nag. 917 : I. L. R. (1947) Kar. P. C. 78 : 73 I. A. 223 : 227 I. C. 195 (P.C.), Munnalal v. Mt. Kashibai.
3. ('17) 41 Bom. 181 : 2 A. I. R. 1915 Bom. 151 : 31 I. C. 106, Advocate-General v. Jimba Bai.
4. ('35) 29 S. L. R. 366, Jalaldin v. Aminuddin.
5. ('39) I. L. R. (1939) Mad. 242 : 25 A. I. R. 1938 Mad. 914 : 179 I. C. 121, Sankaramurthy v. Subbamma.
6. ('03) 27 Bom. 607, Chhaganlal Haribhai v. Dhondu.
7. ('01) 25 Bom. 263, Bai Parvati v. Dalsukram.
8. ('03) 30 I. A. 127 :27 Bom. 485 : 8 Sar. 477 (P. C.), Saboo Sidick v. Ayeshabai.
9. ('24) 11 A. I. R. 1924 Cal. 364 : 73 I. C. 235, Gopal Chandra v. Kadambini Dasi.
10. ('29) 16 A. I. R. 1929 All. 751 : 119 I. C. 253, Jeot Ram Chaudhari v. Mt. Lauji.

Tikamdas Bassarmal—for Appellant.

Keshowdas Dalpatrai—for Respondents.

Thadani J. — This is an appeal from the decision of the learned First Class Subordinate Judge of Sukkur in which he dismissed the plaintiff-appellant's suit with costs.

[2] The suit was instituted by one Mt. Saran in forma pauperis against her husband's brother for partition and separate possession of half-share in certain properties mentioned in lists A, B, C and D annexed to the plaint and for mesne profits. In the alternative, the plaintiff sued for the arrears of maintenance and future maintenance.

[3] The defendant Abdul Satar was a son of Haji Mooso who died in 1909 leaving two widows, two sons, Abdul Satar and Abdul Karim the husband of the plaintiff, and two daughters. Abdul Karim died two years after his father Mooso. Abdul Satar died during the pendency of the suit and his legal representatives have been brought on the record.

[4] It was the case of the appellant that her husband died some eleven years before the institution of the suit in 1939, and that as she was the sole heir of her husband Abdul Karim, she was entitled to Abdul Karim's share in the properties shown in the schedule annexed to the plaint, and that in any case she was entitled to maintenance.

[5] The respondents, case was that the appellant's husband Abdul Karim was disinherited by Haji Mooso in 1907; that thereafter Abdul Karim lived separately from his father; on 17-10 1907, Haji Mooso made a will leaving his entire property to Abdul Satar; it was denied that the house mentioned in list C was purchased from the cash and rents of the property left by Haji Mooso; the deposit of ornaments was also denied. It was further alleged that Abdul Karim died on 20-10-1911, and that a false allegation was made that Abdul Karim died 11 years before

128 Sind suit within the period of limitation. In regard to the alternative claim for maintenance, the defence was that the appellant was not entitled to maintenance in law, nor was she entitled to maintenance at the rate claimed.

[6] On the pleadings a number of issues were raised. Issue 4 was: 'Is the suit in time'? Issue 6 was: 'Did Haji Mooso make a will alleged in the written statement? If so, what is the consequence'?

[7] On the question of limitation, the learned Judge held the suit for partition to be time-barred. In regard to the claim for maintenance, he held that the suit for maintenance was competent, but took the view that as no property was left by the appellant's husband, she is not entitled to be maintained by the respondents. In the result the learned Judge dismissed the suit with costs.

[8] In dealing with the issue of limitation, the learned Judge held that it was satisfactorily established from the evidence of the appellant and from that of her witnesses Abdul Kadir and Jan Muhammad, that the appellant's husband Abdul Karim died some 25-30 years before the institution of the suit. At the time of giving evidence the appellant was about sixty years old. She had stated in her evidence that she was married when she was 12 years old and that her husband died 12 or 13 years after her marriage. In other words, the appellant was 25 years old when her husband died. The learned Judge therefore came to the conclusion that the appellant's husband must have died some 35 years before the institution of the suit in 1939. The appellant had also stated in her evidence that she had handed over the ornaments involved in the suit, to Abdul Satar after her husband's death some 30 years ago, and that her husband died at the age of 30 years, two or three years after his father Haji Mooso's death; in other words, the appellant's husband died in 1914 or 1915, that is to say, some 25 years before the institution of the suit.

[9] One of the witnesses Abdul Kadir examined by the appellant stated in his evidence that the appellant's husband died two or three years after Haji Mooso. Similarly, another witness Jan Muhammad stated that Haji Mooso died 20 years before he gave evidence. Jan Muhammad at the time of giving evidence was 45 years old. The respondents on the other hand produced the death certificate of the appellant's husband, which showed that he died on 20-10-1911. On this evidence the learned Judge was clearly right in coming to the conclusion that the appellant instituted the suit more than 25 years after the death of her husband.

[10] The respondent's case is that the appellant's husband was disinherited by his father Haji Mooso in 1907 and that from 1907 the appellant's husband was living separately from his father, who alone was in possession of the property in suit. On the death of Haji Mooso which occurred, according to the evidence, 2 years before the appellant's husband died in 1911, Abdul Satar became the sole owner of the properties left by Haji Mooso. Abdul Satar's possession of the immovable property in suit after the death of Haji Mooso is admitted by the appellant herself in her evidence. She says, Abdul Satar used to collect rents and carry out repairs to the property. On the evidence the learned Judge rightly came to the conclusion that Abdul Satar was in exclusive possession of the property in suit after the death of Haji Mooso.

[11] There is no doubt that the possession of Abdul Satar was adverse to Abdul Karim who had been disinherited by Haji Mooso in 1907, and that this adverse possession of Abdul Satar which commenced on the death of Haji Mooso in 1909 was never arrested and at the end of 12 years in 1921 Abdul Karim's title, if he had any, was extinguished. The present suit was not brought until 1939. At no time did Abdul Satar treat the appellant as a co-sharer in the property left by Haji Mooso after his death. During the lifetime of Haji Mooso the appellant's husband had no share in the property. It is true that the parties to the suit are Kutchi Memons governed in matters of succession and inheritance by Hindu law, but that branch of Hindu law which makes a Hindu son at birth a co-parcener in the ancestral property is not applicable to Kutchi Memons: *cf.* 16 Bom. L. R. 224.[1] The appellant's husband was therefore not a co-sharer of Haji Mooso during the lifetime of Haji Mooso, assuming that any portion of the property in suit was inherited by Haji Mooso from his father. The appellant's husband was disinherited by Haji Mooso under his will made 2 years before his death. The learned Judge was right in coming to the conclusion that since the death of Haji Mooso in 1907 his son Abdul Satar was in exclusive possession of the property and Abdul Satar's possession was, on the facts of this case, adverse to that of the appellant's husband. The suit brought by the appellant for partition having been instituted after the lapse of 12 years, it was clearly out of time by reason of Art. 127, Limitation Act.

[12] The property alleged to have been left by the deceased Haji Mooso is mentioned by the appellant in Lists A and B and includes some cash. As regards the immovable property mentioned in List A there is no dispute and we have held that the appellant is not entitled to partition. In List B the property consisted of some furniture. The learned Judge has taken the view

that the appellant has failed to prove that Haji Mooso had left any furniture or cash. We see no reason to differ from him.

[13] Before dealing with the appellant's right to maintenance, it is necessary to revert to the will made by Haji Mooso in 1907. We agree with the learned Judge that the will came from proper custody and was more than 30 years old. A presumption therefore arises under S. 90, Evidence Act, that the document evidencing the will was a genuine document and was validly executed. Mr. Tikamdas for the appellant contends that the will must nevertheless be proved to have been signed by the testator. But on the authority of the decision of their Lordships of the Privy Council in 1946-2 M. L. J. 453,[2] the presumption must also extend to the due execution of the will.

[14] It was next contended by Mr. Tikamdas that Haji Mooso being a Kutchi Memon could not dispose of his property by will. The contention, however, has been negatived by the Bombay High Court and this Court when it was Judicial Commissioner's Court in 41 Bom. 181,[3] and 29 S. L. R. 366.[4] As we have already stated, a Kutchi Memon governed by Hindu law in matters of succession and inheritance is not governed by the law of survivorship or acquisition of interest in the ancestral property by birth, as in the case of Hindu joint family joint in food, worship and estate.

[15] The question of maintenance under the Hindu law of a widowed daughter-in-law is dealt with in para. 564 of Mulla's Hindu law, 10th Edn. The learned Judge has held that the appellant's husband left no property of his own and had no share in the property left by Haji Mooso, a finding with which we agree. Moreover, it is clear that the appellant became a widow after the death of her father-in-law Haji Mooso. Haji Mooso was under no moral obligation to maintain the appellant during the lifetime of her husband. There was, therefore, no moral liability attaching to the estate of Haji Mooso which could be transmitted as a legal liability to the heirs and legal representatives of Haji Mooso upon their succession to the estate of Haji Mooso.

[16] Mr. Tikamdas for the appellant has argued the question of maintenance of a daughter-in-law whose husband has left no estate, by the heirs of her father-in-law on the supposition that it makes no difference in law whether or not a daughter-in-law is widowed during the lifetime of her father-in-law. Mr. Tikamdas has, however, been unable to show us any authority for the proposition that where a daughter-in-law is widowed after the death of her father-in-law, she is entitled to maintenance out of the estate left by the father-in-law to his heirs.

condition precedent attaching to the moral 129
lity of a father-in-law to maintain his daughter-in-law is the predecease of his married son. In this view it is not necessary to consider the effect of the will made by Haji Ramzan on the right of maintenance of the appellant by the respondents, and we would, therefore, refrain from assenting to or dissenting from all following reported cases which were cited before us: I. L. R. (1939) Mad. 242,[5] 27 Bom. 607,[6] 25 Bom. 263,[7] 30 I. A. 127;[8] A. I. R. 1924 Cal. 364;[9] A. I. R. 1929 ALL. 751.[10] On an appropriate occasion we will indicate our preference.

[17] On any view of the case we think the appellant is not entitled to maintenance from the estate of Haji Ramzan in the hands of the respondents.

[18] We would accordingly affirm the judgment and decree of the lower Court and dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. (35) 1948 Sind 129 *[C. N. 39.]*

THADANI AND CONSTANTINE JJ.

Tanumal Udhasing — Applicant v. *Firm of Lalsing Thakursing—Opponents.*

Civil Revn. Appln. No. 79 of 1945, Decided on 5th December 1947, to revise an order of Small Cause Court, Nawabshah, D/- 29-9-1945.

Punjab Relief of Indebtedness Act (7 [VII] of 1934), S. 4—Decree for money passed by a Court of competent jurisdiction in Sind—Decision of Punjab Debt Conciliation Board under Punjab Relief of Indebtedness Act which does not apply to Sind cannot be pleaded as discharge of debt : 27 A. I. R. 1940 Bom. 362, *Rel. on.* [Paras 8 and 9]

Case referred :—

1. ('40) 27 A. I. R. 1940 Bom. 362 : I. L. R. (1940) Bom. 799 : 191 I. C. 653, Shankar v. Manek Lal.

Balkrishna H. Lulla — for Applicant.

Thadani J. — This is an application under S. 25, Provincial Small Cause Courts Act, 9 [IX] of 1887, arising out of an order passed by the Judge, Small Cause Court, Nawabshah, dated 29th September 1945, in which he dismissed the applicant's prayer for withdrawal of a sum of Rs. 153-1-0 which previously by his order dated 8th June 1945 he had ordered to be paid to the applicant decree-holder.

[2] The applicant had instituted a suit in the Small Cause Court, Nawabshah, against the firm of Lalsing Thakursingh for the recovery of a sum of Rs. 132-10-6 as compensation for short delivery made under a contract relating to the sale of a grass chopping machine. In due course, the applicant's suit was decreed, and on 18th May 1945, the applicant applied for execution of the decree by calling for the decretal amount from the Savings Bank Account of the opponent firm in the Nawabshah Post-Office. The Court

application, and the amount of Rs. granted was deposited with the Nazir of the Court.

[3] It appears that on 15th June 1945 the Small Cause Court, Nawabshah received a letter dated 6th June 1945 from the Chairman of the Debt Conciliation Board, Jullunder, in which the Chairman stated :

"I have the honour to inform you that the proceedings pending in this Board under the Punjab Relief of Indebtedness Act, 1934, in pursuance of the application dated 24th February 1945 about which an intimation was sent to you on 24th February 1945 have terminated.

2. The date of hearing fixed in your Court as mentioned in the earlier intimation referred to above was 14th March 1945."

This letter was considered by the Court on 29th September 1945 as a result of which the applicant's application for the withdrawal of the decretal amount paid into Court was dismissed.

[4] It is contended on behalf of the applicant judgment-creditor that the Punjab Act 7 [VII] of 1934 being a Provincial Act extends only to the Punjab and cannot apply to the Province of Sind, and that in acting upon the letter of the Chairman of the Debt Conciliation Board, Jullunder, the Small Cause Court Judge, Nawabshah, had given effect to an ex-territorial Act in a matter pending in his Court.

[5] We do not propose to consider other grounds taken in the application, for instance, that the debt was a commercial debt, and as such, not within the cognizance of the Debt Conciliation Board of the Punjab. We propose to decide this application on the ground that the Punjab Debt Conciliation Act has no application to the Province of Sind ; and that the decrees passed by the Courts in Sind cannot be rendered infructuous merely because an application has been made to the Punjab Debt Conciliation Board, and the Board has acted under the provisions of the Punjab Act.

[6] The record of the case does not show where the contract of sale was made, but as delivery was made at Nawabshah the Small Cause Court Nawabshah had jurisdiction to try the suit. Whatever might have been the nature of the debt, on the passing of a decree by a Court of competent jurisdiction, it became a decretal debt, and we cannot see how a decision of the Debt Conciliation Board of the Punjab can affect debts decreed by a Court in this Province.

[7] We have been referred to a case, A. I. R. 1940 Bom. 362,[1] in which question arose how far a civil Court in Bombay could entertain a suit to recover a debt which had been duly declared to be discharged by the Debt Conciliation Board of the Central Provinces. Beaumont C. J. delivering the judgment of the Division Bench observed (p. 363) :

"Where questions arise as to whether the incidents of a contract should be governed by the law of one country or of another, the general rule is that all the rights and incidents arising under the contract are governed by the proper law of the contract, and in this case the law of the contract is the law of the place where the contract was made. One of the incidents which is governed by the law of the contract is the method of discharge of the contract. If under the proper law of the contract, such contract can be discharged by some method other than performance, such a discharge will be recognized in British India. The principle is stated in Dicey's 'Conflict of Laws,' Edn. 5, R. 126, p. 503 : 'A discharge from any debt or liability under the bankruptcy law of the country where the debt or liability is to be paid or satisfied is a discharge therefrom in England.' Bankruptcy is, of course, one method by which a debt may be discharged other than by performance, but the same principle applies to any other special method of discharge. No doubt, the Province of Bombay and the Central Provinces are both part of British India, but in my opinion, where the law of one Province of British India is distinct from the law of another Province, the two Provinces must be regarded for the purposes of this rule as foreign countries *inter se*. In my view, the proper law of this contract is the law in force in the Province of Bombay, and the contract cannot be discharged by a method recognized in the Central Provinces, but not in Bombay. I think that the view of the learned District Judge was right, and a discharge of this debt under the C. P. Debt Conciliation Act is no defence to the suit filed in the Nandurbar Court. The application will be rejected with costs."

[8] In the case before us, the contractual debt had merged into a decretal debt, the discharge or satisfaction of which would be made in a manner laid down in the Code of Civil Procedure or any other law for the time being in force dealing with discharge of decretal debts. There is no provision, as far as we know, in any Act in force in the Province of Sind, whereby a decision of the Punjab Debt Conciliation Board can be pleaded as a discharge of a debt, decreed by a Court in Sind.

[9] As Beaumont C. J. has observed :

"A discharge of this debt under the C. P. Debt Conciliation Act is no defence to the suit filed in the Nandurbar Court."

If it was not a defence to the suit, much less can it operate as a defence to discharge a debt that has been decreed.

[10] We would accordingly set aside the order of the learned Judge whereby he refused to hand over the amount deposited in Court to the applicant until the appeal of the decree holder to the District Court of Jullunder had been disposed of. We order the amount deposited to be paid to the judgment-creditor. The application is allowed with costs.

K.S. *Application allowed.*

A. I. R. (35) 1948 Sind 130 *[C. N. 40.]*

TYABJI C. J.

Malik Jiandkhan v. *Province of Sind.*

Suit No. 296 of 1941, Decided on 22-12-1947.

Mahomedan law — Marriage — Proof of—Acknowledgment — Essentials of, stated.

Amongst Mahomedans no particular ceremonies are required for a marriage. The question of marriage is one of fact and the presumption does not arise merely from the fact of some years of cohabitation. It is required to be proved that the man treated the woman as his wife and had recognized her as such, not merely casually but with the intention and knowledge of giving her the status of a wife. In respect of acknowledgment of a son it is further necessary that the acknowledgment must be as of a legitimate son. Mere acknowledgment of paternity is not sufficient to raise a presumption of legitimacy or marriage. In the event of disproof of marriage, no amount of acknowledgment can make the presumption override the fact and persuade the Court to decide the matter on the presumption : 9 A. I. R. 1922 P. C. 159 and 31 A. I. R. 1944 Bom. 213, *Rel. on.* [Para 23]

Cases referred :—

1. ('21) 48 Cal. 856 : 9 A. I. R. 1922 P. C. 159 : 48 I. A. 114 : 60 I. C. 837 (P. C.), Habibur Rahman v. Altaf Ali.
2. ('44) 31 A. I. R. 1944 Bom. 213 : 218 I. C. 307, Roshanbai v. Suleman Haji Ahmed Umar.
3. (1841-46) 3 M. I. A. 295 : 1 Sar. 282 : 1 Suther 157 (P. C.), Khajah Hidayatoolah v. Raijan Khanum.
4. ('28) 22 S. L. R. 309 : 14 A. I. R. 1927 Sind 209 : 103 I. C. 870, Mt. Hakima v. Mt. Jiandi.
5. ('32) 26 S. L. R. 111 : 19 A. I. R. 1932 Sind 137 : 140 I. C. 724, Karamali Shah v. Hussainalishah.
6. ('37) 24 A. I. R. 1937 P. C. 201 : 31 S. L. R. 575 : 168 I. C. 881, Lakshmi Reddi v. Venkata Reddi.
7. ('37) 31 S. L. R. 71: 24 A. I. R. 1937 Sind 126: 169 I. C. 685, Secy. of State v. Mt. Mariam.
8. ('94) 21 I. A. 56 : 21 Cal. 666 : 6 Sar. 389 (P. C.), Abdul Razak v. Aga Mahomed Jaffer.
9. ('29) 10 Lah. 725 : 16 A. I. R. 1929 P. C. 135 : 56 I. A. 201 : 117 I. C. 17 (P. C.), Mohabbat Ali v. Muhammad Bindabasini.

Dingomal Narainsing — for Plaintiff.
B. H. Lulla and E. V. Castellino — for Defendants 1 & 2 respectively.

Tyabji C. J. — The plaintiff in this suit seeks a declaration that he is a legitimate son of Safarkhan, a paternal-uncle of Malik Bulakhan son of Dodakhan (the second Bulakhan), a first class jagirdar holding extensive Jagir lands in the districts of Dadu, Karachi and Hyderabad, who died on 22nd January 1939. Malik Bulakhan was the last of a long line of Maliks who, as "gadinishins" or "pagdars" were entitled to certain lands and privileges and lived at Thano Bulakhan. The British conferred a jaghir on Malik Bulakhan son of Hyderkhan (the first Bulakhan) and under the terms of the grant the Jaghir was to be regranted on the death of each jaghirdar to the senior lineal male descendant of the first grantee. The first Bulakhan died on 31st May 1853. On the death of the second Bulakhan in 1939 the plaintiff claimed the jaghir as a son of Safarkhan, who was a grandson of the first grantee, there being no other lineal male descendant of the first grantee. It was, however, disputed that the plaintiff was a legitimate son of Safarkhan, although it was admitted that he was a son of Safarkhan by a woman named Hurmat. An inquiry was held by the Collector (Mr. Nur Nabi) under the Pensions Act of 1871, and on 23rd October 1939 the Collector decided that the plaintiff, though a son of Safarkhan, was not a legitimate son, as the plaintiff's mother Hurmat was not legally married to Safarkhan, and the plaintiff was not, therefore, entitled to the jagir. An appeal was made against this decision to the Revenue Commissioner (Mr. Clee), who by his order dated 3rd June 1940 decided in favour of the plaintiff, holding him to be a legitimate son of Safarkhan, and directed that the jagir be conferred upon the plaintiff. The Government of Sind appealed against that decision, and the matter was referred to the Revenue Tribunal which, on 27th March 1941, passed the following order :

"The Tribunal consider that the respondent Alibuxkhan alias Malik Jiandkhan has not clearly established the fact of his legitimate birth and think that the Collector's order was proper. They are therefore pleased to set aside the order of the Revenue Commissioner and to confirm the order of the Collector of Dadu. The jagir will accordingly lapse to the Government. If, however, the respondent establishes the fact of his legitimate birth in a Court of law in proceedings to which the Government is made a party, the jagir should be restored to him. If Government's permission is necessary to file the requisite suit in a Court of law, the said permission should be granted."

[2] In consequence of this the plaintiff filed this suit on 13th August 1941. In the plaint the plaintiff's case is stated as follows :

"9. The plaintiff submits that his mother Mt. Hurmat was lawfully wedded to his father Malik Safarkhan, the Nikah ceremony having been performed about 70 years ago. Both his father and mother lived as husband and wife until the death of his father in about 1892. Thereafter she continued to remain his widow, she being still alive. Further the plaintiff was always acknowledged by his father as his legitimate son and both the plaintiff and his mother were always looked upon and treated by all the family members including the deceased Malik Bulakhan as the widow and legitimate son of the deceased Safarkhan.

10. The plaintiff further submits that as a matter of fact, the plaintiff's father Safarkhan married only one wife and she was Mt. Hurmat and likewise Mt. Hurmat had only one husband and that was Malik Safarkhan.

11. The plaintiff claims that he is the legitimate son of Malik Safarkhan and a direct male descendant of the original grantee Malik Bulakhan."

[3] Defendant 1, the Province of Sind, and defendant 2, Mt. Acherbai, a sister of the last Malik, Bulakhan, have disputed the plaintiff's contention, that Mt. Hurmat was the wife of Safarkhan and the plaintiff was a legitimate son. In their written statements the defendants also challenged the jurisdiction of the Court and the maintainability of the suit as framed, and raised other legal defences, and the following issues were framed :

"1. Has the Court jurisdiction ?

2. Is the suit barred under S. 4 of Pensions Act, 1871?

3. Whether the notice referred to in para. 12 of the plaint is invalid ?

4. Whether the plaintiff is the legitimate son of late Safarkhan ?

4a. Is the suit as framed maintainable ?

5. Is the plaintiff entitled to the relief claimed ?

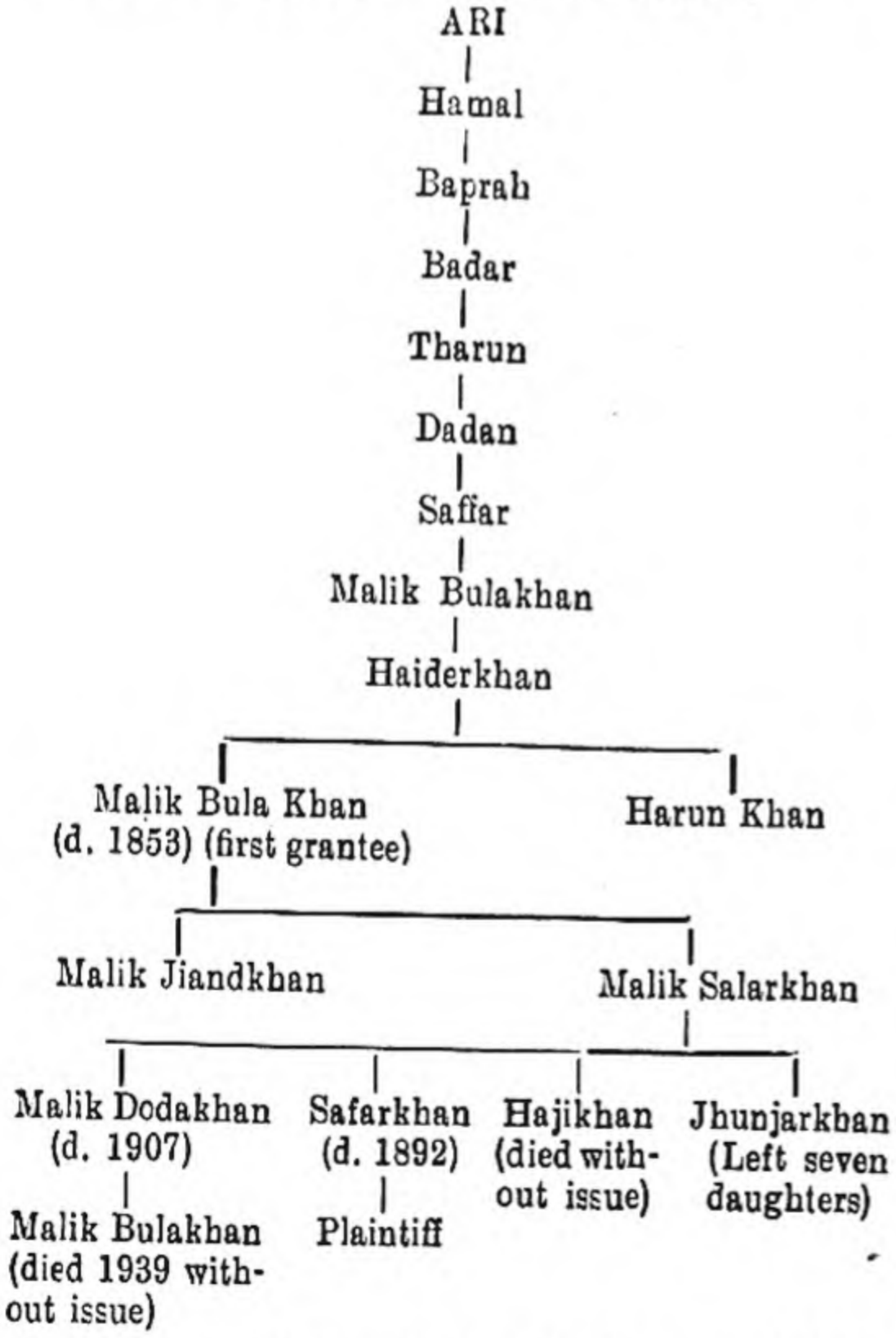
6. General."

When the case was heard, however, the defendants dropped all issues except issue 4, and in fact made it clear that, far from wishing to press any of the legal objections raised in issues 1, 2, 3 and 4A, they desired that this Court should try and decide issue 4, which is thus the only issue in this case.

[4] Eighteen witnesses have been examined on behalf of the plaintiff. It is contended on his behalf that he has proved the marriage of Safarkhan and Hurmat, and also proved that Safarkhan and the members of the Malik family had throughout acknowledged the plaintiff as a legitimate son of Safarkhan. Seven witnesses have been examined on behalf of the defendants to deny those allegations.

[5] Before dealing with the contentions of the parties, it appears advisable first to set out certain undisputable facts, which were either admitted or were not seriously questioned by the parties after the evidence in the case was led, and which are clearly established.

[6] The following geneological table produced by the plaintiff shows the relationship of the successive Maliks of Thano Bula Khan :



The British conferred the Jagir upon Malik Bulakhan son of Haiderkhan, who died on 31.5.1853. He was succeeded by Jiandkhan, who died without any male issue, whereupon the Jagir was conferred upon Salarkhan, the younger brother of Jiandkhan. Salarkhan was succeeded by his son Dodakhan, who died in 1907, when Bula Khan the son of Dodakhan succeeded. As has been mentioned before, Bula Khan left no male issue. Safarkhan, the second son of Salarkhan, died in 1892. Hajikhan, the third son of Salarkhan, died some years later, and Jhunjarkhan, the fourth son of Salarkhan, died still later on 12-3-1932.

[7] The Maliks of Bulakhan and the members of their family have for many generations had their principal residence at Thano Bula Khan within what is known as the "Haveli" of the Maliks, each member of the family having a portion of the "Haveli" allotted to him by the reigning Malik.

[8] When Safarkhan was a young man, there was a young slave girl, Hurmat, who was working as a maid-servant inside the "Haveli." She belonged to the caste of Gadas who were mostly labourers. Her father Tahir was also a household servant in the 'Haveli' and her other relations were dependants of the Malik family. Safarkhan became enamoured of Hurmat, and eloped with her without the knowledge or permission of the Malik or of Hurmat's relations. As plaintiff's counsel elicited from Pir Bakar Shah, Hurmat had been betrothed by her parents to one Master Masood, who was an employee in the Post Office at Thano Bulakhan. It is difficult to say exactly when this occurred but all parties have accepted the suggestion of Mr. Dingomal, the learned counsel for the plaintiff, that this took place about 1873. Safarkhan took Hurmat away to a place called Dadhoon, which was some 5 miles further away from Thano Bula Khan than Kotri, Kotri being some thirty miles away. This elopement caused great offence to the Malik and the members of the family, and Safarkhan lived away at Dadhoon for several years. A male and a female child were born to Safarkhan and Hurmat while they lived at Dadhoon, but these children died very young. Safarkhan did not come back to Thano Bula Khan for several years after the elopement.

[9] It is also clear that when Safarkhan returned to Thano Bula Khan with Hurmat he did not live within the "Haveli" of the Maliks, as the other members of the family did, but he lived, with Hurmat, in a hut some distance away from the 'Haveli,' in a locality where the neighbouring houses were occupied by Hindus, Khaskhelis and Gadas. Some attempt was made by some of the earlier witnesses, examined on behalf of the plaintiff, to show that when Safarkhan came back to Thano Bula Khan he first stayed for some time in the 'Haveli' of the

Maliks with Malik Dodakhan; but the evidence of the witnesses subsequently examined on behalf of the plaintiff, for instance, of Hafiz Sumar (Ex. 31) and Natho (Ex. 26), shows that that was not true, and that Safarkhan lived, as the defendants assert, in a separate house outside the 'Haveli' from the time when he returned to Thano Bula Khan up to the time when, a couple of days before his death, he was taken into the 'Haveli' by Malik Dodakhan where Safarkhan died. Natho (Ex. 26), a maternal-cousin of Hurmat, who would necessarily know the fact, admitted :

"After marrying, Hurmat lived at Thano Bulakhan with Safarkhan in a separate house, separate from Bula Khan's house."

and this fact was not disputed on behalf of the plaintiff in the subsequent stages of the suit.

[10] The plaintiff was born at Thano Bula Khan on 21-6-1877, and named Alibux. Safarkhan and Hurmat had another son, Hussainbaksh, who was younger than the plaintiff, who lived with Hurmat until his death at the age of about 35 in 1926 or 1927.

[11] It is admitted that when Safarkhan was about to die, a couple of days before he actually died, in 1892, he was removed into the 'Haveli' by the Malik Dodakhan. It is alleged on behalf of the plaintiff that Hurmat and her two sons, the plaintiff and Hussainbux, lived inside the 'Haveli' during the period of *idat* after Safarkhan's death, but this has been strenuously denied by the defendants. Except for this, however, it is clear that after his elopement with Hurmat, Safarkhan did not ever live inside the 'Haveli,' and that Hurmat and her sons had never been the inmates of the family residence of the Maliks.

[12] In February 1890 the plaintiff was sent to a Mulla School at Thano Bulakhan, which was in charge of Mulla Haji Hamid, where the plaintiff was taught to read the Kuran and the first Sindhi primar. The register of the school, Ex. 9, shows that he attended the Mulla School from February 1890 to March 1891, and that his name was entered in the register as "Alibaksh *put* (son of) Safarkhan Baprani." There was a District Local Board School at Thano Bula Khan, in which Jhunjarkhan, the youngest brother of Safarkhan, was a teacher. The register of this school, Ex. 20, and the entries therein, Exs. 21 and 22, show that the plaintiff joined this school on 9-12-1890 and left it on 31-7-1894. In this register in the column headed "full name of student" the plaintiff's name was entered as "Alibux Safarkhan." According to the evidence of the plaintiff, he had reached the third or fourth Sindhi standard when he left the school.

[13] It is clear from the evidence that Hussainbakhsh, the younger brother of the plaintiff, never went to any school. Nothing about what the plaintiff did during the years 1894 to 1901 after he left the school.

[14] On 13-4-1901 the plaintiff joined the police, as a mounted (camel) constable, and as the plaintiff's evidence shows, he obtained this job with the help of Jehan Khan, a younger brother of Pir Bakar Shah and an Honorary Magistrate. On the service sheet, Ex. 10, plaintiff's name was entered as "Alibaksh Safarkhan." The plaintiff continued to be a police officer until he retired in 1929. He has stated :

"I retired in 1929 as Mounted Head Constable. My pay before I retired was Rs. 36 per month. I got besides Rs. 5 as Pagi allowance, Re. 1 as literacy allowance, and Rs. 25 or Rs. 30 as horse allowance."

It may be mentioned here that there were three other police officers, recruited from the families of the jagirdar of the locality, viz. Sherdilkhan, Rahimkhan, and Mahomedkhan, each one of whom was appointed a Sub-Inspector when he joined the police.

[15] The names of all, male as well as female, members of the families of Muslim jagirdars end with an honorific suffix, such as 'Khan' in the case of males, and 'Bai' in the case of females showing the status of their families. It would be disrespectful and contrary to custom to refer to such a person by a name without the suffix. Thus the sons of Salarkhan were called and always referred to as Dodakhan, Safarkhan, Hajikhan and Jhunjarkhan. Defendant 2, who is a daughter of Dodakhan, was called Achar Bai, and the name of Bula Khan's wife was Nazil Bai. It is significant that the plaintiff's name as entered in the school registers, Exs. 9, 21 and 22, and in the service sheet, Ex. 10, was "Alibux." It is clear that the plaintiff was throughout called "Alibaksh," and not "Alikhan" or "Alibakhshkhan." The first witnesses examined by the plaintiff, Utumal and Chaturmal, throughout referred to the plaintiff as "Alibux." The plaintiff's brother was throughout referred to by Utumal as "Hussain" and by other witnesses as "Hussainbuksh" never as "Hussainbukshkhan." A point was made of this while the plaintiff was being examined, and, thereafter the plaintiff attempted to make out what was clearly untrue, that he was also called Alibuxkhan sometimes. He stated :

"My name was Allibuksh. Jiandkhan is the name which they gave me at the dastarbandi ceremony. I was also some times called Allibukshkhan by people of my *rai*. When my name was asked I said Alibuksh and not Alibuxkhan, because I do not like to call myself Khan. I gave my name alias as Jiandkhan and not Jiand because that was the name they gave to me. I used to be called Alibaksh and also Alibuxkhan by people."

It is also clear that the plaintiff's mother was always called "Hurmat" only. (His Lordship

quoted a portion of deposition of one witness and proceeded :)

Similarly, plaintiff's wife has been throughout called Mima.

[16] This Mima was a woman of the Meraji Birohi caste, admittedly of a very low status, who was a widow when the plaintiff married her in 1918. The plaintiff admitted :

"It is true that girls in the families of Maliks are generally married to persons nearly related to them, or to men in the families of other Maliks."

He stated :

"I do not know whether girls are frequently married to men much younger than themselves,"

but it is a matter of common knowledge that that is the case. The plaintiff admitted that although defendant 2, Acher Bai, was a cousin of the plaintiff who had never married, there was never any question of his marrying Acher Bai or any other girl from the neighbouring family of the Hamalani Maliks. Admittedly there had been many marriages between members of the family of the Hamalani Maliks and members of the family of the Maliks of Thano Bula Khan. He attempted to explain this by saying :

"Acharbai did not wish to marry, and I did not wish to marry her, and that is why I did not marry her .... I never offered or sent a proposal for any Hamalani girl. I have never sent a proposal for any other girl except Mima. Neither Doda Khan, nor Bula Khan ever told me that I should marry (?) a girl of a good family."

Further, although the plaintiff had a son who was 25 years old and Jhunjarkhan left seven daughters, the youngest of whom was 18 or 19 years old, there never was any question of the plaintiff's son marrying one of the daughters of Jhunjarkhan.

[17] It is also clear that Hurmat, who died in 1942, was a very poor woman, who had to support herself by working as a labourer and as a midwife. This is not only clear from the evidence given by the defendant's witnesses, but from the evidence of Sub-Inspector Lutf Ali Ex. 45, one of the plaintiff's witnesses, who admitted :

"In 1910 my wife and my children were living with me at Thano Bula Khan. I came to know where the plaintiff's house was. I saw the plaintiff's mother then. Plaintiff's mother was then working as a midwife."

It is obvious that family prestige and custom would not ordinarily permit one of the ladies of a family like the Malik family, who was acknowledged as a member of the family, to go about working as a midwife or a labourer.

[18] Another circumstance on which great reliance is placed by the defendants, as weighing heavily against the plaintiff's contention, is the location of the graves of the plaintiff's brother Husseinbux, and the plaintiff's wife Mima in the graveyard at Thano Bula Khan. In this graveyard there is a portion reserved for the graves of the family of the Pirs, and another portion which is reserved for the graves of the members of the family of the Maliks. The graves of the members of the family of the Maliks are on a raised platform, all built up in a very similar manner. These graves are in a line running east to west. The platform on which the graves are built is known as the "thalla" of the "Maliks." In each of these graves the body is placed in the customary manner on its right side with the head to the north and the feet to the south, so that it faces the west. The row of graves progressed from east to west, that is to say, each member of the family who died was buried next to the person who had died last, immediately next and to the west of the last grave in the row. The evidence clearly shows, and there is no dispute about this, that the last persons to be buried in the row on the thalla in order were Salarkhan, Safarkhan, Dodakhan, Hajikhan, Jhunjarkhan, Bulakhan and Nazilbai. The grave of Nazilbai is the last and the western most one, and the row ends here, as the portion to the west is reserved for the Pirs. It is clear as the evidence and the photographs show that the portion immediately to the north of the main row on the thalla is part of the portion reserved for the family of the Maliks, where there is room for another row of graves, and in the ordinary course the thalla would be extended, as and when more graves were built, in the row and immediately to the north of the existing main row. In this row to the north of the thalla, and near its eastern end, where it would commence, there are three very small graves. These are the three graves of the children of Jhunjarkhan, each of whom died when a few months old. To the south of the thalla and immediately to the south of the graves in the middle of the row on the thalla there are three unbuilt full sized graves, which are of Husseinbux, Mima and Hurmat. Further to the east of these three graves, in the same row to the south of the thalla, there are other graves of Gadas, and to the south of these are the graves of Palaris of the Balfat caste. Husseinbuksh, the brother of the plaintiff, died in 1926 or 1927, that is before Hajikhan, Jhunjarkhan, Bulakhan and Nazilbai. Mima died after Hajikhan and before Jhunjarkhan. There is no question about Jhunjarkhan's children having been buried as members of the family of the Maliks in a portion reserved for the family. The explanation of the fact that these children were not buried in the main row is that the graves of only adult members of the family would be made in the main row, and as is usual, the smaller graves of children would be placed separately. The fact that Husseinbux and Mima were not buried in the main row on the thalla

would show that they were not regarded as members of the family. (After discussing the evidence of some witnesses his Lordship continued :) It is argued on behalf of the defendants with considerable force that if Safarkhan had been married to Hurmat, and the marriage had been acknowledged by the Malik family, Hussainbux the son of Safarkhan would have been treated as a member of the Malik family and would have been buried next to Dodakhan, and that Mima, the wife of the plaintiff would have been buried next to Hajikhan on the thalla, and not "with the uncles and aunts" of Sumar, that is among the Gadas.

[19] (His Lordship next referred to certain incidents which had been relied upon as significant and proceeded further:) Another admitted fact is that there was no question or controversy ever raised as to whether the plaintiff was or was not a legitimate son of Safarkhan, before Bula Khan's death. This fact was admitted and in fact asserted by both sides, and each side in its turn attempted to base an argument on it. It is also admitted that immediately after the death of Bulakhan the plaintiff as well as some other persons, including Sher Dilkhan, a member of the family of the Hamalani Maliks, laid claims to the Jagir. Pir Bakar Shah the acknowledged Pir of the family of the Maliks of Thano Bula Khan, who had officiated at the ceremonies when the pag was conferred on malik Bula Khan and his predecessor Malik Doda Khan, refused to support the plaintiff's claim. He has stated:

"As we are the Pir Murshids of the Malik Family, we have been the persons who tied the turbans, conferred the 'pag' on the Maliks. I tied the 'pag' on Dodakhan and Bula Khan. The Hindus and Mussalmans came to me after the death of Bula Khan and asked me to confer the 'pag' on the plaintiff, urging that unless the pag was so conferred, the Jaghir would be confiscated and all would suffer. I, however, refused, as I was not willing to lend myself to an untruth. The plaintiff's own people, the Babranis and Hamalanis, did not want me to tie the turban on the plaintiff, as they stated that the plaintiff was not the legitimate son of Safar Khan."

Usually the dastarbandi ceremony, when the pag is conferred on a successor, takes place within a short time of the death of the pagdar, and the previous dastarbandi ceremonies of the Maliks of Thano Bula Khan had taken place at Thano Bula Khan. In this case no dastarbandi ceremony took place until 26-9-1939, when a gathering took place at Jhimpir, at the instance of the plaintiff, at which the pag was conferred on the plaintiff by the plaintiff's supporters. The plaintiff has admitted:

"I am the only Malik among the Thano Bula Khan Maliks whose dastarbandi ceremony took place at Jhimpir. In the cases of Bula Khan and Dodakhan the ceremonies took place at Bula Khan. . . . The delay in the dastarbandi ceremony in my case, which took place 8 months after Bula Khan's death there was 'shor' (dispute and trouble) in this case.

[20] Another circumstance which must be borne in mind, when the evidence on the main question in the case is considered, is that it would obviously be to the interests generally of the people living at Thano Bulakhan and those connected with them to have somebody to succeed to the Jagir, and particularly would this be the case with those connected with the family of the last malik. It is not, therefore, diffiullt to understand that a person like the plaintiff who was undoubtedly connected with the Malik family, should receive a great deal of support when he claimed the Jaghir and that there should be many people who greatly desired that the plaintiff should succeed.

[21] I next come the question whether the plaintiff has succeeded in proving the nikah which, it is alleged, took place between Safarkhan and Hurmat at Kotri, somewhere about 1873. There is only one witness Chatur, Ex. 18, who has been examined as a witness of the marriage, and it is quite impossible to regard the evidence of this witness as true. (His Lordship discussed his evidence and rejected it as wholly false.) There is no other evidence of the fact of the solemnisation of the marriage and the plaintiff has wholly failed to prove this part of his case.

[22] I next turn to the evidence produced by the plaintiff in support of his contention that he was always acknowledged by his father as his legitimate son, and that the plaintiff and his mother Hurmat were always looked upon and treated by all the family members, including deceased Malik Bula Khan, as the widow and legitimate son of deceased Safarkhan. As regards the law applicable to proof of marriage by indirect evidence by acknowledgment, all that is necessary is to refer to the statement by the Privy Council in 48 Cal. 856[1] at p. 864 where their Lordships (Lord Dunedin) stated:

"Before discussing the subject, it is as well at once to lay down with precision the difference between legitimacy and legitimation. Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under the Mahomedan law. Example of it may be found in other systems. The adoption of the Roman and the Hindu law effected legitimacy. The same was done under the Cannon Law and the Scotch Law in respect of what is known as legitimation per *subsequens matrimonium*. By the Mahomedan law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of zina, that is, illicit connection, and cannot be legitimate. The term 'wife' necessarily connotes marriage; but, as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment

of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledgor meant to accept the other not only as his son, but as his legitimate son. It must not be impossible upon the face of it; i. e., it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not *juris at de jure*, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgment of legitimacy is in this position: The marriage will be held proved and "his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact."

[23] All the important decisions were recently reviewed by Kania J. in A. I. R. 1944 Bom. 213,[2] the head note of which is as follows:

"Amongst Mahomedans no particular ceremonies are required for a marriage. The question whether there was a marriage or not is one of fact. That fact may be proved by direct evidence by calling witnesses who were present at the time of producing the nikahnama signed by the parties. It may be proved by indirect evidence which may raise a presumption of marriage. The question of marriage is one of fact and the presumption does not arise merely from the fact of some years of cohabitation. It is required to be proved that the man treated the woman as his wife and had recognized her as such, not merely casually but with the intention and knowledge of giving her the status of a wife. In respect of acknowledgment of a son it is further necessary that the ackowledgment must be as of a legitimate son. Mere acknowledgment of paternity is not sufficient to raise a presumption of legitimacy or marriage. In the event of disproof of marriage, no amount of acknowledgment can make the presumption override the fact and persuade the Court to decide the matter on the presumption. If marriage is proved no question of acknowledgment remains to be considered. Only when by reason of time or circumstances the question of marriage is in a state of being 'unproved' the question of acknowledgment arises, and in dealing with that question satisfactorily evidence has to be led of clear acknowledgment. If the plaintiff leads such evidence of acknowledgment of the woman as his wife or acknowledgment of a child as his legitimate child, in the absence of proof by the defendant the presumption of marriage will hold good and the plaintiff should be considered as having discharged the burden of proof."

It is clear that the evidence must be clear that the individual in question was acknowledged to be not only a son but a legitimate son, and that the existence of a valid marriage was not in fact negatived before the presumption in favour of the marriage and legitimacy could arise. A large number of rulings were discussed before me; but I consider it quite unnecessary to refer to them, and I barely mention that they included 3 M. I. A. 295;[3] 22 S. L. R. 309;[4] 26 S. L. R. 111;[5] A. I. R. 1937 P. C. 201;[6] 31 S. L. R. 71;[7] 21 I. A. 56[8] and 10 Lah. 725.[9]

[24] A very large number of witnesses have been examined on behalf of the plaintiff to prove the alleged acknowledgments. But very little of this evidence can even be relied upon as in any way bearing on the fact in question and even that is on the face of it quite valueless. (Discussion of evidence omitted.)

[25] Having dealt with the evidence given by the plaintiff and stated my reasons for holding that the plaintiff had wholly failed to prove the marriage of Safarkhan with Hurmat, and also wholly failed to prove that the plaintiff was acknowledged as a legitimate son of Safarkhan, I now turn to the evidence given by the defendants, which, in my view, clearly establishes that the plaintiff was not and was never acknowledged to be a legitimate son of Safarkhan. [After discussing the evidence, his Lordship concluded as follows :]

[26] To sum up the position, the evidence given on behalf of the plaintiff appears to me to be of very little value. On the other hand the evidence of the family witnesses, Acherbai, Baidikhan and Mahomed Aminkhan, which there is no reason whatever for disbelieving and which is very strongly supported by the evidence of Pir Bakarshah, disproves the plaintiff's claim. The most important evidence, I consider is the evidence of the admitted or undisputed circumstances, to which I have referred in the earlier part of my judgment, which, it appears to me, make it quite clear that the plaintiff and his brother Hussein Buksh were not regarded as members of the Malik family and were not treated as such.

[27] I, therefore, answer the main issue in this case (issue 4) in the negative, that is, against the plaintiff. This suit is accordingly dismissed with costs.

D.R.R. *Suit dismissed.*

END

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